IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY No. D11 of 2018

ON APPEAL FROM THE COURT OF APPEAL
OF THE NORTHERN TERRITORY

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant

AND:

SOULEYMANE SANGARE
Respondent

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUE THE APPEAL PRESENTS

2. The single issue on appeal is whether or not the Court of Appeal of the Northern Territory (**Court of Appeal**) erred in refusing to award the appellant (the successful respondent in the Court) its costs in that Court and the court below because the respondent was unable to pay any costs awarded against him. Stated at its most general, the question of principle involved is whether the impecuniosity of a party is relevant to the exercise of the discretion to award costs and, if so, whether that factor alone can justify a successful party being denied its costs.

PART III: NOTICE UNDER S78B, *JUDICARY ACT 1903*

3. Notice is not required under s78B of the *Judiciary Act 1903* (Cth).

PART IV: JUDGMENTS BELOW

4. The judgments below are unreported. The medium neutral citation of the judgment of the Supreme Court of the Northern Territory (**Supreme Court**) is *Sangare v Northern Territory of Australia* [2018] NTSC 5. The medium neutral

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citation of the judgment of the Court of Appeal is *Sangare v Northern Territory of Australia* [2018] NTCA 10.

PART V: FACTUAL BACKGROUND AND JUDGMENTS BELOW

Factual background

5. The relevant facts are set out in *Sangare v Northern Territory* [2018] NTCA 10, [4]-[10]. The respondent, a citizen of Guinea, arrived in Australia on 13 May 2011 under a Belgian passport belonging to his brother and applied for a protection (Class XA) visa under the *Migration Act 1958* (Cth). That application was refused and the decision affirmed by the Refugee Review Tribunal on 22 October 2012. After being employed as a civil engineer on a temporary basis with the then Northern Territory Department of Infrastructure (**Department**) between 20 June and 28 August 2014, the Department offered the respondent a permanent position on the basis that it would sponsor him under a skilled migration visa, with the respondent being responsible for applying for and securing the appropriate visa. During that process, the respondent sought support for his visa application from the then Northern Territory Minister for Infrastructure (**Minister**). The Minister requested and was provided with a briefing by Departmental officers regarding that request (**Ministerial Briefing**). The respondent alleged that part of the Ministerial Briefing contained defamatory material fabricated by the Department to make it appear that the respondent had provided false and misleading information in relation to his immigration status and to make it appear that the respondent was a dishonest person and of bad character.

Decision at trial

6. The respondent commenced proceedings in the Local Court of the Northern Territory of Australia against the appellant, seeking damages for the publication of defamatory statements in the Ministerial Briefing. Because the respondent sought damages in the sum of $5,000,000, the proceedings were transferred to the Supreme Court of the Northern Territory.[1]

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[1] *Local Court Act* (NT), ss12 and 13(1)(b).

7. On 6 February 2018, Grant CJ dismissed the respondent's claim, finding that the publication attracted protection from liability under s27 of the *Defamation Act* (NT) and the defence of qualified privilege at common law.[2] His Honour indicated he would hear the parties as to costs,[3] however the respondent filed a notice of appeal and the appeal commenced before the parties were heard on costs. No costs orders were made at that level.

Court of Appeal's decision

8. The respondent's appeal to the Court of Appeal was also unsuccessful.[4] Kelly J (the other members of the Court agreeing) described the appeal as "without merit" and "doomed to fail".[5] The appellant sought its costs,[6] but the Court of Appeal declined to award the appellant its costs because the respondent (who represented himself at trial and on appeal) indicated from the bar table that, as a result of the termination of his employment with the Department, he was at that time unemployed.[7] No evidence was received as to his current or potential future capacity to meet a costs order. The trial had proceeded across four days (recorded in 245 pages of transcript), the evidence comprised some 271 pages of affidavit material and 14 other exhibits along with the respondent's cross-examination of the appellant's six witnesses and the appellant's cross-examination of the respondent.[8] The Chief Justice's reasons comprised 59 pages, and the appeal hearing took a day. The appellant was represented by private solicitors and counsel from the independent Bar and incurred significant costs in defending the proceedings.

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[2] *Sangare v Northern Territory of Australia* [2018] NTSC 5 at [124] (Core Appeal Book (**CAB**) 100).

[3] Ibid at [126] (**CAB100**).

[4] The respondent's application for special leave from that decision was dismissed on 5 December 2018 in *Sangare v Northern Territory of Australia* [2018] HCASL 386.

[5] *Sangare v Northern Territory of Australia* [2018] NTCA 10 at [44] per Kelly J, Blokland J agreeing at [43] (**CAB133**). See also Southwood J's observations that there "can be no doubt" that the decision below was sound and correct (at [2]) (**CAB113**), and Kelly J's observations that there was "no evidence" in support of the Appellant's allegations at trial and/or no authority cited for legal propositions (at [20], [21], [22], [24], [32]) (**CAB125-129**).

[6] *Sangare v Northern Territory of Australia* [2018] NTCA 10 at [44] per curiam (**CAB133**).

[7] Transcript of proceedings before the Court of Appeal on 3 August 2018, pp 28-29 (Book of Further Materials (**BFM**) **1-2**).

[8] Index to the Court Book before the Court of Appeal (**CAB107-110).**

9. Nevertheless, the Court of Appeal reasoned as follows:[9]

   (a) The appellant has been wholly successful and has been brought to court not once but twice.

   (b) The purpose of an award of costs is not to punish the unsuccessful party but to compensate the successful party.

   (c) The respondent was most unlikely to be able to pay any costs that are awarded against him.

   (d) In those circumstances, the appellant would be most unlikely to be compensated even if an award of costs was made in its favour.

10 (e) The Court should not make a futile order.

   (f) Therefore no order as to costs should be made.

PART VI: STATEMENT OF ARGUMENT

10. The error in the reasoning of the Court of Appeal is that it considered the respondent's (asserted but not proven) financial position to be not only relevant to, but determinative of, the question of costs. It is plain that the Court of Appeal's perception of the respondent's financial circumstances was decisive, because the Court identified only two factors to guide the exercise of its discretion, namely: (1) that the Territory had been entirely successful both at trial and on an appeal which was without merit and doomed to fail; and (2) that
20 the Appellant was "most unlikely" to be able to pay the Territory's costs.[10] The Court's error was to conclude that an apparently impecunious party should not face an adverse costs order, notwithstanding the failure of his case, the success of his opponent, and the unnecessary costs which it incurred.

Impecuniosity is not a justification for depriving a successful party of its costs

11. That result is wrong in principle. Although the discretion to award costs is broad,[11] it is not unqualified: it must be exercised judicially according to

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[9] *Sangare v Northern Territory of Australia* [2018] NTCA 10 at [47] and [48] per curiam (**CAB134**).

[10] Ibid.

[11] *Supreme Court Rules*, r63.03(1); *Latoudis v Casey* (1990) 170 CLR 534 (***Latoudis***) at 541 per Mason CJ and at 557 per Dawson J (Brennan J agreeing).

established principles.[12] Because the usual purpose of an order for costs is to indemnify a successful party for incurring the unnecessary costs of litigation,[13] there is a rule that costs will generally follow the event.[14] The result of litigation is "by far the most important factor" guiding the costs discretion.[15] Thus, a successful party to litigation may reasonably expect to obtain an order for costs.[16] That position will only be departed from if there is a sufficient justification for doing so.[17]

12. Not merely any circumstance can justify depriving a successful party of their costs. The circumstance must be "directly" connected with the litigation,[18] in the sense that it relates to the litigation itself, a party's conduct in the litigation, or to the events leading up to the litigation.[19]

13. It is "well established"[20] that the impecuniosity of a party opposing a costs order is not such a circumstance.[21] There will generally be no relevant connection between a party's impecuniosity and the litigation, the parties' conduct in it or the events leading up to it. Further, an unsuccessful party's impecuniosity

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[12] *Oshlack v Richmond River Council* (1998) 193 CLR 72 (***Oshlack***) at [65] per McHugh J; *Latoudis* at 557-9 per Dawson J (Brennan J agreeing).

[13] *Latoudis* at 543 per Mason CJ, at 562-3 per Toohey J, and at 566-7 per McHugh J; *Cachia v Hanes* (1994) 179 CLR 403 at 410 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; *Oshlack* at [1] per Brennan CJ and at [67] per McHugh J.

[14] *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ; *Latoudis* at 542-3 per Mason CJ, at 565 per Toohey J, and at 567 and 570 per McHugh J; *Oshlack* at [67] per McHugh J.

[15] *Oshlack* at [66] per McHugh J; *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport (No. 2)* [2013] FCAFC 120 at [8] per Jacobson, Jessup and Jagot JJ.

[16] *Latoudis* at 557 and 561 per Dawson J (Brennan J), and at 568 and 569 per McHugh J.

[17] *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ; *GS v AS (No. 4)* [2017] ACTCA 7 at [27] per Refshauge, Rangiah JJ and Walmsley AJ.

[18] *Oshlack* at [65] per McHugh J; *Latoudis* at 557 per Dawson J (Brennan J agreeing) and at 568-9 per McHugh J.

[19] *Scherer v Counting Instruments Ltd* [1986] 1 WLR 615 at 621 per Buckley, Bridge and Cumming-Bruce LJJ, referred to with approval in *State of Tasmania v Anti-Discrimination Tribunal* (2008) 17 Tas R 227 at [20] per Evans J; *Oshlack* at [34] per Gummow and Gaudron JJ.

[20] *Edwards v Stocks (No. 2)* (2009) 17 Tas R 454 (***Edwards***) at [12] per Blow J (Crawford CJ and Slicer J agreeing).

[21] *State of Tasmania v Anti-Discrimination Tribunal* (2008) 17 Tas R 227 at [21] per Evans J.

provides no satisfactory answer to a successful party's complaint that it has been put to the unnecessary costs of litigation.[22]

14. As such, impecuniosity provides no sound basis for depriving a successful party of its costs. Indeed, it has been said that the notion that litigants be afforded special consideration because of financial disadvantage has "nothing to commend it."[23] There are cogent policy reasons for that conclusion. First, if impecuniosity were a barrier to a costs order, it would remove a disincentive for impecunious parties to bring proceedings without merit and conduct litigation so as to cause others to bear unnecessary costs.[24] Secondly, if a party's financial circumstances were a relevant consideration, courts would be engaged in the undesirable task of determining the level of impecuniosity which would justify departure from the usual rule.[25] For those reasons, courts in Australia have uniformly awarded successful litigants costs against unsuccessful impecunious parties, leaving it to the successful litigant to determine whether it is worthwhile enforcing the order and by what means.[26]

15. That position is well-established in every Australian jurisdiction other than the Northern Territory. The intermediate appellate courts of the Federal jurisdiction,[27] Tasmania,[28] Victoria,[29] South Australia,[30] the Australian Capital

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[22] *Board of Examiners v XY* (2006) 25 VAR 193 (***Board of Examiners***) at [34] per Chernov JA (Nettle and Neave JJA agreeing).

[23] *Board of Examiners* at [41] per Nettle JA.

[24] *Oshlack* at [68] per McHugh J; *Kaufman v Kaufman* [2010] FamCA 254 at [42] per Barrett J.

[25] *Board of Examiners* at [33] per Chernov JA (Nettle and Neave JJA agreeing).

[26] *Minister for Immigration & Multicultural Affairs v Zamora* [1998] FCA 1170 at [8]-[9] per Black CJ, Branson and Finkelstein JJ; *Australian Competition and Consumer Commission v Seal-A-Fridge Pty Ltd (No. 2)* [2010] FCA 681 at [47] per Logan J.

[27] *Scott v Secretary, Department of Social Security (No. 2)* [2000] FCA 1450 at [4] per Beaumont and French JJ, cf Finkelstein J in dissent at [8]; *Yilan v Minister for Immigration and Multicultural Affairs* [1999] FCA 1212 at [5] per French, Nicholson and Finkelstein JJ; *Minister for Immigration and Multicultural Affairs v Zamora* [1998] FCA 1170 at [8]-[9] per Black CJ, Branson and Finkelstein JJ; *Hollier v Australian Maritime Safety Authority (No. 2)* [1998] FCA 975 at [8] per Heerey, Whitlam and North JJ.

[28] *Edwards* at [12] per Blow J (Crawford CJ and Slicer J agreeing); *Marlow v Walsh (No. 2)* [2009] TASSC 40 at [23] per Evans, Blow and Porter JJ.

[29] *Board of Examiners* at [31]-[38] per Chernov JA and at [39]-[43] per Nettle JA (Neave JA agreeing).

[30] *Machado & Anor v Underwood & Anor (No 2)* [2016] SASCFC 123 at [45] per Kourakis CJ and Nicholson J (Gray J dissenting, but not on this point).

Territory,[31] Queensland,[32] Western Australia[33] and New South Wales[34] speak with one voice.[35] The Court of Appeal was bound to follow that body of law unless convinced the decisions of those intermediate appellate courts were plainly wrong.[36] The Court of Appeal did not refer to those authorities, let alone reach a view that they were plainly wrong.

The decision below is unsupported by established exceptions to the principle

16. The foregoing is not to say that a party's financial position will always be irrelevant to the issue of costs. Aside from cases where legislation renders the parties' financial circumstances a relevant consideration,[37] there are two ways in which those circumstances may be relevant to the exercise of discretion. Each exception underscores the principle that a party's financial position is *per se* irrelevant, though it may be indirectly relevant in discrete ways.

17. The first exception is that the financial position of the parties may inform the structure of a costs award. For example, in appropriate multi-party litigation, the financial position of a party may be a relevant consideration to how a costs order is formulated *inter partes*.[38] In cases where one of two defendants is successful and the other is not, a court may elect between making a *Sanderson* order (that the unsuccessful defendant pay the successful defendant's costs)[39] or a *Bullock* order (that the plaintiff pay the successful

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[31] *GS v AS (No. 4)* [2017] ACTCA 7 at [102] per Refshauge, Rangiah JJ and Walmsley AJ, application for special leave regarding the issue of costs was refused in *GJ v AS* [2017] HCASL 138.

[32] *Sochorova v Commonwealth* [2012] QCA 152 at [17] per Wilson J (Muir and Fraser JJA agreeing).

[33] *Smolarek v Roper* [2009] WASCA 124 at [11] per Wheeler, Pullin and Newnes JJA.

[34] *Sasson v Rose* [2013] NSWCA 220 at [10] per Meagher JA (Gleeson JA agreeing); *Chapple v Wilcox* (2014) 87 NSWLR 646 at [24] per Basten JA (Gleeson JA agreeing).

[35] The position is also the same in New Zealand: *Chief Executive of the Department of Labour v Taito* [2006] NZCA 458 at [4] per Young P, Chambers and Panckhurst JJ; *Li v Chief Executive of Ministry of Business, Innovation and Employment* [2018] NZHC 2346 at [2] per Downs J.

[36] *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ.

[37] For example, s117(2A)(a) of the *Family Law Act 1975* (Cth) directs the Family Court to take into account "the financial circumstances of each of the parties to the proceedings."

[38] *Edwards* at [13]-[16] per Blow J (Crawford CJ and Slicer J agreeing).

[39] *Sanderson v Blyth Theatre Co* [1903] 2 KB 533.

defendant's costs, with an indemnity for the same from the unsuccessful defendant).[40] If the unsuccessful defendant is insolvent, the court may consider that fact and determine to make a *Bullock* order, because a *Sanderson* order would result in the successful defendant being unable to effectively recover any costs.[41] In such cases, consideration of the parties' financial circumstances does not deny the successful party its costs; rather, the unsuccessful party's impecuniosity is considered so as to give efficacy to the costs award *despite* that fact.[42]

18. The second exception is that a party's financial circumstances may be indirectly relevant by informing a factor which should be taken into account in exercising the discretion. For example, impecuniosity may explain why a party delayed in taking a step in the proceeding[43] and thereby excuse what might otherwise be characterised as delinquency.[44]

Futility

19. It was erroneous for the Court of Appeal to decline to make the award sought because it perceived that the award would be futile. Perceived futility is not an accepted basis upon which to deprive a successful party of its costs.[45] The discretion should be left to the successful party to decide whether to attempt to enforce the award, not the courts.[46]

20. However, even if the utility of making the award were a relevant inquiry, the Court of Appeal reached its conclusion (that the award would be futile)

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[40] *Bullock v London General Omnibus Company* [1907] 1 KB 264.

[41] *Edwards* at [15] per Blow J (Crawford CJ and Slicer J agreeing).

[42] It should also be noted that, in either case, the impecunious, unsuccessful defendant remains ultimately liable for the successful defendant's costs, albeit the liability is only indirect if a *Bullock* order is made.

[43] *State of Tasmania v Anti-Discrimination Tribunal* (2008) 17 Tas R 227 at [25] per Evans J.

[44] As to the effect of which, see *Oshlack* at [44] per Gaudron and Gummow J.

[45] *Graham v Minister for Immigration and Border Protection (No. 2)* [2018] FCA 1116 at [16]-[17] per Tracey J; *MZARS v Minister for Immigration and Border Protection* [2017] FCA 177 at [36]-[37] per Kenny J; *Selliah v Minister for Immigration and Multicultural Affairs* [1998] FCA 469 at [4] per Nicholson J.

[46] *Minister for Immigration & Multicultural Affairs v Zamora* [1998] FCA 1170 at [8]-[9] per Black CJ, Branson and Finkelstein JJ; *Australian Competition and Consumer Commission v Seal-A-Fridge Pty Ltd (No. 2)* [2010] FCA 681 at [47] per Logan J; *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477 per Dixon CJ, McTiernan, Williams, Fullagar and Taylor JJ.

erroneously. First, the Court did not determine that the respondent had *no* present or future capacity to pay the appellant's costs. Rather, the Court considered it sufficient that the respondent was "most unlikely" to be able to pay them. That is an erroneously low threshold for depriving a successful party of the opportunity to recover, now or in the future, any part of its costs.

21. Secondly, the Court of Appeal appears to have restricted itself to considering the respondent's present employment status. The Court did not consider or seek any information about the respondent's current assets or future capacity to pay the appellant's costs.[47]

22. Thirdly, the Court did not consider the utility of the costs order as a debt to the appellant. For example, an order for costs which is not immediately enforced may be relied on to offset debts which the successful party may owe to the unsuccessful party in the future, including as a result of further litigation. The existence of the costs debt, even if it is never ultimately relied upon, is of value – and therefore utility – to the successful party.

23. Fourthly, the Court of Appeal made its determination without any evidence (so depriving the appellant of the chance to test it) of the respondent's present or future capacity to pay the appellant's costs.[48] It appears to have had regard only to the respondent's statement from the bar table that he was at that time unemployed and that the termination of his employment with the Department had prevented him from "getting any decent job."[49]

24. Fifthly, the Court of Appeal did not indicate to the appellant that it intended to decide the question of costs by reference to the respondent's financial circumstances and did not invite submissions from the appellant in response to what the respondent had said about his employment or the perceived futility in making an award.[50]

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[47] Transcript of proceedings before the Court of Appeal on 3 August 2018, pp 28-29 (**BFM1-2**).

[48] *Australian Competition and Consumer Commission v Seal-A-Fridge Pty Ltd (No. 2)* [2010] FCA 681 at [46] per Logan J; *Selliah v Minister for Immigration and Multicultural Affairs* [1998] FCA 469 at [4] per Nicholson J; *Chief Executive of the Department of Labour v Taito* [2006] NZCA 458 at [4] per Young P, Chambers and Panckhurst JJ.

[49] Transcript of proceedings before the Court of Appeal on 3 August 2018, pp 28-29 (**BFM1-2**).

[50] Ibid.

The Court's discretion was improperly exercised

25. For those reasons, in depriving the appellant of its costs by reason only of the respondent's perceived impecuniosity, the Court of Appeal proceeded upon a wrong principle of law and allowed an irrelevant matter to guide the decision, such that its exercise of the costs discretion miscarried, justifying this Court's intervention.[50]

PART VII: ORDERS SOUGHT

26. The orders sought are:

    1. Appeal allowed.

    2. The respondent pay the appellant's costs of and incidental to the proceedings in the Court of Appeal and the court below.

    3. The respondent pay the appellant's costs of the appeal to this Court.

PART VIII: ESTIMATED TIME FOR ORAL ARGUMENT

27. The appellant estimates it will require 1 hour for the presentation of oral argument.

Dated: 23 January 2019

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[50] *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; *Norbis v Norbis* (1986) 161 CLR 513 at 517-518 per Mason and Deane JJ, and at 537-541 per Brennan J; *Latoudis* at 559 per Dawson J (Brennan J agreeing) and at 570 per McHugh J; *Oshlack* at [133] per Kirby J; *Hobbs v Marlowe* [1978] AC 16 at 39 per Diplock LJ; *Board of Examiners* at [12] and [38] per Chernov JA (Nettle and Neave JJA agreeing).