

## **NORTHERN TERRITORY OF AUSTRALIA v SANGARE (D11/2018)**

Court appealed from: Court of Appeal, Supreme Court of the Northern Territory [2018] NTCA 10

Date of judgment: 3 August 2018

Special leave granted: 5 December 2018

The issue in this Appeal is whether, and to what extent, an unsuccessful litigant's circumstances may inform the exercise of the Court's discretion not to award costs in favour of a successful litigant.

The Respondent sued the Appellant, the Northern Territory ("the Territory") for defamation seeking damages of \$5 million. Given that the damages claimed exceeded the jurisdictional limit of the Local Court, the proceedings were heard in the Supreme Court of the Northern Territory. Grant CJ at first instance held that the Territory had successfully established defences giving it protection from liability under both section 27 of the *Defamation Act 2006* (NT) and the defence of qualified privilege at general law. Consequently on 6 February 2018 Grant CJ made orders that the Respondent's action be dismissed and the parties have liberty to apply with respect to costs. Before there was any application as to costs the Respondent appealed to the Court of Appeal. The question of costs was left pending determination of the appeal.

On 3 August 2018 the Court of Appeal unanimously upheld the judgment at first instance and dismissed the appeal. The Territory made application for its costs on the basis that the Territory had been wholly successful in both the trial and the appeal and that the appeal was without merit and doomed to fail. The Respondent opposed any order for costs, arguing that he was unemployed and the judgment against him prevented him from getting "any decent job".

The Court of Appeal noted the purpose of an award of costs is not to punish the unsuccessful party but to compensate the successful party and that "[c]ustomarily, in circumstances such as this the Court will make an order for costs on the basis that costs should follow the event. However, the legislative intention is plainly to confer on courts and judges an unfettered discretion as to costs...". The Court of Appeal declined to make an order for costs of either the trial or the appeal on the basis that the Territory was "most unlikely to be compensated even if an award of costs were made in its favour. In the circumstances, it seems to us that the Court should not make a futile order or orders as to costs."

The Respondent unsuccessfully sought special leave to appeal from the Court of Appeal's judgment dismissing his appeal to the High Court. The Territory's application for special leave to appeal on the question of costs was granted.

The Territory submits that the error of 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.

The Respondent has entered a submitting appearance in the appeal.

Justice Gageler made orders on 21 December 2018 appointing Miles Crawley SC and a junior counsel as amicus curiae in the appeal. The amicus curiae argues that although impecuniosity is not, of itself, a reason to deprive a successful party of their costs it can be, in combination with other factors, a reason to depart from the general rule that costs follow the event.

The ground of appeal is:

- The Court of Appeal erred in refusing to award the Appellant (the Northern Territory) of and incidental to the proceedings in the Court of Appeal and the proceedings below because the Respondent was unlikely to be able to pay any costs awarded against him.