

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2004-404-5217

UNDER the Defamation Act 1992

BETWEEN FLOREA MIRICA
Plaintiff

AND TELEVISION NEW ZEALAND
LIMITED
Defendant

Hearing: 22 February 2005

Appearances: Mr F Mirica in person
Mr W Akel and Ms N Blomfield for defendant

Judgment: 22 February 2005 at 2.50 pm

**(ORAL) JUDGMENT OF ASSOCIATE JUDGE LANG
[re application for security for costs]**

[1] Mr Mirica is suing Television New Zealand Limited (“TVNZ”) in defamation. He alleges that several television and radio programmes broadcast by TVNZ defamed him. His statement of claim seeks damages of \$3 million, notwithstanding the prohibition imposed by s 43(1) of the Defamation Act 1992 in relation to proceedings in which a member of the news media is the defendant.

[2] TVNZ now seeks an order requiring Mr Mirica to provide security for its costs. It says that there is reason to believe that Mr Mirica will not be able to pay the costs of this proceeding if he does not succeed. It also says that, when weighed together, all the factors present in this case suggest that an order for security should be made.

Jurisdiction

[3] TVNZ relies on r 60 of the High Court Rules which provides:

60 Power to make order

[(1) Where the Court is satisfied, on the application of a defendant,—

...

(b) That there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding,—

the Court may, if it thinks fit in all the circumstances, order the giving of security for costs.]

[4] The Court must first be satisfied that there is reason to believe that the plaintiff will not be able to pay the defendant's costs if he is unsuccessful.

[5] In considering the issue of jurisdiction I bear in mind the comments of Hammond J in *Hamilton v Papakura District Council [Security for Costs]* (1997) 11 PRNZ 333, (at p 335):

The words of r 60(1)(b) ... necessarily raise a threshold test; but I respectfully agree with those authorities which hold that what is required is a broad overall assessment under that head. Further, in my view, that exercise is not one to be conducted in a vacuum: the Court has to have regard to the real situation of the parties, the nature of the proceeding, and to cast a realistic eye over the course which the proceeding has, and will likely take.

[6] In the present case Mr Mirica frankly accepts that he would not immediately be able to pay any significant sum by way of security for costs. He says that he owns no property other than a car worth \$5,000 to \$6,000. He tells me that he is presently employed as a taxi driver, earning approximately \$600 per week.

[7] This proceeding is likely to raise complex issues particularly in relation to the pleadings, and its very nature suggests that it will be a very expensive proceeding for the TVNZ to defend. Mr Mirica has no obvious means of satisfying any adverse award of costs that might be awarded against him. In those circumstances I am

satisfied that jurisdiction exists under r 60(1)(b) to make an order requiring Mr Mirica to provide security for TVNZ's costs.

Discretion

[8] However, that is not the end of the matter. The authorities make it clear that, even if jurisdiction exists, the Court still has a discretion as to whether or not to order security to be provided.

[9] As Mr Akel reminded me, the making of an order for security for costs is entirely discretionary, and should not be restricted by the application of general principles. What is required is a broad assessment of the case in order to reach a conclusion as to whether or not, and if so how much, security is to be ordered.

Merits of the plaintiff's claim

[10] One of the principal issues the Court needs to consider in exercising its discretion is the merits of the plaintiff's claim. This is necessarily a difficult exercise, particularly when the proceeding is at a relatively early stage. In those circumstances the Court must reach a conclusion regarding the merits of the plaintiff's claim without being able to assess the totality of the evidence that the plaintiff proposes to adduce in support of it.

[11] In the present case TVNZ has filed a lengthy affidavit in support of its application. I do not propose to say more regarding the contents of that affidavit other than to say that it supports TVNZ's submission that substantive defences are likely to be open to it by way of truth, honest opinion and qualified privilege. On balance I am of the view that Mr Mirica's claim against TVNZ cannot be described as a strong one.

The expense of the proceeding

[12] Mr Akel has produced a schedule which shows that, on a category 2B basis, the likely costs of the proceeding will be in the vicinity of \$77,000. Although I

suspect that the final figure may be somewhat less than that, I would be surprised if it was less than \$50,000.

[13] It is likely also that considerable time will need to be spent between now and trial to resolve issues relating to the pleadings and also possibly in relation to discovery and interrogatories. All of those matters are likely to add to the expense of the proceeding.

[14] I consider it would be wrong to require TVNZ to be required to incur significant costs in defending Mr Mirica's claim unless it was protected to some extent by security for those costs.

Impecuniosity

[15] In reaching this conclusion I do not accept that Mr Mirica has established that his present impecuniosity has been brought about as a result of the acts of TVNZ. He has not filed any formal documents in opposition to the present application, and has adduced no evidence to support his submission that his present predicament has been brought about as a result of the actions of TVNZ. I do not consider that an order for security should be declined or reduced on this ground.

Oppression

[16] For similar reasons I am satisfied that TVNZ is not acting oppressively in bringing the present application. It is obviously concerned that it will be required to incur significant expenditure defending a claim that it considers to be hopeless. Given the circumstances of the present case I consider that it is only reasonable that TVNZ should seek some assurance that Mr Mirica will be able to contribute to its costs in the event that his claim is not successful.

Conclusion

[17] For the reasons set out above I am satisfied that it is appropriate to make an order requiring Mr Mirica to provide security for costs. I propose to do so,

however, on a staged basis so that Mr Mirica can be given a reasonable opportunity to gather together the necessary funds to enable him to prosecute his claim.

[18] Mr Akel seeks security in the total sum of \$50,000. At this stage I propose to make an order requiring Mr Mirica to provide security in the sum of \$15,000. This will provide TVNZ with security up to the closure of pleadings and the completion of discovery and inspection. The issue of further security can be revisited once those processes have been completed. Mr Mirica needs to know, however, that further, and perhaps greater, security is likely to be ordered before the matter proceeds to trial.

Orders

[19] The formal orders of the Court are:

- a) Mr Mirica is to provide security in the sum of \$15,000 towards TVNZ's costs up to the point at which issues in relation to the pleadings, discovery and inspection are completed.
- b) Thereafter the issue of security is to be revisited on a regular basis. TVNZ is to have leave to file memoranda from time to time asking the Court to reconsider that issue.
- c) Security is to be provided by paying the sums ordered into Court or providing security for them to the satisfaction of the Registrar.
- d) The security ordered by this judgment is to be provided no later than 22 May 2005.
- e) This proceeding shall remain stayed until such time as the security has been provided. The Registry is to note that no further pleadings or applications are to be accepted for filing until further order of the Court. Should either party wish to advance the matter in any way they should file a memorandum marked for my attention and a telephone conference will then be convened.

Costs

[20] TVNZ has succeeded in this application and is entitled to costs. It is to receive costs on a category 2B basis together with disbursements as fixed by the Registrar. In the event that security is provided the costs in relation to this application are to be paid forthwith by the Registrar to the solicitors acting for TVNZ.

Next event

[21] The proceeding is to be nominally listed for mention in the Chambers List on 3 June 2005 at 10 am. The purpose of that listing is to ascertain whether or not the security has been provided and, if it has, how the proceeding is to be advanced.

Leave reserved

[22] In the event that security is provided prior to 21 May 2005 Mr Mirica has leave to ask the Registrar to arrange a telephone conference with me so that further directions can be given.

G L Lang
Associate Judge

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