

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-404-001281  
[2023] NZHC 2485**

UNDER The Defamation Act 1992

BETWEEN NANA YU  
Plaintiff

AND YIQI XIA  
Defendant

Hearing: On the papers

Counsel: D Zhang for Plaintiff  
Defendant self-represented

Judgment: 5 September 2023

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**COSTS JUDGMENT OF PAUL DAVISON J**

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*This judgment was delivered by me on 5 September 2023 at 4pm  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
Advent Ark, Auckland

## **Introduction**

[1] Ms Nana Yu (the plaintiff) seeks costs in respect of Ms Yiqi Xia's (the defendant) withdrawn application to set aside a formal proof judgment awarded in the plaintiff's favour. The judgment awarded the plaintiff the sum of \$30,000 against the defendant for defamatory statements the defendant had made online.<sup>1</sup>

## **Background**

### *The dispute*

[2] Between January 2019 and April 2021, the plaintiff and the defendant both worked for Yoke Insulation Ltd. While they were initially on reasonable terms, there was then a falling out between the two over a mistake the plaintiff had made at work. Following the incident, the defendant did not speak to the plaintiff unless she had to.

[3] In May 2021 the manager of Yoke Insulation Ltd advised the plaintiff that the defendant had telephoned him saying that the plaintiff's husband had been harassing her. Shortly after, on 26 May 2021, the plaintiff was alerted to a post the defendant had made on WeChat Moments claiming that the plaintiff had slept with the manager, and that the plaintiff's husband sends his wife to be a "ji" (prostitute). The post was taken down several days later.

### *The formal proof judgment*

[4] The plaintiff commenced proceedings in this Court against the defendant alleging defamation based on the statements made about her in the defendant's WeChat Moments post. The defendant was served with the proceedings but took no steps to defend the plaintiff's claim. Consequently, the hearing of the plaintiff's claim proceeded by way of formal proof.

[5] On 6 December 2022 Venning J found that the plaintiff had proved her claim and entered judgment for the plaintiff against the defendant in the sum of \$30,000.<sup>2</sup>

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<sup>1</sup> *Yu v Xia* [2022] NZHC 3243.

<sup>2</sup> At [38].

The Judge also found that the plaintiff was entitled to costs on a scale 2B basis, together with disbursements.<sup>3</sup>

*The defendant's application to set aside the formal proof judgment*

[6] On 22 December 2022 Mr Malarao and Mr Siu of Meredith Connell notified the Court that they had been appointed as the defendant's solicitors. And on 27 March 2023 counsel for the defendant applied for orders setting aside the formal proof judgment and for costs on the defendant's interlocutory application.

[7] Subsequently, on 29 May 2023 the defendant's counsel notified the Court that the defendant withdrew her application to set aside the formal proof judgment, and that to the extent there were any issues as to costs, the defendant would be acting in person.

**Submissions**

*The plaintiff*

[8] Mr Zhang for the plaintiff submits that the defendant is liable to pay costs for discontinuing her application to set aside the formal proof judgment.<sup>4</sup> He submits that the plaintiff succeeded in her defence of the defendant's interlocutory application to set aside the formal proof judgment, and is entitled to costs.

[9] Mr Zhang says that due to the complexity of the defendant's application and the need to address it on multiple grounds, the plaintiff's actual costs in preparing her notice of opposition and affidavit "far exceeded" the 2B allocation of 0.6 days.

[10] Mr Zhang says it is clear from the plaintiff's affidavit in support of her opposition that there exists uncontradictable evidence that the defendant was not truthful in her affidavit when she said she had mistakenly thrown out the service documents and did not know that this was a court proceeding. Mr Zhang points to the plaintiff's evidence that the defendant made a forum post asking people for advice on

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<sup>3</sup> At [39].

<sup>4</sup> Relying on High Court Rules 2016, r 15.23.

how to deal with the plaintiff's claim against her, one month after she had been served, and that she had only decided not to defend the claim after receiving advice that she would not be prejudiced by an adverse judgment. Mr Zhang submits that had the defendant's interlocutory application and conduct continued, she would have potentially been liable for increased costs.

[11] Mr Zhang says despite the defendant's conduct, the plaintiff nevertheless made a reasonable offer to settle costs with the defendant seeking costs on a scale 2B basis for her application, timetabling memorandum and disbursements. This was sent to the defendant's address for service that she had provided in her notice of change of counsel on 29 May 2023. Mr Zhang's email sent to the defendant at her address for service advised:

My client proposes standard 2B plus disbursement for her opposition. She could claim more but would prefer a quick and straightforward costs resolution. It is roughly (0.6 day) \$1,450 for the opposition and affidavit, (0.2 day) \$480 for the timetabling memorandum, \$700 for translation, and \$110 for filing fee.

Please let us know within 3 days if you are happy with that to be made into a consent order. If not, we will have to file a separate memorandum for which we will need to claim costs on costs, and possibly above 2B for the opposition and affidavit since it was a rather complicated one. We trust that you will be reasonable about this and such a step is unnecessary.

[12] Mr Zhang received a response to his email from someone saying that the address was not the defendant's email address, and provided another email address said to be the defendant's. Mr Zhang then emailed the defendant at the second email address allowing a further three days for her to respond to the plaintiff's offer of a consent order. The defendant did not respond to either email. Mr Zhang says that has resulted in the plaintiff incurring more costs in preparing the plaintiff's costs submissions.

[13] Mr Zhang submits the Court has jurisdiction to award costs on a costs application,<sup>5</sup> and having regard to the brevity of his memorandum, the plaintiff seeks costs on the costs memorandum on a band A basis. Mr Zhang says the proceedings

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<sup>5</sup> *Strata Title Administration Ltd v Body Corporate Administration Ltd* [2014] NZCA 96 at [10]–[14].

should be categorised as category 2. Therefore, the plaintiff seeks costs totalling \$2,390 and comprising of:

<b>Item</b>	<b>Description</b>	<b>Band/allocation</b>	<b>Amount</b>
23	Filing opposition to interlocutory application	B (0.6 days)	\$1,434
11	Filing memorandum for case management conference	A (0.2 days)	\$478
11	Filing memorandum for case management conference	A (0.2 days)	\$478
		<b>Total</b>	\$2,390

[14] The plaintiff also seeks disbursements of \$810 relating to the filing fee for opposition and the translation fee.

*The defendant*

[15] As I have noted, the defendant is self-represented at this stage in the proceeding. The defendant has not filed submissions in relation to the plaintiff's claim for costs.

**Relevant law**

[16] Rule 15.23 of the High Court Rules provides:

### 15.23 Costs

Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[17] In *Du v M5 Holdings Ltd* Katz J rejected the argument that an application to set aside a formal proof judgment should be treated for costs purposes as an originating application rather than an interlocutory application.<sup>6</sup> The defendant's withdrawn application was therefore interlocutory in nature and not a "proceeding" pursuant to r 15.23. However, by analogy r 15.23 has been applied to interlocutory applications.<sup>7</sup> Costs on interlocutory applications, unless there are special reasons to the contrary, must be fixed when the application is determined and become payable when they are fixed.<sup>8</sup>

[18] Rule 15.23 means that the plaintiff in this case does not need to demonstrate that the defendant was unreasonable in bringing its application and then withdrawing it. The plaintiff has the advantage of the presumption that applies even where there has been no unreasonableness of that kind.<sup>9</sup> However, where the plaintiff's conduct is such that it would be an injustice for that party to have costs, the Court can depart from the r 15.23 presumption.<sup>10</sup>

[19] An application for costs on costs as brought by the plaintiff is treated the same for costs purposes as an ordinary interlocutory application.<sup>11</sup> Costs are ultimately a matter at the discretion of the Court.<sup>12</sup>

### Discussion

[20] I consider the costs sought regarding the plaintiff's discontinuance of her application to set aside the formal proof judgment to be appropriate. There is nothing

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<sup>6</sup> *Du v M5 Holdings Ltd* [2020] NZHC 28 at [11]–[12].

<sup>7</sup> *McGechan on Procedure* (Thomson Reuters, online ed) at [HR15.23.07], citing *MV Celebre Ltd v Airwork Flight Operations Ltd* [2015] NZHC 1400 at [9].

<sup>8</sup> High Court Rules, r 14.8(1).

<sup>9</sup> *Opus International Consultants Ltd v Colac Bay Vision Ltd* [2015] NZHC 1782 [21]–[22].

<sup>10</sup> At [22].

<sup>11</sup> *Body Corporate Administration Ltd v Mehta (No 4)* [2013] NZHC 213 at [85]; aff'd *Strata Title Administration Ltd v Body Corporate Administration Ltd* [2014] NZCA 96 at [10]–[14].

<sup>12</sup> High Court Rules, r 14.1.

within the circumstances of this case to displace the clear statutory presumption that a party who has had a proceeding brought against them subsequently discontinued, regardless of actual unreasonableness, is entitled to costs.

[21] The defendant's application was filed on 27 March 2023 with two affidavits in support from the defendant herself and someone claiming the defamatory post was removed the same day. On 19 May 2023 the plaintiff filed a notice of opposition and an affidavit in response to the defendant's affidavit, detailing her objection to the points the defendant had raised. The plaintiff's affidavit was in Mandarin and included an English translation, verified by a translator on 22 May 2023. On 22 May 2023 counsel filed a joint memorandum for first call, signed by both the plaintiff's and the defendant's counsel. On 22 May 2023 the Court set down a one-hour hearing on 26 June 2023. On 29 May 2023 the defendant's counsel advised that the defendant withdrew the application.

[22] Taking the steps the plaintiff took into account, there is nothing in the plaintiff's conduct such that it would be an injustice for that party to have costs and so as to depart from the r 15.23 presumption. I am therefore satisfied that the steps taken by the plaintiff in relation to the application before it was withdrawn, by filing a notice of opposition on 19 May 2023, and the joint memorandum of counsel for the first case management conference, were appropriate. I consider it appropriate for the notice of opposition to be on a band B basis, and the joint memorandum to be on a band A basis. I find that the disbursements claimed of the filing fee and translation fee are reasonable.

[23] I exercise my discretion to award costs on a band A basis for the filing of the plaintiff's costs memorandum on 14 June 2023. The plaintiff acted reasonably in attempting to settle costs with the defendant on two occasions and received no response. The offer proposed, as detailed above at [12], was entirely appropriate and if accepted would have saved the additional costs incurred by the plaintiff's counsel.

## **Result**

[24] I make an order that the defendant is to pay costs to the plaintiff in the sum of **\$3,200.**<sup>13</sup>

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Paul Davison J

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<sup>13</sup> The sum being comprised of legal costs of \$2,390 and disbursements of \$810.