

APPROVED

[2021] IEHC 285

THE HIGH COURT
CIRCUIT APPEALS

2019 No. 183 CA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 28(3) OF THE EQUAL
STATUS ACT 2000

BETWEEN

OLUMIDE SMITH

APPELLANT

AND

THE OFFICE OF THE OMBUDSMAN
ADAM KEARNEY
BERNARD TRAYNOR
PETER TYNDALL

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 5 May 2021

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 11 February 2020 and bears the neutral citation [2020] IEHC 51. This supplementary judgment addresses the allocation of the costs of the proceedings.
2. The within proceedings take the form of an appeal from the Circuit Court pursuant to section 28(3) of the Equal Status Act 2000. As appears from the principal judgment, the appellant, Mr. Smith, has been unsuccessful in his appeal.

NO REDACTION REQUIRED

DISCUSSION

3. The general rule is that a party who has been entirely successful in proceedings is normally entitled to recover their costs against the losing party. This rule is now embodied in section 169 of the Legal Services Regulation Act 2015, and had previously been reflected in the pre- December 2019 version of Order 99 of the Rules of the Superior Courts. A court retains a discretion to depart from the general rule for stated reasons.
4. The principal judgment was delivered on 11 February 2020. Thereafter, the proceedings were adjourned for a period of two weeks to allow the parties to consider the judgment. On the adjourned date (25 February 2020), the respondents to the appeal applied for an order directing that Mr. Smith, as the unsuccessful party, should have to pay their costs of the appeal. Counsel on behalf of the respondents has indicated, however, that his side would not enforce the costs order in the event that Mr. Smith did not pursue these proceedings further by way of an appeal to the Court of Appeal. Counsel explained that this pragmatic approach to costs was intended to bring finality to these proceedings. Mr. Smith's complaint has already been subject to three layers of adjudication, i.e. before the Workplace Relations Commission, the Circuit Court and the High Court.
5. Counsel for the respondents confirmed that his side would be agreeable to this approach to costs being reflected in the wording of an order of the High Court. Any costs order would, in effect, be incapable of execution unless Mr. Smith invoked his constitutional right of appeal to the Court of Appeal. I will refer to this suggested form of order as "*the contingent costs order*".
6. Mr. Smith requested a period of time to consider the position in respect of costs. I acceded to this request and the proceedings were adjourned for four weeks to 24 March 2020. I explained to Mr. Smith that I would only make a contingent costs order if he were to consent to same. Mr. Smith has a constitutional right of appeal to the Court of

Appeal and this right must be respected. In the event that Mr. Smith confirmed that he intended to exercise his right of appeal, then a costs order was to be made in favour of the respondents, subject to a stay on adjudication and execution pending the hearing and determination of the appeal to the Court of Appeal and any application for leave to appeal to the Supreme Court. It was only in the event of Mr. Smith consenting to the contingent costs order that the proviso as to the costs not being enforceable absent an appeal would be included.

7. As it transpired, the matter did not proceed on the adjourned date of 24 March 2020. This was because of the restrictions on non-urgent court hearings introduced in March 2020 as part of the public health measures in response to the coronavirus pandemic. Instead, the proceedings were adjourned generally.
8. The High Court Registrar assigned to this case has now contacted both parties, and offered both sides an opportunity to make any further submissions in writing. The respondents have confirmed that they are content to rest on the oral submissions made on their behalf on 25 February 2020. Mr. Smith has made further submissions by email, and has helpfully referred the court to a number of judgments (including case law from other jurisdictions) which emphasise the fundamental importance of the right to equal treatment.
9. Mr. Smith has confirmed that he intends to exhaust his domestic remedies by appealing the principal judgment. In this regard, Mr. Smith has requested, first, that the High Court grant him leave to appeal; and, secondly, that there be a stay on further action or proceedings on costs.
10. As it happens, Mr. Smith does not need leave to appeal from the High Court. This is because Mr. Smith's appeal came before the High Court pursuant to section 28(3) of the Equal Status Act 2000. This provides that no further appeal lies [from the Circuit Court]

other than an appeal to the High Court on a point of law. The Supreme Court has confirmed in *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13; [2015] 2 I.R. 509 that section 28 did not exclude an appeal to the Supreme Court under Article 34.3.3° of the Constitution of Ireland (as it stood prior to its amendment).

11. The *Stokes* proceedings had been commenced prior to the establishment of the Court of Appeal in October 2014. In a post- 2014 case, such as Mr. Smith’s, the judgment in *Stokes* should be understood as indicating that there is a right of appeal to the Court of Appeal. This follows from the fact that, under Article 34.4.1° of the amended Constitution of Ireland, the constitutional right of appeal from the High Court is now to the Court of Appeal.
12. There is no statutory requirement for leave to appeal under section 28(3) of the Equal Status Act 2004. Accordingly, it is not necessary for Mr. Smith to apply to the High Court for leave to appeal.
13. For the sake of completeness, it should be noted that it is, in principle, open to Mr. Smith to apply for leave to appeal to the Supreme Court for a so-called “leap frog” appeal. Any application for leave to appeal is made directly to the Supreme Court itself. The High Court has no function in granting leave to appeal to the Supreme Court.

DECISION AND FORM OF ORDER

14. Mr. Smith, as is his right, intends to appeal the principal judgment to the Court of Appeal. In the premises, the proposal put forward on behalf of the respondents that a modified costs order be made falls away.
15. The respondents have been entirely successful in opposing Mr. Smith’s appeal to the High Court. The general rule is that a party who has been entirely successful in proceedings is normally entitled to recover their costs against the losing party. Mr. Smith

has not put forward any reason as to why this court should exercise its discretion to depart from the general rule.

16. An order will be made directing Mr. Smith to pay the costs incurred by the respondents in respect of the appeal to the High Court and in respect of the costs of the court below, i.e. the Circuit Court. Costs to include all reserved costs and the costs of one set of written legal submissions. Such costs are to be adjudicated, i.e. measured, in default of agreement by the Office of the Chief Legal Costs Adjudicator in accordance with Part 10 of the Legal Services Regulation Act 2015. A stay is placed on the adjudication and execution of the costs order pending the hearing and determination of the intended appeal to the Court of Appeal, and any application for leave to appeal to the Supreme Court. Such stay to lapse in the event that an appeal is not filed within twenty-eight days of the date of the perfection of this order.

Approved
Gareth S. Mans