

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA112/2015
[2015] NZCA 362**

BETWEEN JANINE DAVINA SAX
 Applicant

AND LUKE ANDREW SIMPSON
 Respondent

Court: Randerson, White and Winkelmann JJ

Counsel: Applicant in person

Judgment: 10 August 2015 at 11:30 am
(On the papers)

JUDGMENT OF THE COURT

A The application for an extension of time to file the case on appeal is declined.

B No order for costs.

REASONS OF THE COURT

(Given by Randerson J)

[1] Ms Sax seeks an extension of time to file the case on appeal under r 43 of the Court of Appeal (Civil) Rules 2005 (the Rules).

Background

[2] Ms Sax's appeal arises from defamation proceedings filed against her former husband, the respondent in relation to proceedings in the Family Court. An order

was made in the District Court that she pay security for costs in the sum of \$10,000, with proceedings stayed until the security was paid.¹ Ms Sax appealed that decision successfully to the High Court and Heath J reduced the security to \$1,000.²

[3] Ms Sax then filed a memorandum in the High Court seeking orders anonymising the security for costs judgment and seeking either suppression of the reasons for the judgment or various publication and access restrictions. Heath J issued a minute on 23 December 2014. He expressed the provisional view that no suppression order should be made in defamation proceedings of this sort, where the whole purpose of the proceeding was to publicly air the issues in dispute with the consequence of public vindication. Nevertheless he ordered interim suppression until another Judge could more fully consider the issue. Faire J agreed with Heath J's reasons and discharged the interim order of name suppression and the application for permanent suppression.³

[4] It is the judgment of Faire J that Ms Sax intends to appeal to this Court. In filing her notice of appeal on 13 March 2015, Ms Sax also filed a memorandum seeking interim suppression of the proceedings in the District Court, the High Court and this Court. On 19 March 2015, Cooper J issued a minute declining the application.⁴ Ms Sax then applied to review the minute, seeking that the decision of Cooper J be set aside in whole or in part. This Court dismissed that application in a judgment of 9 June 2015 on the basis that there are no publication restrictions that apply to defamation proceedings generally and that the presumption in favour of disclosure had not been overcome in the circumstances of the case.⁵

[5] In the meantime, r 43 of the Rules came into effect. The appeal is to be treated as abandoned if the appellant had not applied for the allocation of a hearing date and filed the case on appeal within 3 months after the appeal is brought, that is by 13 March 2015. Ms Sax had applied for an allocation of a hearing date on 10 April 2015, but had not filed her case on appeal. On 13 July, Ms Sax filed an

¹ *Sax v Simpson* DC Tauranga CIV-2013-070-775, 19 August 2014.

² *Sax v Simpson* [2014] NZHC 3235.

³ *Sax v Simpson* [2015] NZHC 422.

⁴ *Sax v Simpson* CA112/2015, 19 March 2015.

⁵ *Sax v Simpson* [2015] NZCA 222.

application for an extension of time to file the case on appeal under r 43(2). She also filed materials purporting to be a case on appeal. These appear to be submissions and a history of the proceedings to date.

The application for an extension of time

[6] Ms Sax applies for an extension of time on the basis that she thought a sufficient case on appeal had already been filed.

[7] Ms Sax accepts she was informed by email dated 7 July 2015 that the material she had filed did not constitute a case on appeal for r 43. She then filed a “case on appeal” on 14 July 2015 but this also falls well short of complying with the Rules. Ms Sax submits that no prejudice would be suffered by the respondent if the Court granted an extension as he had told the Court as early as 25 April 2015 that he did not intend to take any steps in relation to the appeal. Finally she submits that the balance of justice lies in favour of an extension of time being granted.

Analysis

[8] If Ms Sax had filed the case on appeal on time, she would have had an appeal as of right to this Court.⁶ In failing to comply with r 43, she must seek “the exercise by this Court of a positive discretion.”⁷

[9] This Court noted in *Rabson v Gallagher* that some latitude in compliance with case management requirements must be permitted to litigants in person if overall justice is to be done.⁸ Further, there has been no prejudice to the respondent flowing from her failure to comply with r 43.

[10] However, the application for an extension of time must be dismissed for the following reasons:

⁶ Judicature Act 1908, s 66; *Siemer v Heron* [2011] NZSC 133; [2012] NZLR 309 at [31].

⁷ *Schmidt v Ebada Property Investments Ltd* [2012] NZCA 452 at [7].

⁸ *Rabson v Gallagher* [2011] NZCA 204 at [9].

- (a) Once an appellant needs leave to continue, this court will generally grant it only if the appeal seems meritorious.⁹ Here however, the relief sought on appeal is substantially the same as the interim relief sought in this Court on review of Cooper J's minute. Three judges of this Court have already found there is no merit in the application, echoing the reasons of Faire J and Heath J in the High Court.¹⁰ Ms Sax faces the serious hurdle that her various applications for suppression arise in the context of defamation proceedings, not Family Court proceedings. Publication restrictions from the Family Court context will not be carried over to the defamation proceeding where the entire basis of the tort is public vindication of the plaintiff's reputation.
- (b) Although the delay to date is not significant, we note that the case on appeal has still not been filed in the proper form.
- (c) The fact that the respondent has advised he does not intend to take any steps to oppose the application does not mean that the merits of the appeal and overall justice are immaterial.

Result

[11] The application for an extension of time to file the case on appeal is declined.

[12] There is no order for costs as the respondent took no steps in opposing the application.

Solicitors
Ronayne Hollister-Jones Lellman, Tauranga for Respondent

⁹ *Russell v Commissioner of Inland Revenue* (2006) 22 NZTC 19,807 at [10] and *Harris v Davies* [2007] NZCA 358 at [8].

¹⁰ See above at [3]–[4].