

CITATION: *Wendy Nabalja Kitson v Northern Territory of Australia* [2004] NTMC 044

PARTIES: WENDY NABALJARI KITSON  
v  
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Crimes (Victim's Assistance)

JURISDICTION: Local Court – Alice Springs

FILE NO(s): 20303865

DELIVERED ON: 2 April 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 30 March 2004

JUDGMENT OF: M Ward

**CATCHWORDS:**

Crimes (Victim's Assistance) Act; discontinuance; costs, power to award.

**REPRESENTATION:**

*Counsel:*

Applicant: J Stirk  
Respondent: M Heitmann

*Solicitors:*

Applicant: Pover Stirk  
Respondent: M Heitmann

Judgment category classification: [2004] NTMC 044

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Number of paragraphs: 20

IN THE CRIMES (VICTIM'S ASSISTANCE) COURT  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20303864

BETWEEN:

**WENDY NABALJARI KITSON**  
Applicant

AND:

**NORTHERN TERRITORY OF  
AUSTRALIA**  
Respondent

REASONS FOR JUDGMENT

(Delivered 2 April 2004)

Mr M WARD DCM:

1. This is an appeal by an injured applicant from a decision of the Registrar to proceed to tax a bill of costs. The applicant had brought two applications for assistance under the Crimes (Victim's Assistance) Act through two different solicitors in respect of the one alleged assault.
2. This particular application was filed on the 7<sup>th</sup> of March 2003 in the Alice Springs Court by solicitors Povey Stirk on behalf of the applicant.
3. On the 28<sup>th</sup> of April 2003, the solicitor representing the respondent Northern Territory wrote to Povey Stirk pointing out that the claim was a duplication of another claim (20301141) filed in the Tennant Creek Court by solicitors CAAFLU on behalf of the applicant. The applicant discontinued this claim on the 12<sup>th</sup> of December 2003.
4. The respondent then sought to claim costs pursuant to Rule 5.18 (4) of the Local Court Rules. That sub-rule provides:

“ (4) A party who discontinues or withdraws must pay the costs of the other party incurred before the discontinuance or withdrawal unless the Court orders otherwise.”

The Court has not ordered otherwise.

5. On the 24<sup>th</sup> of March 2004, the Registrar held that he ought to tax the respondents costs because the respondent is entitled to costs on a discontinuance under R.5.18 (4) (above). There is an appeal for that decision. The appeal is by way of a De Novo hearing. The first argument of the applicant was that the costs provision of the C (VA) Act were exhaustive, and did not permit payment of the respondent’s costs by the applicant on a discontinuance. There was thus no jurisdiction for the Registrar to proceed to tax the respondent’s costs.
6. Moketarinja’s case (1996) 111 NTR 4 is cited as authority for the applicant’s proposition. Moketarinja was decided before the 2002 amendments to the C (VA) Act. The amendments expanded the power of the Court to make awards for costs against the applicant, in addition to those in s.8 (10). The amendments enacted s.24, which also deals with costs. In particular it enacted s.24 (3). Thus the C (VA) Act now has the following express provisions as to costs, which include power to award costs against an applicant.
7. Section 8 (10) provides:

“(10) Where the Court issues an assistance certificate it may, subject to this Act and the Regulations, made such order as to costs and disbursements as it thinks fit.”
8. Subsection 24 (3) provides:

“(3) If the Court dismisses or strikes out an application under s.5, the Court may order that the applicant must pay all or part of the costs incurred by the Territory in respect of the applicant.”
9. In Moketarinja, Mildren J held (at p.7):

“I consider that the intention of the legislature is that an award of costs may be made in relation to an application for an assistance certificate under s.5 of the Act only in favour of an applicant and that the legislature did not intend there would be power to award costs in favour of an alleged offender.”

10. That part of the ratio must be read down in the light of the enactment in 2002 of ss.24 (3). There now is express power to award costs in favour of the Territory in certain limited circumstances spelt out in that subsection.
11. Registrar Campbell went further in paragraph 6, dot point four, of his reasons. He discerned an intention on the part of the legislature to reverse Moketarinja’s case generally. I am not sure I could go so far. It is surely modified only to the extent of ss.24 (3), and in one other way to which I shall make reference.
12. The other modification to his Honour’s ratio is that adverted to by Registrar Campbell in his reasons paragraph 6, dot point three, as follows:

“The Local Court legislation is looked to when the Crimes (Victim’s Assistance) Legislation is silent and this does provide for costs to be payable when an action is discontinued and also provided for the taxation of costs (otherwise I would not be able to tax costs in this type of case).”

13. There is no power to discontinue an action in the Crimes (Victim’s Assistance) Act. However, subsection 15 (1) of the Act, at least by implication, gives power to make rules to regulate procedures under the Act. Rule 5 provides:

“If the manner or form of the procedure –

- (a) for commencing or taking a step in a proceeding: or
- (b) by which the jurisdiction, power or authority of the Court is to be exercised,

is not prescribed by these Rules or by or under an Act, the Court may adopt and apply (with the necessary modifications) the relevant Rules and forms observed and used under the Local Court Rules.”

14. There is no procedure nor form prescribed within the C (VA) Act for discontinuing an action once commenced. Without invoking the Local Court Rules and forms, the applicant could have presented to the Court and advised that she did not wish to proceed further, and offered no evidence. The Court could then have struck out or dismissed the application. It could then have ordered the applicant to pay the costs of the Northern Territory, pursuant to ss.24 (3).
15. Instead the applicant invoked the Local Court Rules, and in particular Rule 5.18, headed “Discontinuance or Withdrawal”. Clause (1) of the Rules gave power to discontinue a proceeding commenced in the Local Court. With necessary modification, it now enables an applicant in the C (VA) jurisdiction to withdraw an application. Clause (4) of Rule 5.18 provides:
  - (4) A party who discontinues... must pay the costs of the other party incurred before the discontinuance... unless the Court orders otherwise.”
16. There is no such order.
17. In my view, Registrar Campbell was correct when he said that a party invoking the Local Court Rules to discontinue an application must bear the brunt of an order for costs under Rule 5.18 (4). Moketarinja’s case must be taken to be modified accordingly.
18. In the alternative, I was asked to order that the applicant not have to pay costs to the Northern Territory. In her affidavit, sworn on the 10<sup>th</sup> of March 2004, the applicant claimed some sought of mix-up as the reason for the duplication of proceedings. It is difficult to understand precisely how the mix-up came about.
19. I do not regard the explanation in the applicant’s affidavit as sufficient to overcome the general Rule expressed in clause 5.15 (4) of the Local Court Rules. Applications for assistance under the C (VA) Act might be dressed up in all sorts

of euphemisms (“the victim may apply for as assistance certificate”). But at the end of the day, each application is about an applicant attempting to obtain money from the Northern Territory, out of the limited funds which it has to disburse to a variety of supplicants. It behoves a person seeking a certificate of assistance to be careful, not to exaggerate nor duplicate, nor waste money in time, costs and effort unnecessarily.

20. The appeal is dismissed. I order the applicant is to pay the costs of the Northern Territory on this appeal, to be taxed as agreed.

Dated this 2<sup>nd</sup> day of April 2004.

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**M Ward**  
DEPUTY CHIEF MAGISTRATE