

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA153/2022
[2023] NZCA 127**

BETWEEN VIN TOMAR
 Applicant

AND FAMILY COURT AT AUCKLAND
 First Respondent

 MONIKA TOMAR
 Second Respondent

CA156/2022

BETWEEN VIN TOMAR
 Applicant

AND THE FAMILY COURT IN AUCKLAND,
 HAMILTON AND MORRINSVILLE
 First, Second and Third Respondents

 THE LAWYER FOR CHILD (MS SUSAN
 EWEN)
 Fourth Respondent

 THE SUPERVISED CONTACT CENTRE
 (BARNADOS NEW ZEALAND
 INCORPORATED)
 Fifth Respondent

 SPECIALIST REPORT WRITER
 (MS APRIL TRENBERTH)
 Sixth Respondent

 MONIKA TOMAR
 Seventh Respondent

BETWEEN VIN TOMAR
 Applicant

AND PATRICK JOHN HENSHALL
 First Respondent

 MONIKA TOMAR
 Second Respondent

Court: Brown and Goddard JJ

Counsel: Applicant in person
 No appearance for Respondents CA153/2022 or CA158/2022
 No appearance for First, Second, Third, Fourth, Fifth and Seventh
 Respondents in CA156/2022
 D S McGill for Sixth Respondent in CA156/2022

Judgment: 24 April 2023 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

- A Mr Tomar’s applications for orders under s 59 of the Senior Courts Act 2016 transferring four High Court judicial review proceedings to this Court are struck out on the grounds that they are an abuse of process.**
- B There is no order as to costs.**
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REASONS OF THE COURT

(Given by Goddard J)

Background

[1] Mr Tomar’s former wife, Ms Khatri, brought proceedings against Mr Tomar in the Family Court. Those proceedings were substantially successful. In the course of those proceedings Mr Tomar filed dozens of applications that were unsuccessful.

Mr Tomar also pursued three unsuccessful appeals from the Family Court decisions to the High Court (the appeals).¹

[2] Mr Tomar then filed four separate applications for judicial review in the High Court in relation to the proceedings in the Family Court and the implementation of the orders made by that Court (the judicial review proceedings). Ms Khatri was named as a respondent in each proceeding, together with various other respondents.

[3] Ms Khatri applied to the High Court seeking an order under s 166 of the Senior Courts Act 2016 prohibiting Mr Tomar from commencing or continuing any civil proceedings against her without the leave of a Judge (a civil restraint order). The application was heard by Downs J. The Judge declined to make a civil restraint order.² The Judge considered that Mr Tomar had filed dozens of meritless applications.³ However most of these applications did not qualify as “proceedings commenced or continued” by Mr Tomar for the purposes of s 166 of the Senior Courts Act. The Judge identified five applications commenced or continued by Mr Tomar that were totally without merit, and that arguably did amount to “proceedings”.⁴ But ultimately the Judge considered that it was more appropriate to deal with the application in a different way. He said:

[59] Three points go the other way. First, all of Mr Tomar’s applications were ultimately directed at opposing relief Ms Khatri sought. Mr Tomar was a defendant, albeit, as observed, an especially difficult one. This scenario is removed from the orthodox one in which a vexatious litigant *brings* hopeless cases against others. Second, Ms Khatri has had some relief in the form of costs orders, including instances of increased and indemnity costs, and Judges have dismissed Mr Tomar’s plainly meritless applications. In this sense, the system has worked, albeit not without hardship to Ms Khatri. Third—and decisively—a simpler, more proportionate remedy is readily available.

[60] Section 166(6) of the Senior Courts Act confirms the Act does not limit the inherent power of the High Court to control its own proceedings. Mr Tomar has not paid much of the costs awarded against him. Ms Khatri said \$63,387.15 remained outstanding, and she expected Lang J to award costs in the wake of the unsuccessful appeals. Ms Khatri was prescient. On 9 November 2021, Lang J ordered Mr Tomar pay \$35,611 in costs. So, Mr Tomar now owes Ms Khatri \$98,998.15 in unpaid costs.

¹ *Thomas v Kane* [2021] NZHC 1211; and *Tomar v Tomar* [2021] NZHC 2353.

² *Khatri v Tomar* [2021] NZHC 3091 (High Court judgment).

³ At [1] and [48]–[51].

⁴ At [54]–[55].

[61] It would be contrary to the interests of justice for Mr Tomar to continue his existing litigation in the High Court; bring new proceedings in this Court; or file applications of any sort in relation to either, given Mr Tomar has not met his obligations to Ms Khatri in relation to costs, particularly when these encompass meritless litigation here and below. I put this proposition to Mr Tomar. I foreshadowed the possibility of a prohibition unless Mr Tomar paid outstanding costs. Mr Tomar said he would “not object” to a prohibition of this nature, provided the outstanding costs were “not unlawful”. Plainly, they are not.

(Footnotes omitted.)

- [4] The Judge made an order prohibiting Mr Tomar from:
- (a) continuing all existing litigation in the High Court;
 - (b) bringing new proceedings in the High Court in which Ms Khatri is a party or the proceeding is about or in any way related to Ms Khatri;
 - (c) filing applications of any sort in relation to (a) or (b);

Unless he first pays Ms Khatri, in full, \$98,998.15 in outstanding costs.⁵

[5] The judicial review proceedings were stayed pending payment of outstanding costs.⁶

[6] On 15 December 2021 Mr Tomar filed a notice of appeal against the High Court judgment.⁷ On 16 June 2022 the Registrar gave notice that the appeal was deemed to be abandoned. Mr Tomar sought a review of that decision. That application was declined.⁸

[7] In one of the judicial review proceedings, three respondents had applied to strike out the claim against them before the proceedings were stayed by Downs J.⁹ By a minute dated 16 December 2021, Downs J lifted the stay to enable the strike out application to be determined, and in a separate judgment he struck out the claims

⁵ At [63].

⁶ At [64].

⁷ CA723/2021.

⁸ *Tomar v Khatri* [2022] NZCA 233.

⁹ The fourth, fifth and sixth respondents named by Mr Tomar in CA156/2022.

against those respondents.¹⁰ The claims against those respondents were struck out on the basis that the claims constituted a collateral attack on the correctness of the High Court determinations of Mr Tomar’s appeals. Mr Tomar was “seeking, by cloak of judicial review, to relitigate the appeals.”¹¹ So the claims were an abuse of process.

[8] Mr Tomar filed an appeal in this Court from the strike out judgment.¹² On 27 July 2022 the Registrar gave notice that this appeal was deemed to be abandoned.

The applications before this Court

[9] In March 2022 Mr Tomar filed three applications in this Court for transfer of civil proceedings from the High Court under s 59 of the Senior Courts Act.¹³ Those applications seek transfer to this Court of the judicial review proceedings.

[10] On 6 April 2022 Brown J stayed those three applications pending further order of this Court. As Brown J explained in that minute, the applications appear to have been made in response to the High Court judgment. They appear to be calculated to circumvent the order made by the High Court, as they seek to continue existing High Court litigation but in a different venue.

[11] At the time Brown J granted a stay of the three applications, Mr Tomar’s appeals against the High Court judgment and the strike out judgment were still on foot. However as noted above, both are now deemed abandoned.

[12] On 21 February 2023 I issued a minute noting that the rationale for a stay appears to have come to an end with the deemed abandonment of the appeal against the High Court judgment. I reviewed the applications, and considered that in the circumstances outlined above the Court should consider making an order under r 44A of the Court of Appeal (Civil) Rules 2005 striking out the applications on the grounds that they are an abuse of the process of the Court. Mr Tomar was given notice of the

¹⁰ *Tomar v Family Court* [2021] NZHC 3542 [strike out judgment].

¹¹ At [20].

¹² CA739/2021.

¹³ CA153/2022; CA156/2022; and CA158/2022: these applications are the subject of this judgment.

Court's intention to consider making such an order, and an opportunity to file written submissions.

Mr Tomar's submissions

[13] Mr Tomar filed submissions opposing the making of an order striking out his three applications. He submits that the Court is in error because r 44A applies only to an "appeal", not to an "application". He submits that the appropriate course of action is for the applications under s 59 of the Senior Courts Act to be determined.

Discussion

[14] Rule 44A of the Rules provides as follows:

44A Court's power to strike out or stay appeal

- (1) In addition to any express power in these rules to strike out an appeal, the Court may, on an interlocutory application or on its own initiative, make an order striking out or staying an appeal in whole or in part if—
 - (a) the appellant is in continuing default in complying with any of these rules or with any procedural direction or order made by a Judge; or
 - (b) the appellant has failed to prosecute the appeal with due diligence and dispatch; or
 - (c) the appeal is frivolous, vexatious, or otherwise an abuse of the process of the Court.
- (2) The Court must—
 - (a) give the appellant 10 working days' prior notice of its intention to consider making an order under this rule; and
 - (b) give ancillary directions as to the filing and service of any written submissions.
- (3) The Court may make an order under this rule on the papers or after an oral hearing, as the Court thinks fit.
- (4) The Court may order a stay under this rule on any terms that the Court thinks appropriate.
- (5) This rule also applies to cross-appeals.

[15] Mr Tomar is correct in his submission that r 44A focuses on striking out or staying an appeal, rather than an application. However a similar power is conferred by r 26C in relation to applications for leave to appeal:

26C Court's power to strike out or stay application for leave

- (1) The Court may, on an interlocutory application or on its own initiative, make an order striking out or staying an application for leave to appeal in whole or in part if—
 - (a) the applicant is in continuing default in complying with any of these rules or with any procedural direction or order made by a Judge; or
 - (b) the applicant has failed to prosecute the application with due diligence and dispatch; or
 - (c) the application is frivolous, vexatious, or otherwise an abuse of the process of the Court.
- (2) The Court must—
 - (a) give the applicant 10 working days' prior notice of its intention to consider making an order under this rule; and
 - (b) give ancillary directions as to the filing and service of any written submissions.
- (3) The Court may make an order under this rule on the papers or after an oral hearing, as the Court thinks fit.
- (4) The Court may order a stay under this rule on any terms that the Court thinks appropriate.

[16] So the Rules provide for the striking out or stay of applications for leave to appeal and appeals, where the application or appeal is an abuse of the process of the Court.

[17] An application under s 59 of the Senior Courts Act for transfer of a High Court proceeding to this Court is neither an application for leave to appeal nor an appeal. Such applications are not expressly provided for in the Rules. So r 5(4) applies:

5 Directions

...

- (4) If any matter arises in a proceeding for which no form of procedure is prescribed by these rules, the Court must dispose of the matter as nearly as practicable in accordance with the provisions of these rules

affecting any similar matter, or, if there are no such provisions, in the manner that the Court thinks best calculated to promote the ends of justice.

...

[18] We are satisfied that this Court has jurisdiction to strike out or stay an application under s 59 of the Senior Courts Act on the grounds that it is an abuse of process, pursuant to r 5(4). The principle that this Court should not permit proceedings before it to be used to abuse the process of the Court applies to s 59 applications just as it does to applications for leave to appeal and to appeals. These are “similar matters” for the purpose of r 5(4). The procedure adopted should be as near as practicable to that prescribed by rr 26C and 44A.

[19] We also consider that the Court has an inherent jurisdiction to strike out such applications, in the exercise of the implied jurisdiction of a court of record to control the abuse of its process.¹⁴

[20] We are satisfied that it would be an abuse of process for this Court to entertain Mr Tomar’s applications. They are a stratagem designed to circumvent the orders made in the High Court judgment. Mr Tomar appealed against those orders, then abandoned that appeal. He should not be permitted to circumvent the High Court orders, and the outcome of his appeal, in this way. Ms Khatri and the other defendants should not be put to the time and cost of responding to Mr Tomar’s applications before this Court: that would be contrary to the interests of justice, and would itself undermine the rationale for the making of the orders in the High Court judgment.

[21] Mr Tomar’s applications are also an abuse of process because they seek to circumvent the strike out judgment, by seeking to pursue the claims against the respondents which were struck out in the High Court. Again, Mr Tomar appealed against that judgment then abandoned that appeal. He should not be permitted to circumvent the strike out judgment and the outcome of his appeal against it in this manner.

¹⁴ *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114] per McGrath, William Young and Glazebrook JJ, citing *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [111] per McGrath J.

[22] Mr Tomar's submissions did not identify any reason to think that the applications are not an abuse of process. Plainly they are.

Result

[23] Mr Tomar's applications for orders under s 59 of the Senior Courts Act 2016 transferring four High Court judicial review proceedings to this Court are struck out on the grounds that they are an abuse of process.

[24] There is no order as to costs.

Solicitors:
Duncan Cotterill, Auckland for Sixth Respondent in CA156/2022