

COURT OF APPEAL FOR THE YUKON TERRITORY

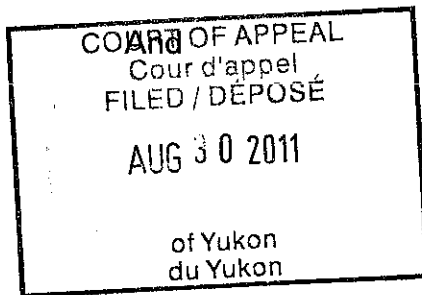
Citation: *Ausiku v. Hennigar*,
2011 YKCA 5

Date: 20110830
Docket: YU0662

Between:

David Kudumo Ausiku

Appellant
(Plaintiff)



Tammie Hennigar

Respondent
(Defendant)

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of the Yukon Territory, September 8, 2010
(*D.K.A. v. T.H.*, 2010 YKSC 63, Whitehorse Registry No. 10-A0058)

Acting on his own behalf: D.K. Ausiku

Counsel for the Respondent: D.P. Hoffman

Place and Date of Hearing: Whitehorse, Yukon Territory
May 17, 2011

Place and Date of Judgment: Vancouver, British Columbia
August 30, 2011

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice Bennett

VANCOUVER

AUG 30 2011

**COURT OF APPEAL
REGISTRY**

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] David Kudumo Ausiku appeals from the order of Mr. Justice Gower of the Supreme Court of the Yukon Territory, striking out his statement of claim against Tammie Hennigar. Mr. Ausiku alleges various misfeasances by Ms. Hennigar which appear to stem from an incident which he claims resulted in his being “banned” from the Canada Games Centre in Whitehorse where he performed janitorial services as an employee of a cleaning company. After filing and settling a complaint to the Yukon Human Rights Commission, Mr. Ausiku commenced an action against Ms. Hennigar.

[2] The chambers judge struck the statement of claim on the basis that it did not give rise to any reasonable cause of action. Mr. Ausiku contends that the judge erred by failing to consider the evidence and facts as presented in the statement of claim to find a reasonable cause of action.

[3] For the reasons that follow, I am unable to accept Mr. Ausiku’s arguments.

Factual Background

[4] Mr. Ausiku was employed by Filipina Cleaners, which was under contract with the City of Whitehorse to clean the Games Centre. That contract contained the following provision:

The [City] reserves the right to request removal of any contractor’s employee not meeting any of the requirements of the specification or any acts of misconduct as determined by the [City].

[5] On November 12, 2008, Ms. Hennigar, the Acting Associate Manager of Indoor Facilities at the Games Centre, received a complaint that Mr. Ausiku had treated patrons of the Games Centre in a disrespectful and threatening fashion. As a result, she advised Filipina Cleaners that Mr. Ausiku should no longer be assigned to work at the Games Centre. Dennis Shewfelt, the City Manager, also told Filipina Cleaners that Mr. Ausiku should not be permitted to work at the Games Centre.

[6] It appears that Mr. Ausiku's manager at Filipina Cleaners, Ailene Gayangos, requested a meeting between herself, Mr. Ausiku, and the City to discuss the incident. Ms. Hennigar declined to attend the meeting because she was of the view that it was not her role to supervise a contractor's staff. As well, she was concerned about the possibility of an altercation with Mr. Ausiku. Ms. Gayangos wrote to Ms. Hennigar to confirm the facts surrounding the incident and to clarify the protocol for dealing with situations in which cleaning staff encounter harassment from patrons at the Games Centre. Mr. Shewfelt responded and explained what had been reported by the Games Centre staff regarding the incident. The letter stated that Mr. Ausiku's conduct had violated the City's "Respectful Workplace policy", and that, pursuant to the contract, the City was requesting that Mr. Ausiku be removed from the Games Centre.

[7] It appears that Filipina Cleaners reassigned Mr. Ausiku to another work location. He was not prohibited from attending at the Games Centre in his personal capacity.

[8] Mr. Ausiku filed a complaint against Filipina Cleaners (and perhaps against the City and its employees) with the Yukon Human Rights Commission. A settlement of that complaint was reached and signed by the parties, including Mr. Ausiku.

[9] Mr. Ausiku then commenced an action against Ms. Hennigar alleging a variety of torts. He also commenced an action against the Human Rights Commission alleging discrimination. Both statements of claim were struck out in separate applications. This appeal relates only to the statement of claim against Ms. Hennigar. Mr. Ausiku's appeal from the striking out of his claim against the Commission has not yet been heard: File No. 10-YU670.

Statement Of Claim

[10] The statement of claim involving Ms. Hennigar was filed July 7, 2010. It lists the allegations as follows:

1. ... Negative interference in livelihood
2. ... Wilful incitement of hatred
3. ... Open racism towards Africans

4. ... Wilful conspiracy intended to cause harm or death
5. ... Unlawful vicious defamatory libel

[11] The facts pleaded to support those allegations are:

(a) ... Ms. Tammie Hennigar who worked for the City of Whitehorse banned me from entering or working in Canada Winter Games Centre building on November 13, 2008 to deprive me livelihood without reasons.

(b) ... Ms. Tammie Hennigar told the Police in Whitehorse that I was planning to kill the Indian children, the false stories she intended to incite the Indians to hate me or kill me.

(c) ... Ms. Tammie Hennigar claimed that I can not [*sic*] be a Canadian Citizen because I am "Physically Black" which means she hate [*sic*] all Africans.

(d) ... Ms. Tammie Hennigar sent a Policeman, Mr. Horbachewsky [*sic*] on December 13, 2008 to my apartment to arrest me after she banned me from entering Canada Winter Games Centre while I was no longer working in the building. ...

(e) ... Ms. Tammie Hennigar Conspired [*sic*] with her friends to come up with false and vicious allegations against my human dignity claiming that I was hearing voices that tells [*sic*] me what to do, and I became a threat to her staff in Canada Winter Games Centre Building.

(f) ... Ms. Tammie Hennigar claimed that I was a threat to her staff because I was "Physically Black" and she will never talk to me.

(g) ... The only reason I can see why Ms. Tammie Hennigar came up with all these dangerous hatred, conspiracy to edanger [*sic*] my life, and humiliating false stories against me, perhaps, it was because I reported her boss Mr. Richard Graham to the Yukon Human Rights Commission for displaying [*sic*] racist attitude towards me; the complain [*sic*] I later withdrew against him in October 2008 just before Ms. Tammie Hennigar came up with these [*sic*] vicious attack on my human dignity.

(h) ... Ms. Tammie Hennigar did similar retaliation against me when she realized that I went to report her to the Yukon Human Rights Commission for banning me from working in Canada Winter Games Centre building and telling my boss Ms. Gayangos to dismiss me from my job, the only reason she sent Mr. Horbachewsky to my place to arrest me and put me in jail or kill me because I don't know her agreement with the policeman she sent to my place.

[Emphasis in original.]

[12] The statement of claim does not set out what relief Mr. Ausiku seeks.

Proceedings in Chambers

[13] Before the chambers judge, Ms. Hennigar contended that even if it is assumed that all allegations outlined in the claim are true, the facts as pleaded in the statement of

claim do not disclose any reasonable cause of action. She noted that the statement of claim does not disclose facts usually pertinent to litigation, such as who the plaintiff and defendant are, in what jurisdiction each of them lives, and their respective occupations. In relation to the claim of defamatory libel, it was argued that particulars were not sufficiently pleaded, as required by Rule 20(14) of the *Rules of Court*. Ms. Hennigar also argued that the facts supporting the conspiracy claim are lacking as there are no persons or co-conspirators named. Finally, she argued that for some of the causes of action alleged, the courts are not the proper forum and that the matter is frivolous and vexatious as Mr. Ausiku should pursue his claim at the Yukon Human Rights Commission which he has done and, in fact, settled.

[14] In response, Mr. Ausiku explained to the chambers judge his reasons for commencing this action and what he sought to achieve. Mr. Ausiku stated that he feels that he was treated unfairly by Ms. Hennigar and that the November 12, 2008 incident was entirely made up by her. He argued that Ms. Hennigar caused him harm by refusing to meet with him and his employer after the incident was reported, and that she has made him a criminal by reporting the incident to the police. Mr. Ausiku also contended that Ms. Hennigar is the party responsible for his loss of income as, after the incident, he lost employment hours. Finally, Mr. Ausiku stated that the Human Rights Commission mishandled his claim. He now seeks recourse against both Ms. Hennigar and the Commission through the actions he has commenced against them.

[15] The chambers judge gave oral reasons for judgment at the conclusion of the application. After setting out what he understood to be the underlying facts in the dispute and referring to an affidavit filed by Mr. Ausiku, the judge struck the statement of claim on the basis that no reasonable cause of action exists based on the way in which the claim was drafted, and for the reasons provided by Ms. Hennigar. His reasons are indexed as 2010 YTSC 63.

Grounds of Appeal

[16] In his factum, Mr. Ausiku alleges the chambers judge erred by ignoring facts and evidence, and by discriminating against him and violating the Code of Judicial Conduct.

He accuses the judge of “trying to cover-up the truth and siding with [Ms. Hennigar’s] team”. It is apparent that Mr. Ausiku does not understand what is required to properly commence an action and believes the chambers judge should have heard and decided the merits of his action.

[17] Further, in his factum Mr. Ausiku pleads violations of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, and the *Criminal Code*, R.S.C. 1985, c. C-46. He disputes various facts as alleged by Ms. Hennigar and as stated by the chambers judge. Finally, he asks that a lawyer be appointed to assist him in redrafting his claim.

Analysis

[18] Pursuant to Rule 20(26)(a) of the Yukon *Rules of Court*, a statement of claim may be struck if it discloses “no reasonable claim”. This rule is the same as former British Columbia Rule 19(24)(a) (now Rule 9-5(1)(a)). The applicable test for striking a statement of claim was most recently articulated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42:

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the [former British Columbia *Rules of Court*]. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

...

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the [*Rules of Court*] (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to

prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[19] By reason of Rule 20(29), evidence is not admissible on an application under Rule 20(26)(a) to strike a statement of claim. It appears, however, that the chambers judge considered the affidavit and statements of Mr. Ausiku in reaching his conclusion that the statement of claim disclosed no reasonable cause of action. That was an error. However, as I will explain, his ultimate conclusion was correct.

Intentional Interference with Economic Interests

[20] In pleading “negative interference in livelihood” it appears Mr. Ausiku seeks to accuse Ms. Hennigar of intentionally interfering with his economic interests. This tort is classified as a business or economic tort. P.H. Osborne, in *The Law of Torts*, 3d ed. (Toronto: Irwin Law Inc., 2007) at 319, indicates that the essential elements of this tort are “an intention to injure the plaintiff’s economic interests; an interference in those interests by illegal or unlawful means, and economic harm”. Although the application of this tort to the present circumstances is novel, a court should not strike out a statement of claim simply based on novelty alone: *Imperial Tobacco* at para. 22; *Bow Valley Resource Services v. Kansa General Insurance Company* (1991), 56 B.C.L.R. (2d) 337 at 339 (C.A.).

[21] Despite the novelty of the claim, Mr. Ausiku has not pleaded sufficient facts to support his allegation. In particular, there are no facts relating to economic harm suffered by Mr. Ausiku.

Wilful Incitement of Hatred

[22] In his factum, Mr. Ausiku explains that this claim relates to a “canard and criminal negligence act” that was “not just a simple slander or libel”. In essence, he pleads a violation of the *Criminal Code*.

[23] There is no tort of a breach of a statutory duty in Canada unless the elements of a recognized tort are also satisfied: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 at 225; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 31. Wilful incitement of hatred is not a recognized tort in Canada and, as such, the potential success of his action would need to fall under defamation as discussed below.

Conspiracy

[24] In terms of the conspiracy alleged, Mr. Ausiku explains in his factum that the acts he complains of were breaches of the conspiracy provision of the *Criminal Code*, i.e., s. 465(1). As already noted, a breach of the *Criminal Code* cannot, standing alone, constitute a civil tort in Canada.

[25] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156 at para. 5 (C.A.), Chief Justice McEachern stated that the civil tort of conspiracy requires the following elements:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
- 3.(i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
- (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
4. actual damage suffered by the plaintiff.

[26] In this case, Mr. Ausiku has failed to plead facts upon which a claim for civil conspiracy could be grounded. Most notably, he has not provided any indication of what kind of harm he suffered as a result of any conspiracy between Ms. Hennigar and others, who are not named. It is, therefore, plain and obvious that Mr. Ausiku's statement of claim fails to disclose a reasonable claim in conspiracy.

Defamation

[27] In his pleadings, Mr. Ausiku alleges “unlawful vicious defamatory libel” by Ms. Hennigar. Defamation is often said to consist of two categories: libel and slander. Libel has been described as having “basically been associated with the written word, but also extends to pictures, statutes, films, television, taped telephone messages and even conduct implying defamatory meaning”: M. Linden and B. Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ont: LexisNexis, 2011) at 770. Slander, on the other hand, generally covers spoken word and is not actionable unless special damages are pleaded and proven: *Canadian Tort Law* at 771. As set out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 at para. 28, to prove defamation a plaintiff must generally establish:

(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[28] Pleadings for an action in libel or slander are governed by Rule 20(14), which states, in part:

In an action for libel or slander,

(a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense[.]

[29] From his pleadings it appears that the only phrase Mr. Ausiku takes issue with is Ms. Hennigar’s alleged comment that he is “Physically Black”. He indicates that by saying this, Ms. Hennigar actually meant she “hate [sic] all Africans”. Further, he asserts that Ms. Hennigar claimed he was a threat to her staff because of his appearance.

[30] Mr. Ausiku has not adequately described how the impugned phrase was used in a derogatory sense. He has not provided facts and matters on which he relies. Further,

he has not indicated how those words, or any others for that matter, were published or communicated. Accordingly, his pleadings do not disclose a claim in defamation.

Discrimination Based on Race

[31] Mr. Ausiku alleges that Ms. Hennigar's actions in fabricating the November 12, 2008 incident and subsequently having him "banned" from the Games Centre were motivated by the fact that he is "Physically Black' which means she hate [sic] all Africans". Discrimination has no common law remedy and must be pursued exclusively under applicable human rights legislation unless the claim is attached to an existing cause of action, such as wrongful dismissal, infliction of mental suffering, or assault: *Seneca College v. Bhaduria*, [1981] 2 S.C.R. 181 at 194, 195; *Canadian Tort Law* at 65.

[32] As no other reasonable causes of action have been pleaded to which this claim could attach, this portion of the pleadings was properly struck.

Amending the Statement of Claim

[33] Although his position is not entirely clear, it appears that Mr. Ausiku now asks to be permitted to amend his statement of claim. He did not make such a request to the chambers judge. In addition, he has not indicated what amendments he proposes. In the circumstances, it would not be appropriate for this Court to entertain such an application.

Conclusion

[34] I would dismiss this appeal.


The Honourable Mr. Justice Frankel

I agree:


The Honourable Madam Justice Rowles

I agree:


The Honourable Madam Justice Bennett