

CANADA / JUDGMENT

Ayangma v. The Queen

2003 FC 1013

COURT

Federal Court

DECIDED

29 August 2003

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Ayangma v. The Queen Court (s) Database Federal Court Decisions Date 2003-08-29 Neutral citation 2003 FC 1013 File numbers T-1129-03 Notes Digest Decision Content Date: 20030829 Docket: T-1129-03 Citation: 2003 FC 1013 BETWEEN: Dr. NOËL AYANGMA Plaintiff

- and - HER MAJESTY THE QUEEN Defendant REASONS FOR ORDER LEMIEUX J.:

- [1] The defendant Her Majesty the Queen ("HMQ") seeks from the plaintiff security for costs in this action in the amount of \$10,000 which is Her estimate of approximately two-thirds of the full costs of Her defence.
- [2] The plaintiff, a self represented litigant and employee of the Government of Canada, filed his action on July 3, 2003, and amended it the following day. He alleges he was maliciously slandered and defamed by servants of HMQ when they were engaged in what he says is an illegal process for the selection of a candidate, and he was one of them, to the position of Project Manager in one of the branches of the Department of Health and Welfare.
- [3] The defendant seeks security for costs pursuant to subsections 416(1)(e) and (f) of the Federal Court Rules, 1998 (the "Rules") and also says the plaintiff should not be shielded by the provisions of section 417.
- [4] Section 416 and 417 of the Rules reads:
416. (1) Where, on the motion of a defendant, it appears to the Court that
- (a) the plaintiff is ordinarily resident outside Canada,
 - (b) the plaintiff is a corporation, an unincorporated association or a nominal plaintiff and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so,
 - (c) the plaintiff has not provided an address in the statement of claim, or has provided an incorrect address therein, and has not satisfied the Court that the omission or misstatement was made innocently and without intention to deceive,

- (d) the plaintiff has changed address during the course of the proceeding with a view to evading the consequences of the litigation,
 - (e) the plaintiff has another proceeding for the same relief pending elsewhere,
 - (f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,
 - (g) there is reason to believe that the action is frivolous and vexatious and the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant, if ordered to do so, or
 - (h) an Act of Parliament entitles the defendant to security for costs, the Court may order the plaintiff to give security for the defendant's costs. Staging 416(2)
- (2) The Court may order that security for the costs of a defendant be given in stages, as costs are incurred. Further steps 416(3)
- (3) Unless the Court orders otherwise, until the security required by an order under subsection (1) or (2) has been given, the plaintiff may not take any further step in the action, other than an appeal from that order. Party temporarily resident in Canada 416(4)
- (4) A party ordinarily resident outside Canada may be ordered to give security for costs, notwithstanding that the party may be temporarily resident in Canada. Voluntary payment into court 416(5)
- (5) In the absence of an order under subsection (1), a plaintiff may, at any time after filing a statement of claim, pay an amount into court as security for the defendant's costs and give notice of the payment to the defendant. Increase in security 416(6)
- (6) The Court may, on the motion of a defendant, order a plaintiff who has paid an amount into court under subsection (5) to pay in an additional amount as security for the defendant's costs. Grounds for refusing security 417
417. The Court may refuse to order that security for costs be given under any of paragraphs 416(1) (a) to (g) if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit. [emphasis mine]
416. (1) Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :
- a) le demandeur réside habituellement hors du Canada;
 - b) le demandeur est une personne morale ou une association sans personnalité morale ou n'est demandeur que de nom et il y a lieu de croire qu'il ne détient pas au Canada des actifs suffisants pour payer les dépens advenant qu'il lui soit ordonné de le faire;

- c) le demandeur n'a pas indiqué d'adresse dans la déclaration, ou y a inscrit une adresse erronée, et il n'a pas convaincu la Cour que l'omission ou l'erreur a été faite involontairement et sans intention de tromper;
 - d) le demandeur a changé d'adresse au cours de l'instance en vue de se soustraire aux conséquences du litige;
 - e) le demandeur est partie à une autre instance en cours ailleurs qui vise la même réparation;
 - f) le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;
 - g) il y a lieu de croire que l'action est frivole ou vexatoire et que le demandeur ne détient pas au Canada des actifs suffisants pour payer les dépens s'il lui est ordonné de le faire;
 - h) une loi fédérale autorise le défendeur à obtenir un cautionnement pour les dépens.
Cautionnement en tranches 416(2)
- (2) La Cour peut ordonner que le cautionnement pour les dépens soit fourni en tranches représentant les dépens engagés. Défaut du demandeur 416(3)
- (3) Sauf ordonnance contraire de la Cour, le demandeur qui ne fournit pas le cautionnement ordonné aux termes des paragraphes (1) ou (2) ne peut prendre de nouvelles mesures dans l'instance, autres que celle de porter en appel l'ordonnance de cautionnement. Résident temporaire 416(4)
- (4) La partie qui réside habituellement hors du Canada peut être contrainte par ordonnance à fournir un cautionnement pour les dépens, même si elle réside temporairement au Canada. Paiement volontaire 416(5)
- (5) En l'absence de l'ordonnance visée au paragraphe (1), le demandeur peut, après avoir déposé sa déclaration, consigner une somme d'argent à la Cour à titre de cautionnement pour les dépens qui pourraient être adjugés au défendeur et en aviser celui-ci.
Cautionnement plus élevé 416(6)
- (6) La Cour peut, sur requête du défendeur, ordonner au demandeur qui a consigné une somme d'argent à la Cour en application du paragraphe (5) de consigner un montant additionnel.
Motifs de refus de cautionnement 417
417. La Cour peut refuser d'ordonner la fourniture d'un cautionnement pour les dépens dans les situations visées aux alinéas 416(1)a) à g) si le demandeur fait la preuve de son indigence et si elle est convaincue du bien-fondé de la cause.
- [5] The plaintiff has, since 1997, initiated in this Court thirteen (13) proceedings (actions or judicial reviews) against HMQ.

- [6] The actions spawned several interlocutory proceedings in which costs were awarded against the plaintiff. Costs have been taxed in three awards for a total amount of \$9,834.16.
- [7] In addition, HMQ is about to tax costs against the plaintiff in respect of other costs awards including an appeal to the Federal Court of Appeal. The defendant estimates costs, when taxed, will exceed \$14,000.00.
- [8] The defendant commenced garnishment against the plaintiff's salary on January 2, 2002, in the amount of \$100 per pay cheque. From the balance of \$9,834.16 taxed costs, there remains outstanding today the amount of \$5,734.16 plus interest.
- [9] HMQ also seeks the following ancillary orders from this Court:
- (1) an order pursuant to Rule 416(3) prohibiting the plaintiff from taking any further steps in this action until security has been posted and all outstanding costs in other proceedings have been paid in full;
 - (2) an order pursuant to the inherent jurisdiction of the Court dismissing the action, without further notice, should the plaintiff fail, within 120 days of the date of the order to post security for costs in the amount of \$10,000 and to pay the costs owing to the defendant in all other matters before the Court;
 - (3) an order that the defendant remains free to have her costs assessed, and/or take collection proceedings in respect of any and all outstanding costs in this action and in any other proceeding before the Court;
 - (4) an order for costs of this motion, payable forthwith and in any event of the cause, on a solicitor-client basis;
 - (5) an order, pursuant to Rule 8 of the Rules granting the defendant an extension of time of thirty (30) days to file Her statement of defence from the date She receives notice of either of the following:
 - (i) that outstanding costs in regard of all proceedings in this Court have been paid in full and security for costs has been posted, to file the statement of defence in this action; or (ii) the motion for security for costs is dismissed.
- [10] As noted, HMQ also invokes paragraph 416(1)(e) of the Rules as an additional and separate ground justifying an order for security for costs. The defendant says the plaintiff has another proceeding for the same relief pending in this Court in court file T-900-03 in which the plaintiff as applicant seeks an order:
- (a) staying the staffing and selection process for the Program Manager currently being conducted;
 - (b) compensating the plaintiff for loss of opportunity;
 - (c) compensating the plaintiff (applicant) for back pay;

- (d) allowing damages for hurt feelings;
- (e) allowing damages for unfair and/or discriminatory treatment or practices.

ANALYSIS

- [11] In my view, the defendant's motion for security for costs turns on the application of paragraph 416(1)(f) of the Rules.
- [12] The defendant has not persuaded me that paragraph 416(1)(e) of the Rules applies. It is a condition for the application of this paragraph that the plaintiff has another proceeding for the same relief pending elsewhere. As I see it, the plaintiff is not seeking in this action T-1129-03, the same relief as he is seeking in T-900-03 which is a judicial review application concerning the selection process for the Program Manager position upon which is inappropriately grafted ancillary relief in the form of damages which is not available in judicial review.
- [13] In my view, the defendant is entitled to an order for security for costs pursuant to paragraph 416(1)(f) since the evidence produced by Her on this motion meets all of the conditions for the application of that paragraph. HMQ produced three certificates of assessment whereby costs have been taxed and allowed against the plaintiff. These costs, while under garnishment, are unpaid in part.
- [14] Under paragraph 416(1)(f) of the Rules, a defendant does not have to satisfy any other requirement than those specifically contained in that paragraph. In particular, a defendant does not have to demonstrate as he must do under paragraph 416(1)(g) of the Rules that the plaintiff's action has no merit and the plaintiff would have insufficient assets in Canada available to pay the defendant's costs.
- [15] The structure of subsection 416(1) of the Rules compels this conclusion. Each of the paragraphs in that subsection provides a separate and independent ground for the award by a defendant of security for costs.
- [16] The defendant argues section 417 of the Rules should not shield the plaintiff from an order for security for costs. I agree with the defendant for the simple reason that Dr. Ayangma did not invoke section 417 as a shield to a security for costs order. Under this section, the plaintiff bears the onus of establishing impecuniosity on a balance of probabilities and he must put to the Court material which shows his case has merit. As noted, Dr. Ayangma has not attempted to do so.
- [17] HMQ seeks security for costs in the amount of \$10,000 being approximately two thirds of its estimated costs for the full defence of the plaintiff's action totalling \$17,270.00.
- [18] Subsection 416(2) of the Rules provides the Court may order that security for costs of a defendant be given in stages, as costs are incurred. Staging provides, in my view, for fairness and balance in the interests of both a plaintiff and a defendant.

- [19] At this point in time, I see no justification for requiring Dr. Ayangma to either pay the two thirds of the defendant's total estimated costs in Court or to file a bond for that amount as provided for in section 418 of the Rules.
- [20] As a first stage, I order the plaintiff to provide security to the defendant on or before September 30, 2003, in the amount of \$1,300.00 covering the estimated costs for preparation of the Crown's defence, this motion and the defendant's affidavit of documents, listing and inspection.
- [21] I am also prepared to order now that the plaintiff shall provide security for costs to the defendant not less than thirty days after the delivery to him of HMQ's affidavit of documents before the defendant is required to expend time and effort in the preparation for the examination for discovery and attendance on that discovery. I tentatively set that amount of security at \$3,000 but grant the defendant permission to seek a variance of that amount once Her estimates are firmed up.
- [22] HMQ seeks an order pursuant to subsection 416(3) of the Rules the plaintiff may not take any further steps in this action unless he posts security as ordered here and unless he pays in full all costs outstanding from other proceedings. I am not prepared on this 369 motion in writing to make such an order. On the other hand, it is clear from the Rule the plaintiff cannot take further steps in this action unless he posts the security I have ordered.
- [23] Making the requested order is contingent upon having full argument on the interpretation to be given to subsection 416(3) and whether the words "unless the Court otherwise orders" can relate to matters other than the provision of security for costs. I make the same comment to the extent the defendant grounds Her request for such an order upon the inherent jurisdiction of this Court.
- [24] The same reasoning applies to the order sought by HMQ for the dismissal of this action, without further notice to the plaintiff, should the plaintiff fail to post the security for costs so ordered. That matter is before the Court in relation to another proceeding between the same parties.
- [25] Finally, I see no basis the defendant be awarded security for costs on a solicitor-client basis, the plaintiff not having crossed the line defined by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, namely reprehensible, scandalous or outrageous conduct on his part.
- [26] The defendant is entitled to the costs of this motion taxed according to Column III of Tariff B.
- [27] The defendant is not required to file Her defence until the plaintiff has filed the security for costs so ordered.

[28] I see no purpose to the third order sought and identified as number 3 in paragraph 9 of these reasons. The defendant has not shown me how She would otherwise be restricted from continuing to take legitimate collection actions unless the order sought was made. "François Lemieux" J U D G E OTTAWA, ONTARIO AUGUST 29, 2003 FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1129-03 STYLE OF CAUSE: DR. NOËL AYANGMA v. HER MAJESTY THE QUEEN MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES. REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE LEMIEUX DATED: AUGUST 29, 2003 WRITTEN REPRESENTATIONS BY: Dr. Noël Ayangma FOR PLAINTIFF ON HIS OWN BEHALF Mr. James Gunvaldsen-Klaassen FOR DEFENDANT SOLICITORS OF RECORD: DR. NOËL AYANGMA FOR PLAINTIFF Charlottetown, P.E.I. MORRIS ROSENBERG FOR DEFENDANT Deputy Attorney General of Canada

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