

**IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC 85

Originating Application No 137 of 2023

Between

CZV

... Applicant

And

Kanagavijayan Nadarajan t/a Kana & Co

... Respondent

JUDGMENT

[Civil Procedure — Appeals — Leave]

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CZV

v

Kanagavijayan Nadarajan (trading as Kana & Co)

[2023] SGHC 85

General Division of the High Court — Originating Application No 137 of 2023

Choo Han Teck J

30 March 2023

5 April 2023

Judgment reserved.

Choo Han Teck J:

1 Mr Y is in divorce proceedings against his wife, the appellant (“Ms L”). The respondent (“Mr K”) is his lawyer in those proceedings, which are ongoing. On 15 December 2021, Ms L sent to Mr Y a WhatsApp message containing certain allegations of Mr K’s conduct in the divorce proceedings (“the WhatsApp Message”). Mr Y forwarded this message to Mr K. Mr K was outraged and, eight months later, in August 2022, he sued Ms L for defamation. In his statement of claim, he pleaded that he “was in a state of shock and disbelief such that he was unable to answer [his client’s] phone call [...and] was in a state of distress such that he was deeply hurt and unable to concentrate on the day’s activities”. He says the WhatsApp Message subjected him to embarrassment, ridicule and odium. He says it suggests that he was incompetent, lazy, and materialistic. Most of all, he says this WhatsApp

Message was calculated to disparage him in his profession as an Advocate and Solicitor.

2 Ms L, aggrieved that a marital communication is being used against her in a defamation suit, applied to strike out Mr K’s claim. The crux of her case is that the WhatsApp Message is inadmissible because it is protected by marital privilege under s 124(1) of the Evidence Act 1893 (2020 Rev Ed). Since the WhatsApp Message pertains to the only defamatory particular pleaded, Ms L says that Mr K’s claim is plainly unsustainable and should thus be struck out. For ease of reference, the relevant provision relied upon by Ms L is set out as follows:

124.—(1) No person who is or has been married may be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor may he or she be permitted to disclose any such communication unless the person who made it or his or her representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

3 Deputy Registrar Teo Guan Kee (“the DR”) who heard Ms L’s application dismissed it because he thought that it was plausible that marital privilege may not apply to the communication in question. Ms L appealed against the DR’s decision. Her appeal was dismissed by District Judge Toh Yung Cheong (“the DJ”), who affirmed the DR’s order. Ms L now seeks leave by this application to appeal against the DJ’s decision. Counsel for Ms L, Ms Christine Chuah, makes two arguments as to why leave to appeal should be granted. The first is strictly an argument in law. She says that the DR and DJ erred in law in holding that the WhatsApp Message may be admissible when it is undoubtedly inadmissible. Her second argument is ancillary to her first. She

says that this case raises a novel issue of law because marital privilege has never been discussed in the context of a striking out proceeding, and therefore, Ms L ought to be permitted to argue it on appeal. Furthermore, she says that the issue in question is a matter of greater interest in the profession because there is a trend in cases where third parties (such as the divorcing couple's parents) are laying claims to matrimonial assets, and relying on spousal communications in support of their claims.

4 I will address the latter point straightaway. It is a self-defeating argument. If this is indeed a novel point of law on the admissibility of evidence intended for trial, it is incongruent with an application to strike out a claim on the basis that it discloses no reasonable cause of action. Ms Chuah is seeking a summary determination on a point of substantive law. A striking out application is not the correct procedure for that.

5 Returning to the first ground, even if I agree with Ms Chuah that the WhatsApp message is inadmissible, I do not think that Mr K's statement of claim discloses no reasonable cause of action. The focus of striking out proceedings is on the pleadings themselves — specifically, the particulars that are pleaded. Particulars and facts in pleadings are different from evidence. The pleaded facts may disclose a reasonable cause of action, even if the claimant subsequently fails to adduce evidence to prove those facts.

6 I agree with the DJ that it is plausible for the WhatsApp Message to be admitted into evidence. The authorities show that marital privilege does not apply to every communication made during the course of marriage. The High Court in *Systematic Airconditioning Pte Ltd v Ho Seng Ken and others* [2023]

SGHC 10 held that marital privilege over a spousal communication was, in that case, only a privilege of the recipient spouse of that communication and not the communicating spouse. Thus, it remains plausible that the disclosure of the WhatsApp Message may be adduced at trial by other means — such as from a cross-examination of Ms L. Accordingly, I do not accept Ms Chuah’s argument that Mr K’s claim ought to be struck out for want of evidence at this stage.

7 In my view, Ms Chuah’s arguments only fortify my view that there are triable issues which are best determined at trial rather than a striking out application. Thus, this application for leave to appeal is dismissed. To help the parties along what I am saying below, I order that costs are reserved to the trial judge.

8 The above is my decision on the issue before me. What remains is the more sensitive question of the wisdom of commencing this suit itself. It is sometimes important that defamation must be cleared at trial, but for every such case, there are many in which the best course of action is to say a little prayer and have the slight or slander buried. One reason is the ever-looming spectre of the “Streisand Effect”. That occurs in many instances in which that which we hope to erase, becomes instead, indelible.

9 In this case, there is one other factor worthy of further reflection — by both parties. The divorce proceedings is ongoing. Mr K is still acting for Mr Y. With this separate action, will Mr K be able to act impartially, and with the equanimity required of counsel if he is locked in a side action with the other party in the divorce? Similarly, a divorce can always be settled amicably if

parties are sensible or sensibly counselled. If this action goes on, the prospects for an amicable settlement are not bright.

- Sgd -
Choo Han Teck
Judge of the High Court

Christine Chuah Hui Fen (D'Bi An LLC) for the applicant;
Respondent in-person.
