

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 80/2021
[2021] NZSC 117

BETWEEN VINCENT JACOB MIDDELDORP
 Applicant

AND AVONDALE JOCKEY CLUB
 INCORPORATED
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: P W David QC and C D Boswell for Applicant
 G M Coumbe QC and D A C Bullock for Respondent

Judgment: 17 September 2021

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] Mr Middeldorp seeks leave to appeal against a decision of the Court of Appeal dealing with costs in relation to judicial review proceedings between Mr Middeldorp and the respondent, Avondale Jockey Club Inc (the Club).¹

Background

[2] The background is summarised in some detail in the Court of Appeal costs judgment, but a brief summary is sufficient for present purposes.

¹ *Middeldorp v Avondale Jockey Club Inc* [2021] NZCA 238 (Cooper, Mallon and Wylie JJ) [CA costs judgment].

[3] Mr Middeldorp was a member of the committee of the Club. He opposed an important decision made by the Club (to close training facilities on Club land), and took steps which led to his suspension from the committee for two different periods.

[4] In the period between these suspensions, the committee received 14 applications for membership of the Club from applicants whom the committee suspected were seeking to join to assist Mr Middeldorp's efforts to challenge the committee's decision to close the training facilities. Ultimately, it rejected all 14 applications for membership.

[5] Mr Middeldorp also considered the committee was operating unlawfully because it operated with less than 10 committee members and did not follow the retirement and re-election rules of the Club.

High Court judicial review

[6] Mr Middeldorp commenced judicial review proceedings challenging the lawfulness of both decisions to suspend him from the committee, the decisions to decline the 14 applications for membership and the committee's operation with less than 10 members and without otherwise complying with Club rules.

[7] The High Court Judge found the Club was amenable to review, found in favour of Mr Middeldorp on the suspension issue (on the basis that the committee did not have the power to suspend), but found against Mr Middeldorp on all other aspects of his claim.² Although the High Court Judge found the suspensions were unlawful, she declined to grant a declaration to that effect.

[8] In a separate judgment, the High Court Judge awarded costs to the Club as the successful party. Costs were calculated on a 2B basis, but with a discount of 15 per cent to represent Mr Middeldorp's success on the suspension and amenability issues.³ The total costs were \$18,955.

² *Middeldorp v Avondale Jockey Club Inc* [2019] NZHC 901, [2019] NZAR 738 [HC substantive judgment].

³ *Middeldorp v Avondale Jockey Club Inc* [2019] NZHC 1447 [HC first costs judgment].

Court of Appeal substantive appeal

[9] Mr Middeldorp appealed the substantive judgment to the Court of Appeal. The Court allowed his appeal only to the extent that it considered the High Court Judge was wrong not to have made a declaration that he was suspended unlawfully. In all other respects, the Court dismissed the appeal.⁴ It made no order for costs but ordered the Club to pay the usual disbursements of the appellant. The Court of Appeal did not make an order requiring that costs be reassessed in the High Court.

High Court reconsideration of costs

[10] Mr Middeldorp then applied to the High Court for a reconsideration of costs in light of the outcome of the appeal to the Court of Appeal. Mr Middeldorp argued that, as he had succeeded in the Court of Appeal in having a declaration made about the unlawfulness of his suspensions, he was the successful party and costs should be awarded in his favour, with the earlier award in favour of the Club being rescinded. The High Court Judge rejected this, but increased the discount from 15 per cent to 25 per cent to reflect the elements of the claims on which Mr Middeldorp had been successful in the Court of Appeal.⁵ This reduced the costs award to \$16,725.

Court of Appeal costs appeal

[11] Mr Middeldorp then appealed to the Court of Appeal against the High Court's second costs judgment. He reiterated the arguments he had made in the High Court, but without success.⁶

[12] The Court of Appeal summarised the outcome of the litigation after the Court of Appeal's substantive judgment as follows:

[13] The outcome after the appeal was that:

- (a) Mr Middeldorp had succeeded on his challenge to the suspension decisions, pursuant to one of his three causes of action, and had obtained relief partly in the terms in which it had been sought;

⁴ *Middeldorp v Avondale Jockey Club Inc* [2020] NZCA 13 [CA substantive judgment].

⁵ *Middeldorp v Avondale Jockey Club Inc* [2020] NZHC 1748 (Gordon J) [HC second costs judgment].

⁶ CA costs judgment, above n 1.

- (b) Mr Middeldorp had failed on his challenge to the application decisions (one cause of action); and
- (c) Mr Middeldorp had failed to establish that the Committee acted in breach of its Rules by operating without 10 members, succeeded in establishing that the Committee had not followed its rules in its retirement and re-election processes, but was declined any relief (one cause of action).

[13] The essence of the argument in the Court of Appeal was that Mr Middeldorp was the successful party and should therefore have had costs awarded in his favour in the High Court. The Court of Appeal found that, assessing the outcome in relation to all of the claims made by Mr Middeldorp, there was no error on the part of the High Court Judge in determining that, on an overall basis, the Club was the successful party.⁷

The leave application

[14] The application for leave is advanced on the basis that the proposed appeal would raise a matter of both general or public importance and commercial significance which would have a significant impact on the efficient and predictable administration of the costs rules.⁸ It is also argued that the result, which leads to the applicant being required to pay costs to the Club of \$16,725, involves a substantial miscarriage of justice.⁹

[15] The essence of the argument Mr Middeldorp wishes to pursue is that, because he successfully sought judicial review of the suspension decisions and obtained relief by way of a declaration that the Club had acted unlawfully, he was the successful party and costs should be awarded in his favour.

[16] The respondent argues that this is not a matter of general or public importance or commercial significance. Nor is there any miscarriage. The respondent points out that the assessment of who the successful party was took into account that Mr Middeldorp had multiple claims before the High Court and the declaration that was ultimately made related only to one of them and was in more limited terms than

⁷ At [26]–[31].

⁸ Senior Courts Act 2016, s 74(2)(a) and (c).

⁹ Section 74(2)(b).

claimed. The Club argues therefore that the assessment of who was successful was a matter of factual assessment by the High Court Judge in exercising the costs discretion.

Our evaluation

[17] We accept that predictability and certainty in relation to costs awards is important, and that the costs discretion must be exercised in a principled way, reflecting the provisions of Part 14 of the High Court Rules 2016. But we are not persuaded that the present case truly gives rise to a point of principle. Rather, the assessment made by the High Court Judge that the Club was the successful party reflected the unusual facts of the case, where there were multiple causes of action and the declaration obtained by Mr Middeldorp related only to one of them. This conclusion was upheld by the Court of Appeal, referring in this respect to what were, “in effect, three judicial review proceedings rolled into one claim”, so there are concurrent findings on the point.¹⁰ We do not see the present case giving rise to a concern that the principle that the successful party should be awarded costs has been ignored. The costs award was simply determined by reference to the factual assessment as to who the successful party was on an overall basis. We therefore see no question of general or public importance or commercial significance as existing in this case. Nor do we see any risk of a miscarriage of justice arising if leave is declined.

[18] We therefore dismiss the application for leave to appeal. Mr Middeldorp must pay the Club costs of \$2,500.

Solicitors:
Wilson Harle, Auckland for Applicant
Lee Salmon Long, Auckland for Respondent

¹⁰ CA costs judgment, above n 1, at [26].