NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF [MS D] IN [2021] NZHC 2080 REMAINS IN FORCE.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 48/2023
[2023] NZSC 76

BETWEEN	D (SC 48/2023) Applicant
AND	JDN Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: Applicant in person
Respondent in person

Judgment: 28 June 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

Introduction

[1] The applicant has filed an application for leave to appeal from a decision of the

Court of Appeal.[1] The Court dismissed an appeal by the applicant from a decision of the High Court to strike out the applicant's judicial review application.[2] The judicial review application concerned a decision of the Family Court.

Background

[2] The background is set out in the judgment of the Court of Appeal.[3] We need only note that the appeal to the Court of Appeal arose in the context of ongoing litigation between the applicant and the respondent, her former partner, over the care of their children. After a hearing in the Family Court, the applicant applied without notice for the following:[4]

> (a) an order transferring the Family Court proceedings to the Family Court at Auckland;
>
> (b) directions regarding the alleged perjury by JDN; and
>
> (c) orders admonishing JDN for denigrating [Ms D], requiring him to pay a $5,000 bond into court and granting [Ms D] six weeks with the children.

[3] The applications were declined on the basis the evidence did not establish a need to proceed urgently without notice. The Family Court Judge directed the applications were to proceed on notice.

[4] The applicant applied, without notice, to the High Court seeking a review of the decision of the Family Court. The Court of Appeal recorded that the application made applications seeking the following:[5]

> (a) that the proceeding be transferred to Family Court at Auckland;
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> (b) directions for a hearing to address allegations of perjury made against the respondent; and
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> (c) various declarations about the way the Family Court made its decision.

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1 *[D] v JDN* [2023] NZCA 131 (Courtney, Venning and Downs JJ) [CA judgment].
2 *[D] v JDN* HC Auckland CIV-2023-404-34, 16 January 2023 (Van Bohemen J) [HC decision].
3 CA judgment, above n 1, at [1]–[10].
4 Set out at [5].
5 At [7].

[5] In striking out the application, the High Court said the application was vexatious and an abuse of process, noting there was no reason to proceed without notice nor any urgency.[6]

[6] In dismissing the appeal, the Court of Appeal observed that the Family Court decision was that the applications should go ahead, but on notice. The Court of Appeal concluded:[7]

> The only possible inference to draw from [Ms D]'s filing of the judicial review proceeding in the High Court without notice, when there was no apparent urgency and against the background of Judge Ryan's direction that the applications proceed on notice, is that [Ms D] was seeking to obtain an advantage over JDN by proceeding without serving him. In the circumstances, the proceeding was an abuse of process. Van Bohemen J made no error in his characterisation of the proceeding, nor in his decision to strike it out.

The proposed appeal

[7] The applicant wishes to argue the Court of Appeal's decision was wrong, ignoring errors in the Courts below. The submission is that the proposed appeal raises questions of public interest and the approach of the Court of Appeal has given rise to a miscarriage of justice.

[8] Amongst other matters, the applicant maintains there was urgency, noting the Family Court was bound by the requirements in ss 4 and 5 of the Care of Children Act 2004 to consider the welfare and best interests of the children. The applicant also questions the make-up of the panel hearing the appeal which comprised a Court of Appeal Judge and two Judges of the High Court sitting in the same city as the Family Court Judge.

[9] We do not consider the proposed appeal meets the criteria for leave.[8] The issues raised turn on the particular facts. There is nothing in the material before the Court showing sufficient doubt about the correctness of the decision to justify the granting of leave. As the Court of Appeal noted, the Family Court decision envisaged

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6 HC decision, above n 2, at [20]–[21].
7 CA judgment, above n 1, at [12].
8 Senior Courts Act 2016, s 74(2).

that the applications were to be addressed by that Court. In terms of the composition of the panel, s 47 of the Senior Courts Act 2016 envisages that the Court of Appeal will sit in divisions and s 48(1)(c) provides that for the purposes of a proceeding heard by a division, the Court may comprise a Judge of the Court of Appeal and two Judges of the High Court. None of the applicant's other arguments have any merit. There is no appearance of a miscarriage of justice.

Result

[10] The application for leave to appeal is dismissed. The respondent abided by the decision of the Court. In those circumstances, we make no order as to costs.