

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**  
**CIVIL JURISDICTION**

**HBC NO. 44 OF 2016**

**BETWEEN** : **KENTO (FIJI) LIMITED**  
 : **PLAINTIFF/APPLICANT**

**AND** : **NAOBEKA INVESTMENT LIMITED**  
 : **1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AND** : **SOUTH SEA CRUISES LIMITED**  
 : **2<sup>ND</sup> DEFENDANT/RESPONDENT**

**Counsel** : Mr. S. Inoke for the Plaintiff/Applicant.  
 : Mr. I. Tikoca for the 1<sup>st</sup> Defendant/Respondent.  
 : Ms. Tabuadua for the 2<sup>nd</sup> Defendant/Respondent.

**Written Submissions by** : Applicant on 20<sup>th</sup> December, 2017  
 : 2<sup>nd</sup> Respondent on 2<sup>nd</sup> December, 2017

**Date of Hearing** : 9<sup>th</sup> November, 2017

**Date of Ruling** : 9<sup>th</sup> March, 2018

**Ruling by** : Justice Mr. Mohamed Mackie

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**RULING**  
[On Indemnity Cost]

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**A. Introduction:**

1. This ruling pertains to an application for Indemnity Cost made, on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant - Respondent on 9<sup>th</sup> November 2017, when the application for the Extension of Time for Leave to Appeal, Leave to Appeal and Stay, that had been

made by the Plaintiff- Applicant (applicant) on 15<sup>th</sup> December 2016, was withdrawn before me.

2. Instead, the learned Counsel for the applicant (applicant's counsel) opted to proceed with the hearing into a similar application of the applicant that had been made in the action bearing No: - HBC -27/2016 that involves the parties in this action and two other defendants.
3. The ruling in the said action No: HBC-27 -2016 was pronounced by me on 23<sup>rd</sup> February 2018 granting the applicant's application for the extension of time to file leave to appeal and leave to appeal against the learned Master's ruling dated 18<sup>th</sup> November 2016, and no cost was ordered in favour of the 2<sup>nd</sup> respondent, hereof, who happened to be the 2<sup>nd</sup> respondent in that application too, albeit cost was moved for on its behalf, for the reasons stated in that ruling.

**B. Brief History: (Action No:- HBC-44 of 2016)**

- a. The applicant filed the writ of summons together with the statement of claim against the 1<sup>st</sup> and the 2<sup>nd</sup> defendant – respondents (respondents) on 15<sup>th</sup> March 2016.
- b. The 2<sup>nd</sup> respondent filed the statement of defense on 27<sup>th</sup> April 2016.
- c. The 2<sup>nd</sup> respondent filed the striking out application on 4<sup>th</sup> May 2016.
- d. This action was struck out by the leaned Master (Master) on 18<sup>th</sup> November 2016 and by the impugned ruling summarily assessed cost of \$500.00 to both the respondents was ordered.
- e. The applicant filed the application for the leave for extension of time for leave to appeal and leave to appeal on 15<sup>th</sup> December 2016.
- f. The 2<sup>nd</sup> respondent filed its reply affidavit on 23<sup>rd</sup> February 2017.
- g. The matter came up for hearing before me on 9<sup>th</sup> November 2017, as stated above, being subjected to few mention dates necessitated due to change of judges.

**C. The Law and the Principles that Govern the Indemnity Cost:**

4. Order 62, Rule 37 of the High Court Rules empowers courts to award indemnity costs at its discretion. For the sake of completeness, Order 62, Rule 37 is reproduced below.

Amount of Indemnity costs (O.62, r.37)

37. - (1) *the amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer.*

5. G.E. Dal Pont, in “Law of Costs”, Third Edition, writes at Page 533 and 534; ‘Indemnity’ Basis

*“Other than in the High Court, Tasmania and Western Australia, statute or court rules make specific provision for taxation on an indemnity basis. Other than in the Family Law and Queensland rules – which define the ‘indemnity basis’ in terms akin to the traditional ‘solicitor and client basis’ – the ‘indemnity basis’ is defined in largely common terms to cover all costs incurred by the person in whose favour costs are ordered except to the extent that they are of general law concept of ‘indemnity costs’. The power to make such an order in the High Court and Tasmania stems from the general costs discretion vested in superior courts, and in Western Australia can arguably moreover be sourced from a specific statutory provision.*

*Although all costs ordered as between party and party are, pursuant to the ‘costs indemnity rule’, indemnity costs in one sense, an order for ‘indemnity costs’, or that costs be taxed on an ‘indemnity basis’, is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a ‘punitive’ costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred.”*

6. Principles Governing Indemnity Costs: Principles governing the award of indemnity costs are set out in a number of authorities.

6.1 *General principles, among others, include:*

- a. *A court has ‘absolute and unfettered’ discretion vis-à-vis the award of costs but discretion ‘must be exercised judicially’: Trade Practices Commission v. Nicholas Enterprises (1979) 28 ALR 201, at 207*
- b. *The question is always ‘whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by*

reference to party and party': *Colgate-Palmolive Company and Colgate Palmolive Pty Limited v. Cussons Pty Ltd*; [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.

- c. A party against whom indemnity costs are sought 'is entitled to notice of the order sought': *Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd* (1995) NSWLR 242
- d. That such notice is required is 'a principle of elementary justice' applying to both civil and criminal cases: *Sayed Mukhtar Shah v. Elizabeth Rice and Ors* (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA
- e. '... Neither considerations of hardship to the successful party nor the over-optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable': *State v. The Police Service Commission; Ex parte Beniamino Naviveli* (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6
- f. Usually, party/party costs are awarded, with indemnity costs awarded only 'where there are exceptional reasons for doing so': *Colgate-Palmolive Co. v. Cussons Pty Ltd* at 232-34; *Bowen Jones v. Bowen Jones* [1986] 3 All ER 163; *Re Malley SM; Ex parte Gardner* [2001] WASC 83; *SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor* [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.
- g. Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where 'there is some special or unusual feature of the case to justify' a court's 'exercising its discretion in that way': *Preston v. Preston* [1982] 1 All ER 41, at 58
- h. Indemnity costs can be ordered as and when the justice of the case so requires: *Lee v. Mavaddat* [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.
- i. For indemnity costs to be awarded there must be 'some form of delinquency in the conduct of the proceedings': *Harrison v. Schipp* [2001] NSWCA 13, at paras [1], [153]
- j. Circumstances in which indemnity costs are ordered must be such as to 'take a case out of the "ordinary" or "usual" category ...': *MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2)* (1996) 140 ALR 707, at 711, per Lindgren J.

- k. *'... it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order': **Dillon and Ors v. Baltic Shipping Co. ('The Mikhail Lermontov')** (1991) 2 Lloyds Rep 155, at 176, per Kirby, P.*
- l. *Solicitor/client or indemnity costs can be considered appropriately 'whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success': **Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors** [1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.*
- m. *Albeit rare, where action appears to have commenced/continued when 'applicant ... should have known ... he had no chance of success', the presumption is that it 'commenced or continued for some ulterior motive or ... [in] willful disregard of the known facts or ... clearly established law' and the court needs 'to consider how it should exercise its unfettered discretion': **Fountain Selected Meats**, at 401, per Woodward, J.*
- n. *Where action taken or threatened by a defendant 'constituted, or would have constituted, an abuse of the process of the court', indemnity costs are appropriate: **Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd** (1992) 30 NSWLR 359, at 362. Per Power, J.*
- o. *Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has 'been wasted on totally frivolous and thoroughly unjustified defences': **Baillieu Knight Frank**, at 362, per Power, J.*
- p. *Indemnity costs awarded where 'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court': **Willis v. Red bridge Health Authority** (1960) 1 WLR 1228, at 1232, per Beldam, LJ*
- q. *'Abuse of process and unmeritorious behavior by a losing litigant has always been sanctionable by way of an indemnity costs order inter partes. A party cannot be penalised [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behaviour is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties': **Ranjay Shandil v. Public Service Commission** (Civil Jurisdiction Judicial Review No. 004 of 1996, 16*

*May 1997*), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) NLJ 710 (May 1996)

- r. *'It is sufficient ... to enliven the discretion to award [ indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case': J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2) (1993) 46 IR 301, at 303, per French, J.*
- s. *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterized as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full': Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101, at paras [6]-[7], per Wheeler, J.*
- t. *However, a case should not be characterised as 'hopeless' too readily so as to support an award of indemnity costs , bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances': Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101, at paras [6]-[7], per Wheeler, J.*
- u. *Purpose of indemnity costs is not penal but compensatory so awarded 'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'; the court 'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs': Willis v. Red bridge Health Authority, at 1232, per Beldam, LJ*
- v. *Actions of a Defendant in defending an action, albeit being determined by the trial judge as 'wrong and without any legal justification, the result of its own careless actions', do 'not approach the degree of impropriety that needs to be established to justify indemnity costs ... [R]egardless of how sloppy the [Defendant] might well have been in lending as much as \$70,000 to [a Plaintiff], they had every justification for defending this action ... The judge was wrong to award [ indemnity costs ] in these circumstances. He should have awarded costs on the ordinary party and party scale': Credit Corporation (Fiji) Limited v. Wasal Khan and Mohd Nasir Khan (Civil Appeal No. ABU0040 of 2006S; High Court Civil Action No. HBC0344 of 1998, 8 July 2008), per Pathik, Khan and Bruce, JJA, at 11*
- w. *Starting an action knowing it to be false is an abuse of process and may also involve knowingly attempting to mislead the court: Ma So So*

*Josephine v. Chin Yuk Lun Francis and Chan Mee Yee (FACV No. 15 of 2003, Court of Final Appeal Hong Kong Special Administrative Region, Final Appeal No. 15 of 2003 (Civil)(On Appeal from CACV No. 382 of 2002, 16 September 2004), at para [43], per Ribeiro, PJ (Li, CJ, Bokhary and Chan, PJ and Richardson, NPJ concurring)*

**D. Discussion:-**

7. Apart from the oral submissions made at the hearing, the learned Counsel for the 2<sup>nd</sup> respondent (2<sup>nd</sup> respondent's Counsel) and the applicant's Counsel have tendered respective written submissions, for which I am grateful to them.
8. It is to be noted that when the Learned Master struck out this action on 18<sup>th</sup> November 2016, by the impugned ruling, the cost to be paid to both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents by the applicant was also fixed as summarily assessed cost of \$500.00. It means that for the whole action, till it's striking out, the total cost granted for both the respondents was limited to \$500.00 and that order remains unchallenged.
9. Thus, the 2<sup>nd</sup> respondent's claim for cost should be limited only to subsequent proceedings, commenced by the applicant on 15<sup>th</sup> December 2016 by filing the application for extension of time and leave to appeal, which was withdrawn by the applicant's counsel on 9<sup>th</sup> November 2017, without leaving room for incurring further costs, admittedly, by giving notice by the applicant's solicitors prior to the hearing date.
10. Though, the learned Counsel for the 1<sup>st</sup> respondent too joined the Counsel for the 2<sup>nd</sup> respondent in moving for indemnity costs, I find that no notice of such move has been given by the 1<sup>st</sup> respondent's Solicitors to the applicant's Solicitors. The reply affidavit filed by ASIVENI LUTUMAILAGI, for and on behalf of the 1<sup>st</sup> respondent, does not speak about any cost.
11. Therefore, in the absence of notice for indemnity cost, the 1<sup>st</sup> respondent shall not be entitled for such cost. So the cost what the 1<sup>st</sup> respondent can now seek, beyond the cost ordered by Master on 18<sup>th</sup> November 2016, is not indemnity cost.
12. This 2<sup>nd</sup> respondent, in this action No: HBC - 44 of 2016, which has reached its tail end , and in the actions bearing No:- HBC 27 of 2016, which awaits its appellate process after the extension of time and leave to appeal being granted, has so far been defended by the same firm of Solicitors.

13. The action No:-HBC- 27 of 2016 still stands to proceed for trial against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents since the striking out therein was only in respect of this 1<sup>st</sup> respondent and 4<sup>th</sup> defendant- respondent therein and in the event the 2<sup>nd</sup> respondent succeeds in that action at the end, perhaps it can claim substantial cost for all the work done in that action.
14. The 2<sup>nd</sup> respondent who had filed its Statement of defense in this action 44 of 2016, to contest the matter subsequently filed the striking out application in order to have a short cut and though succeeded in it, had to end up with only a summarily assessed cost of \$500.00, that too to be shared with the 1<sup>st</sup> respondent. Had the action proceeded for trial without interruption, and in the event the 2<sup>nd</sup> respondent succeeded on its apparently, arguable and sound defense it would have, probably, reaped a higher cost.
15. All the receipts tendered, annexed to the reply affidavit of **Nouzab Fareed** on behalf of the 2<sup>nd</sup> respondent, in proof of its purported payments to the Solicitors are in relation to the period prior to 18<sup>th</sup> November 2016 on which date the striking out order was made, except for one receipt dated **13th January 2017** for 2778.27 dollars.
16. Since the notice of the leave to appeal and the extension of time to appeal applications had been served on the 2<sup>nd</sup> respondent , admittedly, only on **23<sup>rd</sup> January 2017** the above payment of \$2772.27 purportedly made on 13<sup>th</sup> January 2017 could not have been on the account of these proceedings necessitated by the leave to appeal application of the applicant.
17. The 2<sup>nd</sup> respondent has not satisfied this court that it had to incur a substantial cost in relation to this action after the impugned ruling of striking out was made on 18<sup>th</sup> November 2016. The subsequent Court appearances have been made not purely for HBC-44/16 action. The 2<sup>nd</sup> respondent is at liberty to make its claim for suitable cost in relation to HBC-27 of 2016, provided it successfully defends it and subject to any other considerations.
18. I observe that delay, if any, occurred during the pendency of the leave to appeal application preferred by the applicant was not due to any specific fault on the part of the applicant and the applicant has shown due diligence during the process and also withdrawn it at the earliest available opportunity, which in turn has saved all the parties from further expenses.



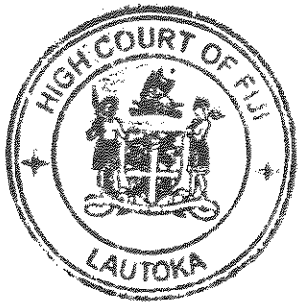
**Was there reprehensible conduct on the part of the Plaintiff?**

19. To justify an award of indemnity costs, the Court needs to be satisfied that the applicant has conducted itself “wholly unreasonably in connection with the hearing” and that such conduct was “reprehensible...to signify the Court’s condemnation as to the way the applicant has conducted the litigation. (*Tuidama v Devi Civil Action No. HBC105.2008 (18 February 2009)*; *Rokotuiviwa v Seveci Civil Action No. HBC374.2007 (12 September 2008)*; *Singh v Naupoto (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008)*)
20. I am not satisfied that the applicant has conducted itself in such a “reprehensible” manner, such as to warrant the Court’s condemnation and an award of indemnity costs. I note that the applicant has only endeavored to continue to prosecute its ill-fated action by filing the leave to appeal application, against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, on the grounds of appeal relied on for its relief.
21. I cannot see any abuse of process by the applicant, in merely making its application for leave to extend the time and for appeal. The 2<sup>nd</sup> respondent has not proved that it had to defend the leave to appeal application of the applicant in this action incurring extra and substantial cost. It has just defended this application while purportedly defending the application in the connected matter HBC: 27 of 2016, which did not warrant the 2<sup>nd</sup> respondent to actively participate as he was not a party to the application.
22. The 2<sup>nd</sup> respondent has not substantiated its purported claim for indemnity cost to be imposed on the applicant in relation to the leave to appeal application of the applicant in this matter.
23. In my view, payment of summarily assessed nominal cost of \$ 500.00 each to the 1<sup>st</sup> and 2<sup>nd</sup> respondents would suffice, in order to do justice, on account of the proceedings necessitated on the applicant’s application.

**E. Final Orders:**

1. The application for the **indemnity cost** by the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the applicant refused.
2. The applicant shall pay unto the 1<sup>st</sup> and 2<sup>nd</sup> respondents \$500.00 each being the summarily assessed cost within 3 weeks. Total cost will be \$ 1000.00.

3. Proceedings stand terminated.



**At Lautoka**  
**9<sup>th</sup> March, 2018**

.....  
A.M. Mohamed Mackie

**JUDGE**