

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

CIVIL ACTION NO. HBM 18 of 2012

IN THE MATTER OF COMMITTAL PROCEEDINGS UNDER Order 52 of the High Court Rules 1988 against the 1st named Respondent/Respondent for Contempt of Court Orders.

BETWEEN : **BIJMA KUMAR aka BIJMA KUMARI SINGH aka BIJAM KUMAR** of 5 Oliver Street, Bexley, North NSW 207, Australia as Executrix and Trustee of the Estate of **BHAGAT SINGH**
APPLICANT

AND : **PRANITESH SINGH and SONIA SINGH** both of Sabeto, Nadi
RESPONDENTS

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Mr. R. Singh, for the Applicant
Mr. K. Patel, for the Respondent (1st named)

DATE OF DECISION : 11th October 2022

RULING

[On Indemnity Cost]

A. Introduction & Background facts:

1. This ruling is pronounced in relation to the relief of Indemnity Cost prayed for in terms of paragraph 4 of the Prayers to SUMMONS filed, dated and supported, *inter-parte*, on 15th July, 2022 on behalf of the 1st named first Respondent, PRANITESH SINGH (the Respondent), seeking to set aside Judgment and Orders that had been entered against him by this Court in his absence for his Committal to the Prison on contempt of Court Charges.
2. The said Application for Committal had been preferred by the Applicant, with the leave being obtained, pursuant to Order 52 of the High Court Rule 1988, by alleging that the Respondent had violated certain injunctive Orders that had been granted by the Magistrate's Court of NADI on 30th January, 2019, which were, subsequently, made as permanent Orders on 1st May, 2019 in the Action No.70 of 2018 that had been filed against this Respondent naming him as the defendant by one BAGATH SINGH as the plaintiff .
3. Though , the above injunctive Orders dated 30th January, 2019 had been sealed and served on the Respondent therein PRANITESH SINGH, on 21st March, 2019, as he had not responded to it, same had been made permanent Orders on 1st May, 2019 by the Magistrate, which had also, been served on him on 23rd May, 2019.

4. It is as the Executrix & Trustee of the Estate of said BAGATH SINGH, the Applicant hereof filed this Application for Committal of the Respondent.
5. The leave to bring Committal proceeding being granted by this Court on 26th April, 2021, though, the Respondent was, reportedly, served with the NOTICE OF MOTION, together with the Application, Affidavit and the Statement, on 3rd May, 2022, as the Respondent failed to appear and Defend the Committal charges against him, on proof thereof by the Applicant, this Court by its Judgment dated 28th June, 2022 found the Respondent guilty of contempt charges and fixed the matter for sentencing hearing on 15th July, 2022.
6. The said judgment dated 28th June, 2022, being sealed and served on the Respondent on 1st July, 2022, as directed by this Court, when the matter was to be taken up for sentencing hearing on 15th July, 2022, Mr. K. Patel, the learned counsel for the Respondent moved to support the SUMMONS TO SET ASIDE filed on behalf of the Respondent at 9:00 am on 15th July, 2022.
7. By the said Summons, the Counsel for the Respondent brought to the attention of this Court about another pending Action in this Court, bearing No- HBC-71 of 2019, filed by the Respondent PRANITESH SINGH as the Plaintiff against the Applicant hereof BIJMA KUMARI & another wherein Hon. Mohamed Ajmeer –J (as he then was) had made the RULING dated 24th July, 2020 granting, *inter-alia*, an injunction Order which stayed the proceedings in the Magistrate's Court Action No-70 of 2018 and allowed the plaintiff thereof, namely PRANITESH SINGH, who is the Respondent in this matter, to reside in his property comprised in Instrument of Tenancy No- 61/10/7618 and Agreement for Lease No. 6/10/7871 until the determination of the matter.
8. When Mr. K. Patel, the Counsel for the Respondent PRANITESH SINGH, was to support the his Application for setting aside, Mr. Rupesh Singh, the learned Counsel for the Applicant brought to the attention of the Court about a supplementary Affidavit sworn and filed on 11th July, 2022 by Ms. A. B. Swami (former Counsel in carriage), annexing documents, *inter-alia*, the said Ruling dated 24th July, 2020 delivered by Ajmeer –J. Ms. Swami, in her supplementary Affidavit had finally averred that the failure to provide the Ruling in the said Action was only an inadvertence on the part of her firm and the client and not out of any disrespect to the Court.
9. At this juncture, having ascertained the factual position, the court granted time for both the parties to decide the way forward, and further resolved not to proceed with the sentencing hearing and fixed the matter to be mentioned on 4th August, 2022.
10. Accordingly, when the matter was mentioned on 4th August, 2022, with the consent of the Counsel for the Applicant, the Orders in terms of paragraphs 1 and 2 of the Summons, by which my Order dated 26th April, 2022 granting leave to issue committal proceedings and my Judgment dated 28th June, 2022 finding the Respondent guilty, were set aside, leaving the issue of costs to be decided by court, if not agreed by and between the parties.
11. Counsel for both the parties filed their respective submissions on the remaining issue of costs, which the counsel for the Respondent moved for on indemnity basis in a sum of \$12,000.00, while the Counsel for the Applicant submitted that the award of \$500.00 would be sufficient.

12. Thus, the only issue that demands adjudication hereof is the amount of cost to be paid to the Respondent.

B. The Law and the Principles that Govern the Indemnity Cost :

13. Order 62, Rule 37 of the High Court Rules empowers courts to award indemnity costs at its discretion. For the sake of easy reference 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.*

14. . Dal Pont, in "Law of Costs ", Third Edition, writes at Page 533 and 534;

'Indemnity' Basis

.....

"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."

Principles Governing Indemnity Costs:

15. Principles governing the award of indemnity costs are set out in a number of authorities. 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***

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.***

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***

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***

'... 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

Usually, party/party costs are awarded, with indemnity costs 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] WASCA 83; SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor [2004] WASC 26 (S2) (23 July 2004), at 16, per Roberts-Smith, J.***

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***

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.***

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]***

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.***

'... 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.***

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.***

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.***

Where action taken or threatened by a Respondent '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.***

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)

C. **Discussion:-**

16. The “aborted” committal proceeding, commenced and continued by the Applicant hereof before me, was based on the interim injunction Order issued in the Civil Action No-70 of 2018 by the Magistrate’s Court of Nadi on 30th January,2019, which order was subsequently made permanent against the Respondent on 1st May, 2019 as he had not responded to the interim injunction, despite the service thereof on him.
17. The said injunction had been granted ;
 - a. Restraining the Respondent hereof, his servants and agents from repeating or continuing with the nuisance,
 - b. Restraining the Respondent from entering the Agreement for Lease Ref No.6/10/7871 ,and
 - c. Restraining the Respondent to be within 100m of distance of the Applicant at all material time.
18. As per the Ruling dated 24th July, 2020, in action No- HBC 71 of 2019, pronounced by Justice Mohamed Ajmeer, which was marked as “B” and annexed to the Supplementary Affidavit of Ms. Swami, it is clear that Ms. Swami, being the Counsel who appeared for BIJMA KUMARI, the Defendant thereof, and BIJMA KUMARI being the Executrix & Trustee of Late BAGATH SINGH, (the Plaintiff in the Magistrate’s Court action) were well aware and/ or should have been aware of the fact that the injunction Orders obtained from the Magistrate’s Court by late BAGATH SINGH in Civil Action No.70 of 2018, was held in abeyance pending the determination of the action No- HBC 71 of 2019.
19. Had this been divulged to the Court by the Applicant hereof BIJMA KUMARI or by the Counsel at the stage of seeking for leave to commence committal proceedings or thereafter during the substantial proceedings, it would, undoubtedly, have created a different picture as to the actual current status of affairs and the Court would not have proceeded to make any inimical Order or Judgment against the Respondent.
20. The Applicant, BIJMA KUMARI, could very well have avoided theses unwarranted committal proceedings, for which she fully relied on the injunction order, obtained by BAGATH SINGH, operation of which stood suspended by the aforesaid Ruling pronounced by Ajmeer –J in the HBC Action No.71 of 2019.
21. However, it is observed that whatever said and done by the Applicant BIJMA KUMARI, the Respondent had a duty to respond to the NOTICE OF MOTION, that accompanied the copy of the Ex-parte Application for Leave, the Affidavit and the Statement of the Applicant, which were reportedly served on the Respondent on 3rd May, 2022. He did not respond to the Notice of Motion.

22. The Respondent waited till the Committal judgment dated 28th June, 2022 was served on him on 01st July, 2022, for which he responded at the 11th Hour by filing his Summons for Setting Aside at 9:00 am on 15th July, 2022 when the Court was supposed to have proceeded with the sentencing hearing.
23. Firstly, as and when the NOTICE OF MOTION, along with the other papers was served on him on 3rd May, 2022, the Respondent could have simply appeared and informed the Court that the injunction order issued by the Magistrate's Court is in abeyance and no Committal proceedings could have based on it. He waited for over a period of 2 months and filed his setting aside Application on 15th July, 2022.
24. Thereafter, though the Committal Judgment too was served on him on 1st July, 2022, he remained inactive for two weeks till 15th July, 2022 to file his Summons for setting aside. Had he diligently acted and kept the Court informed by merely tendering a copy of the Ruling by Ajmeer-J dated 24th July, 2020, the Court would definitely have accepted and acted upon it appropriately. No need would have arisen for the Respondent to file the Setting aside Application incurring the cost thereto, if any.
25. It has to be borne in mind that by pinning the blame on the Respondent as above, this Court does not intend to justify the wrongful act or omission, if any, on the part of the Applicant and/or her Solicitors. The Respondent has had a duty to keep the Court informed about the factual position, by which the Court would have acted accordingly to save the Respondent from being convicted for an act or omission on his part, which may not, probably, have been an offence of contempt at the time material. The Court also would have been able to save its precious time and resources.
26. Further, the Respondent could also have put the Applicant on notice, informing that if the Applicant opts to continue with the Committal proceedings on such an allegation of contempt, she will have to face the costs on indemnity basis. Had the Respondent done so, his move for costs on indemnity basis would have been with more merits and stood justified. But, the Respondent for reason known to him did not do so.
27. However, the Respondent has not satisfied this court that he had to incur a substantial cost in relation to his Application for setting aside the Committal Proceedings. One can allege that the Respondent waited till the last moment and made his Application targeting a heavy cost to be levied on the Applicant.

Was there reprehensible conduct on the part of the Applicant?

28. To justify an award of indemnity costs, the Court needs to be satisfied that the Applicant conducted herself wholly in an unreasonable manner in connection with the contempt proceedings and that such conduct was "reprehensible...to warrant and 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)*)

29. In my view, until the propriety of the ex-parte injunction orders obtained by Late BAGATH SINGH from the Magistrate's Court of Nadi, on which the Contempt charges were based, is finally decided through the trial in the action bearing No.HBC-71 of 2019 by calling oral evidence, this Court is not in a position to decide whether the conduct of the Applicant and her Solicitors were reprehensible to warrant the Court's condemnation and an award of indemnity costs. The Counsel for the Applicant Mr. Rupesh Singh, has argued that the Orders made by the learned Magistrate are still valid.
30. Former Counsel for the Applicant, before proceeding for sentencing hearing on 15th July, 2022, filed her Supplementary Affidavit on 11th July, 2022 together with the Ruling of Justice Ajmeer in the Action No. HBC-71 of 2019 and had it too served on the Respondent on the same date. It is only after this service the Respondent took pain to file his Summons for Setting Aside. The Solicitors for the Applicant have taken earliest step to rectify the error, which is claimed to have been caused inadvertently.
31. Even, if I concede that the act of the Applicant and her Solicitors was reprehensible, I am not inclined to decide that such conduct would entitle the Respondent to ask for an indemnity cost in a sum of \$12,000.00, which is an exorbitant amount and still remain unsubstantiated by the Respondent.
32. In my view, an order for the payment of summarily assed cost in a sum of \$1,200.00 (One Thousand Two Hundred Dollars) by the Applicant unto the Respondent would do justice on account of the aborted proceedings for Committal.

D. Final Orders:

- a. The prayer for the payment of an indemnity cost, in a sum of \$12,000.00 is declined.
- b. The Applicant is ordered to pay unto the Respondent a sum of \$1,200.00 (One Thousand Two Hundred Fijian Dollars) being the summarily assessed cost, within 3 weeks from today.
- c. Proceedings stands terminated.




A.M. Mohamed Mackie
Judge

At High Court Lautoka this 11th day of October, 2022.

SOLICITORS:

For the Applicant: Messrs Patel & Sharma

For the Respondent: Krishnil Patel Lawyers