

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 306 of 2007

BETWEEN : **JOSEVATA WAQALIVA VULUMA** of Regent Road, Narewa Village, Nadi, Businessman
1st Plaintiff

AND : **J VULUMA AND VATUNITU & COMPANY** a firm having its registered office at Regent Road, Narewa Village, Nadi
2nd Plaintiff

AND : **MERCHANT FINANCE & INVESTMENT COMPANY LIMITED** a limited liability company having its registered office at Level 1, Ramarama House, Gordon Street, Suva.
1st Defendant

AND : **AUTOMART LIMITED** a limited liability company having its registered office at 27 Sautamata Street, Lautoka
2nd Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Mr. I. Fa for the Plaintiffs
Ms. S. Nagera. for the 1st Defendant
Mr. N. Kumar with Ms. N. Morgam for the 2nd Defendant

Date of Decision : 15th March 2024

DECISION

(On taxation of indemnity cost)

01. The plaintiff filed the Notice of Motion on 12.05.2023 and moved the court to grant following orders:

- a. That, the 1st and 2nd Plaintiffs' costs, awarded by the Court in its judgment delivered on 22.11.2017 on an indemnity basis, be assessed as per the 1st and 2nd Plaintiffs' schedule of costs attached herewith;
 - b. That, the 1st and 2nd Defendants do pay the 1st and 2nd Plaintiffs' costs as contained in the schedule herein;
 - c. That the costs of this application be paid by the 1st and 2nd Defendants on an indemnity basis; and
 - d. Any other orders that this Court considers appropriate in the circumstances.
02. The plaintiffs obtained the judgment in their favour in this case and the court delivering the judgment awarded costs on indemnity basis in favour of them. However, the plaintiffs filed the application for taxation of costs out of time with the leave of the court. The hearing of the application was deferred due to the stay granted by a judge and finally was taken up on 12.02.2024 because the stay expired.
03. The Order 62 of the High Court's Rules provides the power to grant cost either the "gross sum" in lieu of the taxed costs or the taxed cost. The taxed cost would either be on standard basis or indemnity basis. The rule 12 stipulates the basis of taxation for both standard cost and indemnity cost and it reads:

Basis of taxation (O.62, r.12)

12.-(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.

(2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these rules the term "the indemnity basis" in relation to the taxation of costs shall be construed accordingly.

04. The above rule sets two separate standards for taxation. On the standard basis, costs could only be recovered if they were reasonably incurred. In case of any doubt, the paying party shall have the benefit of the doubt on reasonableness. On the indemnity basis, all the cost shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred. The receiving party shall have the benefit of the doubt on reasonableness. The difference between the two approaches, as Justice Tuilevuka (as he then was) stated in **Re Shabu Shabu Restaurant Company Ltd** [2009] FJHC 252; HBF018.2009 (5 November 2009), is that in the former, the benefit of any doubt in any costs raised is given to the loser. In the latter, it is given to the winner.
05. The unambiguous language of Order 62 rule 12 requires the taxing court to decide, (a) whether the amount was reasonable, (b) and it was reasonably incurred, and (c) to give the benefit of the doubt to the receiving party (see: **Ranjay Shandil -v- Public Services Commission**, Suva High Court J/R No: HBJ 0004/1996 which was followed in **Shah v Fiji Islands Revenue and Customs Authority** [2006] FJHC 141; Judicial Review HBJ 42 of 2001 and decided on 11. May 2006).
06. **MALINS, V.-C.** in **Smith -v- Buller** [1874-1880] ALL ER 425 said at 426:

It is of great importance that the unsuccessful party should bear only the costs necessarily incurred and no more. Those who enter into litigation and are successful must be allowed by their adversary all the expenses necessarily incurred in the litigation but only those expenses which are necessary to conduct the litigation will be allowed in a taxation as between party and party. Expenses which are not absolutely necessary are luxuries. Where the successful party has chosen to conduct the litigation in a luxuries. Where the successful party has chosen to conduct the litigation in a luxurious manner the extra expense must fall on him and not upon the unsuccessful party. In the present case the drawings furnished by the defendant were no doubt very convenient but as they were not absolutely necessary to the case they were luxuries which cannot be allowed on taxation. The objection to their allowance on taxation will therefore be allowed.

07. Accordingly, the law on taxation of indemnity costs requires the taxing court to decide, (a) whether the amount was reasonable, (b) and it was reasonably incurred, and (c) any doubt as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party.

08. The plaintiffs annexed the schedule bill of costs with their Notice of Motion. Accordingly, they claim \$ 152,738.72 (VIP) as the total amount of costs incurred for them in prosecuting the case from the inception till the determination of the matter. The solicitors for the defendants opposed the said amount and stated that, the plaintiff has not submitted a single receipt in support of the costs incurred to them. In fact, the solicitor for the plaintiffs too admitted that, they did not submit any receipt. This court directed the solicitors for the plaintiffs to exchange or give the necessary copies of the receipts or bills to the other solicitors for them to consider and amicably settle the issue of costs. This direction was made pursuant to Order 62 r. 29 (7) (d) (iii) to give to the defendants a bundle comprising the fee notes of counsel and accounts for other disbursements. However, it was admitted that, no such bundle was exchanged and the plaintiffs do not have any receipt or bill. The plaintiffs also claimed the amount they paid to their previous solicitors. However, no single receipt was produced by the plaintiffs.
09. The plaintiffs should satisfy the court, in the first place that, the particular amount of costs were incurred, for the court to decide any doubt as to reasonableness, in favour of the plaintiffs. In the absence of proof for the incurred costs, the court will not be in a position to decide the reasonableness in favour of the plaintiffs.
10. Furthermore, it was detected at hearing that, the plaintiffs included in the said Motion some disbursements claimed to have been paid to the registry for filling some documents to which no fee is applicable at all. They are Items Nos. 19, 109, 110, 114 and 119. Similarly, the transaction in Item No. 107 is repeated and mentioned in Item No. 116. In fact, the counsel for the plaintiffs admitted it was a mistake. However, this cannot be considered as simple mistake but it undermines the credibility of the plaintiffs' claim. On one hand, the plaintiffs do not have any bill or receipt even though they claimed a substantial amount of costs on indemnity basis. On the other hand, the credibility of claim is questionable due to false claims of fees which never been paid at all and the repeated claim. Therefore, I am unable to tax the costs as per the Motion filed by the plaintiffs.
11. Conversely, the counsels for the defendants agreed at the beginning of the hearing that, only costs that can be allowed for the plaintiffs was \$ 12,799.85. It was further informed that, the defendants proposed the said amount to the plaintiffs before the hearing; however, they (plaintiffs) rejected it. Therefore, I round up the amount proposed by the defendants as \$ 12,800.00 and order them to pay the same as the indemnity costs in this matter.

12. In result, the final orders are:

- a. The 1st and 2nd defendants should pay \$ 12,800.00 (inclusive of VAT) as the agreed indemnity costs in this matter;
- b. The costs should be paid within a month from today; and
- c. The parties to bear their costs for this application.

**At Lautoka
15.03.2024**



15/3/24
U. L. Mohamed Azhar
Master of the High Court