

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	09/NAN/0103
BETWEEN:	MEREONI APPELLANT
AND:	SAVENACA RESPONDENT
Appearances:	Appellant in Person. Mr. H. Ram for the Respondent.
Date/Place of Judgment:	Friday, 02 nd March, 2012 at Lautoka.
Coram:	The Hon. Justice Anjala Wati.
Category:	All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental
Anonymised Case Citation:	MEREONI v. SAVENACA - Fiji Family High Court Appeal Case Number: 09/Nan/0103.

JUDGMENT

CATCHWORDS:

FAMILY LAW-APPEAL - COSTS - Indemnity Costs.

LEGISLATION:

The Family Law Act No. 18 of 2003 ("FLA "): s. 205.

CASES:

Penfold v. Penfold (1980) 144 CLR 311; 28 ALR 213; 5 Fam LR 579; (1980) FLC 90-800.

In the Marriage of Kohan (1992) 16 Fam LR 245; 112 FLR151; (1993) FLC 92-340 (Kohan).

Latoudis v Casey (1990) 170 CLR 534; 97 ALR 45; [1990] HCA 59.

1. On the 20th day of July, 2011, the learned magistrate had made an order for costs against the wife in the sum of \$8,047.30, made up as follows:-

- (a) Legal costs - \$5,127.30;
- (b) 2nd Paternity Test - \$2,500.00; and
- (c) Travel Costs - \$0,420.00

2. Aggrieved with that order, the wife filed an appeal.

3. The cost order arose out of the wife's withdrawal of her application for maintenance after the 2nd DNA test result favoured the father.

4. His worship clearly explained his reasons for the award of costs to be as follows: -

(i) The child was born within wedlock but the mother admitted to having an affair with another man which resulted in the parties undergoing DNA parentage testing procedure.

(ii) The 1st DNA test favoured the father, despite that the mother contested the results and continued to pursue her claim. The father then had to undergo a second parentage testing. The results of the second test reaffirmed that the respondent was not the father. After being supplied with the results of the 2nd DNA test, the mother withdrew her claim.

(iii) The mother had been wholly unsuccessful in the proceedings.

(iv) Her conduct of pursuing the claim despite admitting that she had an affair with another man and despite the results of the 1st report favouring the father was improper.

(v) The father incurred legal costs in defending the claim and it was reasonable to allow the legal costs.

(vi) S.205 (2) and s.139 (4) of the FLA allows for an order for costs to be made.

5. The wife's contest is that she had at all time, maintained an application for maintenance from the husband as a step-father. The husband knew of this and he should be penalised for undergoing the DNA test.
6. The Respondent's counsel submitted that the order for cost and the quantum is correct. The wife had lodged a first application on the 07th day of April, 2009. It was this application that was heard and withdrawn by the wife on the 10th day of April, 2010. There was never any admission that the husband was not the father although the wife had admitted that she had an affair with another person. She maintained that the husband was the biological father. The wife further had disputed that the 1st DNA test was correct. She had challenged the procedure utilised in 1st DNA test. Her allegation was that the DNA was not properly conducted because an independent solicitor was not present and the chains of swabs not properly conveyed. She provided communication between her and the laboratory that conducted the test. Because of her dispute, the only way the husband could prove his position was to obtain another DNA test. At that time the husband also raised the issue of costs although the Court did not make any order and the husband had maintained that he will be seeking costs if DNA result was negative. When the 2nd result arrived, the wife had no option but to withdraw her claim and she did exactly that and made a subsequent application for contribution from the husband as the step-parent. That is still pending. The wife's conduct calls for indemnity costs against her.
7. Section 205 of the Family Law Act deals with the issue of costs and provides as follows:

"205. - (1) Subject to subsection (2) and section 207, each party to proceedings under this Act bears his or her own costs.

(2) If, proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsection (3)

and the rules of the respective Division, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.

(3) In considering what order (if any) should be made under section (2), the court must have regard to -

(a) the financial circumstances of each of the parties to the proceedings;

(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

(d) whether of the proceedings were necessitated by the failure of the party to the proceedings to comply with various orders of the court;

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(f) whether either party to the proceedings has made an offer in writing to the other party of the proceedings to settle the proceedings and the terms of any such offer, and

(g) such other matters as the court considers relevant."

8. The parties to the proceedings in Family Court generally speaking bear their own costs: s. 205(1).

9. However, the Court has a discretion to award costs (s. 205 (2)) and, in exercising that

discretion, is required to take into account a number of specified matters: s. 205 (3) (a) - (f). The specified factors are not exhaustive: s. 205 (3) (g).

10. The workings of the above subsections 1 and 2 are properly highlighted by the case of *Penfold v. Penfold* (1980) 144 CLR 311; 28 ALR 213; 5 Fam LR 579; (1980) FLC 90- 800 where the High Court held, at CLR 315; ALR 216; Fam LR 582, FLC 75,053-4 that:

"It is an accurate description of s 117(1) to say that it expresses a general rule, provided that it is firmly understood that the section is not paramount to s 117(2). Subsection (1) is expressed to be subject to subs (2); the former must yield whenever a judge finds in a particular case that there are circumstances justifying the making of an order for costs.

Subsection (2) requires a finding of justifying circumstances as an essential preliminary to the making of an order. Beyond this there is nothing in the subject matter or in the inter-relationship of the two provisions which imposes any additional or special onus on an applicant for an order for costs.

Consequently, with respect to their Honours in the Family Court, we do not agree with the suggestion made in the judgment under appeal that an order can only be made under s 117 (2) in a "clear case".

Subsection (2) does not in our view as a matter of law require the Judge to specify the circumstances which justify the making of an order.. Judges very frequently make orders for costs without giving reasons or making findings, even when costs are in issue. The absence of reasons or findings, does not itself, indicate that a Judge has erroneously exercised his discretion toward costs, though it will place an appellate court in the position of examining the circumstances of determining for itself whether the circumstances show that the discretion was erroneously exercised..."

11. Penfold's case discusses s. 117(1) and s. 117(2) which is equivalent to our s. 205(1) and s.

205(2). I respectfully apply the law set out in Penfold's case to this case.

12. An order for indemnity costs was sought. There is no dispute that this Court has power to make such an order (see, for example, *In the Marriage of Kohan (1992) 16 Fam LR 245; 112 FLR 151; (1993) FLC 92-340 (Kohan); Latoudis v Casey (1990) 170 CLR 534; 97 ALR 45; [1990] HCA 59*, each cited by *Holden CJ in Munday v Bowman (1997) 22 Fam LR 321; (1997) FLC 92-784*).
13. It is frequently been said that "*exceptional circumstances*" are needed to justify an order for indemnity costs (see, for example *Holden CJ*, above, at *Fam LR 323; FLC 83,660-84, 661*), or that "*a very great departure from the normal standard*" is required (see *Kohan at Fam LR 254; FLR 160; FLC 79,611*).
14. It is clear from the records that although the wife had admitted to having an affair with another man, she never conclusively stated that the husband was not the father of the child. She filed a general application for child maintenance without stating that maintenance was claimed from the husband as a step parent. After withdrawing the first application, she subsequently filed another application where she claims maintenance from the husband as a step-father.
15. Further, the husband had once vide DNA test result proved that he was not the father. The wife should have stopped the battle there but she continued to challenge the DNA process and got another DNA test done.
16. When the second test results arrived, she then discontinued her case.
17. The wife's conduct in this case had been reprehensive. She knew that the husband was not the father of the child and instead of claiming maintenance from the natural father she still pursued the claim against the husband. She now says that the husband should support her child as the child's step-parent. That question should be properly determined by the Court. Knowing the husband is not the father, the wife got the husband to get two DNA tests done, the second was after she challenged the 1st DNA test procedure. At no time did the wife tell the Court that the husband is not the father.
18. The wife should have made this clear to the Court. She did not and she allowed the husband to incur legal expenses. She finally withdrew her claim and was wholly unsuccessful.
19. The wife's conduct in this case is nothing short of being reprehensive and as such the order

for cost against her in the sum of \$8,047.30 is well and truly justified.

20. The wife is working and has the financial means to pay the costs too.

21. The appeal has no basis and ought to be dismissed forthwith. I have noted that the wife's conduct has been reprehensive and she has been putting the husband to more legal costs. However, she is subject to an indemnity costs in lower Court and as such I will not order any further cost on appeal.

ANJALA WATI

Judge

02.03.2012

1. *Appellant in Person.*
2. *Mr. H. Ram, counsel for the respondent.*
3. *Fite Number: 09/NAN/0103.*