

Antiporta v Paea

Supreme Court, Nuku'alofa

10 C.439/95

Lewis J

9 & 12 September, 1995

*Costs - practice direction 2/92 - exceed rate - party & party costs**Law Practitioner - solicitor and client costs**Practice & procedure - costs - solicitor and client - party and party*

20 The law practitioner for the plaintiff claimed that the plaintiff was entitled to costs (under a court order) from the unsuccessful defendant at a solicitor and client rate and not at the regulated (by practice direction 2/92) party and party rate.

Held:

1. Party VII of the Law Practitioners Act 1989 regulates charges of fees and costs by law practitioners and in particular between solicitor and client.
2. A client (as opposed to a litigant) may make whatever arrangement with a solicitor as he/she is prepared to pay and the solicitor prepared to charge .
- 30 3. But the provisions of the Act cannot be applied to party and party costs which are presently governed by practice direction 2/92.

Statutes considered : Law Practitioners Act 1989 ss.24, 25, 26

Counsel for plaintiff : Mr Appleby

Counsel for defendant : Mr Edwards

Judgment

The narrow point raised by this application relates to the rate to be charged in the costs to be awarded to the successful party to an action in a chamber application having regard to the existence of Section 25 of the Law Practitioners Act 1989.

The Plaintiff claims costs of a chamber application made by the defendant to file a defence out of time which was granted on terms (and without any objection by the Plaintiff).

Mr. Appleby, of counsel for the Plaintiff, claims a fee to counsel at a higher rate than is usual, on the ground of practice note No.2 of 1992 which provides inter alia in paragraph 4(2):-

"(2) In any case a Judge of the Supreme Court on special cause shown may allow an increase in any of the above charges, of such amount as he thinks fit."

It is submitted by Mr. Appleby that when one reads practice direction 2/92 in conjunction with Section 25 of the Law Practitioners Act 1989 the Court may allow a higher hourly rate for counsel in the circumstances of the present case (and by implication other like cases). There appears never to have been application of this nature in respect of which a ruling has been delivered. The present application provides an occasion for such a ruling.

The circumstances of the present case are that the law firm of which Mr. Appleby is a principal, has an agreement which I find to be an agreement in the nature of the one referred to in the Law Practitioners Act. A copy of the agreement is tendered without objection. The document bears the title, "Macdonald Appleby client information form". It contains the following passage (among others),

"I understand the charge - out rate to be applied to me, my business or my company as disclosed herein, and I agree to pay all fees based and charged a monthly basis or otherwise thereon, and in addition I agree to pay for all costs and disbursements expended on my behalf"

The defence opposes the application.

Part VII of the Law Practitioners Act, Section 24, 25 and 26, provides as follows:-

PARTY VII - COSTS

24. A law practitioner is entitled in respect of services rendered as a lawyer to sue for, and recover:
 - (a) his taxed costs; or
 - (b) in the case of an agreement as to costs in terms of Section 25, the amount of such agreed costs.
25. (1) A law practitioner may make a written agreement with his client regarding the amount and manner of payment of costs for the whole or any part of any past, present or future services rendered or to be rendered as a law practitioner.
 - (2) Such an agreement shall exclude any further claim by the law practitioner in respect of any costs for the conduct and completion of the business regarding which the agreement is made.
 - (3) Such an agreement may be reviewed by the Supreme Court on application by petition by either party and if in the opinion of the Court the agreement is unreasonable the Court may:
 - (a) increase or reduce the amount payable; or

- (b) cancel the agreement and tax the costs;
and in either case may make such order as to the costs of the review as seems fit to the Court.
26. (1) The Supreme Court on application by a law practitioner or his client may tax any costs in respect of services rendered by the law practitioner:
- (a) in an account rendered and not yet paid; or
 - (b) in an account already paid, on application within six months of payment
- (2) For the purposes of such a taxation the Court may call on any person to render accounts relating to those services.

It is necessary in deciding the present application to read Part VII of the Law Practitioners Act as a whole. Part VII has the heading "COSTS" and consists of three Sections. The Marginal Notes to the three sections are:-

"24. Recovery of Costs"

"25. Agreement on Costs" and

"26. Taxation of Costs."

In none of the provisions of those three sections is reference made to party and party costs. Parliament in my opinion intended to meet a need to regulate charges of fees and costs by law practitioners and in particular between solicitor and client when drafting the sections. Such an approach is entirely consistent with the avowed object of the legislation since the Act is:-

"An Act to provide for law practitioners: for their professional conduct and discipline: for the establishment of the Tonga Law Society: and for connected purposes."

A client (as opposed to a litigant) may make whatever arrangement with his or her solicitor as to the costs he or she is prepared to pay and the solicitor is prepared to charge. However the efficacy of such an agreement is subject to the supervision of a judge of the Supreme Court, when and if a dispute arises between the client and the solicitor, or in circumstances where there is an intervention by the Law Society.

In my opinion, the phrase "either party" in subsection (3) of section 25 of the Act, relates back to the expression, "written agreement" referred to in subsection (1). It does not in any way relate to the law practitioner for the opposing party. The tenor of S.25 of the Law Practitioners Act relates only to solicitor and client costs and cannot be applied to party and party costs.

In the present application I rule that the rate which Macdonald Appleby, Solicitors shall be allowed taxable costs is at the rate of \$100.00 per hour, that is the hourly rate applicable to "Counsel" in P.D. 2/92.