

**IN THE COURT OF APPEAL, FIJI ISLANDS**  
**AT SUVA**

**CIVIL APPEAL NO. ABU0006 OF 2008**

*[On Appeal from HBM 0053 of 2007]*

**BETWEEN** : THE ATTORNEY GENERAL OF FIJI

*Appellant*

**AND** : TUPOU TOKAIWAI SENIREWA DRAUNIDALO

*Respondent*

**Coram** : Byrne, J. A.  
Goundar, J. A.  
Bruce, J. A.

**Counsel** : L. Daunivalu for the Appellant  
R. Naidu and Ms N. Basawaiya for the  
Respondent

**Date of Hearing** : 13<sup>th</sup> November 2008

**Date of Judgment:** 16<sup>th</sup> March 2009

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***JUDGMENT OF THE COURT***

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**Introduction**

[1] On 14<sup>th</sup> May 2007 Fiji One National News broadcast a news item containing the comments made by the Respondent who was, at the time, Vice President of the Fiji Law Society. The coverage was, apparently, of comments made by the Respondent to the ABC, the national broadcaster of Australia. The Respondent was quoted as saying: "It's not just about being independent in fact. You've got to appear to be independent. And when you take up an appointment after soldiers have forced your Chief Justice to go on leave there's just no appearance of independence. It doesn't matter if, you

know, when you say there is no appearance of it. So the confidence of lawyers in the judicial system let alone the public is shattered.”

- [2] In the same news item Fiji One National News broadcast comments from the Attorney General contradicting her contentions.

### **Committal Proceedings instituted**

- [3] On 15 June 2007 the Attorney General applied, pursuant to Order 52, Rule 2 of the High Court Rules, for the committal of the Respondent in connection with the comments that she had made.
- [4] On 22 June 2007, in the High Court (Coventry J) granted leave to issue an application for order of committal pursuant to Order 52, Rule 2.
- [5] On 20 November 2007 Coventry J ordered that the Attorney General be given leave to withdraw the proceedings. Further, Coventry J ordered that the Attorney General pay the sum of \$20,000 by way of indemnity costs by 3p.m. on 11 December 2007 to the Respondent.

### **Appeal**

- [6] On 4 February 2008 the Attorney General by notice of appeal appealed against the decision to order indemnity costs of \$20,000. The grounds of appeal complain of a variety of matters in the judgment of Coventry J. These are aptly summarized in paragraph 1.4 of the submissions of the attorney general as follows: the Appellant argues in this appeal that indemnity costs should not have been awarded because of :

- i) The nature of the proceedings; and
- ii) There was no reprehensible conduct by the appellant to justify an award of indemnity costs against him.

[7] On appeal, much of the focus of the complaint of the Appellant was that the costs were awarded on an indemnity basis.

[8] In this regard, the meaning of indemnity costs is set out in “State v Police Service Commission, ex parte Beniamino Naiveli JR 29/94. In that case, Scott J considered indemnity costs was a term commonly used to indicate a more generous award than the usual party and party costs provided for under the High Court Rules. Essentially, what was contemplated as the basis for calculation of indemnity costs was costs payable to a barrister and solicitor by his or her own client. This was considered in *Public Service Commission v Naiveli* [1996] FJCA 3 by Casey JA who observed:

Scott J issued a supplementary judgment on 4 September 1995 awarding the indemnity costs which are the subject of the appeal. He adopted the conclusions of Sir Robert Megarry in *EMI Records* above (ie *EMI Records v Wallace* [1982] 2 All ER 980), and accepted that such costs may be awarded only in exceptional cases. He referred to counsel’s submission that the respondent had been dismissed from the Police Force after several years’ suspension, and that the decision was adhered to by the Commission, even after its attention had been drawn to the irregular way in which it had been made. He added some strictures about the inadequate scale of party and party costs, with its resulting unfairness and even hardship to successful litigants, and in particular to the respondent. However, 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 - see the examples discussed in *Thomson v Swan Hunter and Wigham Richardson Ltd* [1954] 2 All ER 859 and *Bowen-Jones* [1986] 3 All ER 163.

- [9] There are a large number of authorities, many of which are cited in the written submissions of the Appellant, which made the point that the award of indemnity costs is an exceptional basis for the award of costs. With attempting an exhaustive review of the authorities or wishing to add to the long list of authorities on the topic, the award of indemnity costs would only be considered in exceptional cases where the conduct of a party (or, possibly, its legal representatives) was reprehensible to a significant degree.
- [10] The Respondent does not appear to disagree with the principles upon which indemnity costs should be awarded as outlined by the Appellant. The essence of the case on appeal for the Respondent is that the exercise of discretion on the part of Coventry J in awarding costs on an indemnity basis should not be interfered with.
- [11] In our opinion, it was not appropriate to characterize the conduct of the Attorney General in determining to institute and then withdraw the proceedings as sufficiently reprehensible to justify an award of indemnity costs. Without directly saying so, the opening paragraphs of the ruling of Coventry J would seem to suggest that he fundamentally disagreed with the judgment of the Attorney General in bring the proceedings. That said, nothing in this judgment should imply any disagreement with the observations in paragraph 1 of Coventry J's judgment. There was simply no information as to why the Attorney General chose to act as he did. The reasons may have been good, bad or indifferent. However, it is not appropriate to assume (as is implicit in the reasons of Coventry J) that they were bad, because, for example, the withdrawal was because the proceedings should never have been brought in the

first place or, had Coventry J been in the shoes of the Attorney General he would not have moved to commit for contempt. One of the most demanding offices in the law is Attorney General. Often decisions have to be made at speed. Sometimes, especially decisions at speed can be on inadequate information or information when viewed after greater reflection should be viewed differently to how such was first viewed. It is not necessary in this judgment to examine the scope of any assumption that the Attorney General acts in the public interest. By characterizing the award of costs as indemnity costs, there is to be clearly implied a finding by Coventry J that the Attorney General has acted in a substantially reprehensible manner. As we say there is nothing upon which he could make this finding.

[12] Nevertheless, it is plain beyond argument that, the issue of characterising of the costs as indemnity costs being left aside, the Respondent was plainly entitled to some costs. After all, once the proceedings reached the stage of the Attorney General being given leave to proceed under Order 52 Rule 2, the respondent was entitled to engage legal representation to conduct her case with appropriate vigour. (It was never suggested that she was not so entitled notwithstanding that she was, at all material times, a practicing lawyer). Lawyers cost money. Indeed, during the exchanges between the parties on the hearing of the application for leave to withdraw the contempt proceedings, counsel for the Respondent produced a bill of costs of something of the order of \$40,000. The position of the Attorney General was that only nominal costs should be awarded. That is, with respect, unsustainable. For that to occur there would have to have been

some positive evidence that there was some special reason to adopt that course.

[13] Of course, the award of \$20,000 costs is about half of the quantum in the bill of costs produced by counsel for the respondent in the hearing before Coventry J. Although the costs award was characterized as an award of indemnity costs, it is difficult to see from the notes of proceedings how, using the definition of Scott J mentioned above, that these were, in truth, the indemnity costs. It might be argued for the Attorney General that the award of \$20,000 by Coventry J as indemnity costs carries with it the implication that had he been considering party and party costs as the basis for the award something less would have been ordered. That is as may be.

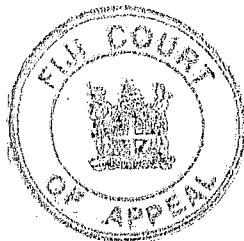
[14] It seems to us that a proper award of costs not on an indemnity basis but on a party/party basis would have been something of the order of \$12,500. Certainly, for the avoidance of any doubt, we do not accept that an indemnity award could *never* be awarded against the Attorney General. We can readily understand that some of the observations of Coventry J might have caused, to put the matter neutrally, the Attorney General some not inconsiderable anxiety. However, at the end of the day, we returned to the obvious proposition that the Respondent was entitled to some form of costs.

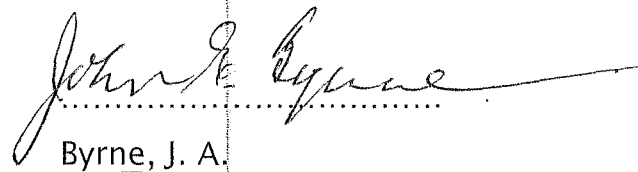
[15] We interpolate that it is high time that levels of costs awarded on a party and party basis be reviewed. Some of the awards seen in recent cases might be properly characterized as approaching the level of derisory. However, this judgment is not the place to

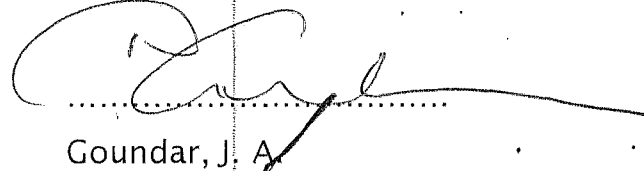
undertake that review. That sort of issue appears to us, the Respondent's comments on Fiji One National News notwithstanding, a matter which cries out for consultation between the Courts and the Law Society. We can leave that matter out of account in coming to a final conclusion in this judgment.

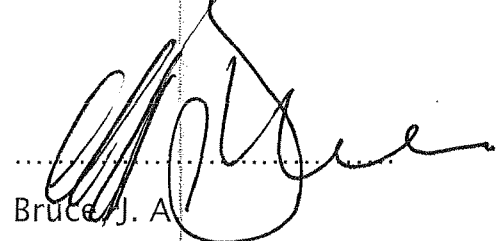
[15] It seems to us then an award of costs on a party and party basis of \$12,500 is justified. Accordingly, the orders of this court are:

- (1) Appeal upheld.
- (2) For the amount of \$20,000 costs awarded to the Respondent there is substituted the amount of \$12,500.
- (3) Appellant to have his costs of the appeal fixed at \$2,500.



  
Byrne, J. A.

  
Goundar, J. A.

  
Bruce, J. A.

At Suva  
16<sup>th</sup> March 2009