

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No: HBC 47 of 2014

BETWEEN : VANUALEVU HARDWARE (FIJI) LIMITED
1st Plaintiff
: BASHIR KHAN
2nd Plaintiff
AND : NEWWORLD LIMITED
Defendant

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No: HBC 53 of 2014

BETWEEN : VANUALEVU HARDWARE (FIJI) LIMITED
1st Plaintiff
: BASHIR KHAN
2nd Plaintiff
AND : NEWWORLD LIMITED
Defendant

BEFORE : The Hon. Mr Justice David Alfred
Counsel : Mr F Haniff for the 1st and 2nd Plaintiffs
Mr R Vananalagi for Messrs A.K. Law, Solicitors for
the Defendant
Mr A Vakaloloma for Messrs Rigsby Law

Date of Hearing : 7 September 2015
Date of Judgment : 6 April 2016

JUDGMENT

1. When this matter first came up before me, Counsel for the Plaintiffs informed me that both actions had been discontinued and the only issue is one of costs.
2. Counsel for the Plaintiff submitted that under Order 62 rule 11 of the Rules of the High Court (RHC), the legal representatives are personally liable for costs. Order 62 rule 11(4) of the RHC gives the legal representative an opportunity to show cause. Rigsby Law took no notice of Messrs A.K.Law, the Solicitors for the Defendant, telling them in writing not to file the proceedings which are now Civil Action No. 53 of 2014. For this reason, Counsel says Rigsby should indemnify both Plaintiffs against any costs the Court will award to the Defendant. The Court has jurisdiction to order Ms Rigsby or Mr Kaiyava to personally pay any costs payable to the Defendant or alternatively to order Ms Rigsby or Mr Kaiyava or Rigsby Law to indemnify the 1st and 2nd Plaintiffs against any costs payable by them to the Defendant.
3. Counsel for Rigsby Law now submitted. They object to any order for costs against the firm. He said Civil Action 53 of 2014 was not filed by Ms Rigsby. Costs, if awarded, should be paid by the 1st and 2nd Plaintiffs and not by Rigsby Law nor by Ms Rigsby, and should be taxed.
4. Counsel for Messrs A.K Law then submitted. He said the Plaintiffs should pay costs directly to the Defendant as there was reprehensible conduct on the Plaintiffs' part. The relevant paras of the affidavit of P Sami show that the Plaintiffs wanted the action filed and were on the same page as Rigsby Law. He referred to Order 41 rule 8 of the RHC which provides that an affidavit sworn before a solicitor of a party is not acceptable. He concluded by saying the 1st and 2nd Plaintiffs should pay costs directly to the Defendant.
5. At the conclusion of the hearing, I informed I would take time to consider my decision. In the course of reaching my decision I have perused:

- (1) Written Submission of Solicitors for Messrs Rigsby Law.
 - (2) Written Response of Solicitors for both Plaintiffs.
 - (3) Written Reply of Solicitors for the Defendant.
 - (4) Authorities cited by Counsel.
6. I now proceed to deliver my judgment. The point raised in this matter is a rather short one. It is who are liable to pay costs to the Defendant, and whether it should be on an indemnity basis.
 7. At the outset, I have perused the pleadings in both Civil Action 47 of 2014 and Civil Action 53 of 2014 (both hereinafter referred to collectively as the actions). I note as follows: The 1st action was filed in the Labasa High Court on 8 August 2014 by Messrs Rigsby Law. On 22 September 2014 it was discontinued by Messrs Rigsby Law, Solicitors for the Plaintiffs.
 8. The 2nd action which started life as a Notice of Motion was filed on 28 August 2014 by Messrs Rigsby Law. It was discontinued by the Plaintiff (sic), through Messrs Rigsby Law, on 22 September 2014.
 9. The Supreme Court Practice 1995 (the White Book) at pages 394-5 state the general rule is that a defendant is entitled to costs when an action is discontinued. A plaintiff who discontinued an action without leave, must pay the costs of the defendant.
 10. The answer to the above question in the White Book as to what those costs are to be is to be found in Order 62 rule 5(3) of the RHC. This lays down that when a party by a notice in writing and without leave discontinues an action against any other party, that other party shall be entitled to his costs of the action incurred to the time of receipt of the notice of discontinuance.

11. Thus a limit is set by the RHC for the period for which the Defendant is entitled to costs. In the 1st action it was 6 weeks from filing to discontinuance. In the 2nd it was less than 4 weeks.
12. A careful perusal of the Court file reveals the only document filed by the Defendant during either of the aforesaid periods, was its Summons to strike out and for declaration of the Plaintiffs as vexatious litigants, filed on 28 August 2014.
13. I do not consider any reasonable Defendant would have been unhappy that the Plaintiff had discontinued both actions against it. The Defendant should doubtless have preferred to let well alone, rather than countenance further litigation in regard to the 2 discontinued actions.
14. Therefore, shorn of all surplusage and verbiage, what remains is the nub of the matter which is simply who is to pay costs to the Defendant and on what basis.
15. Because of the able way this issue has been argued both orally and in writing by all 3 Counsel, I am able to conclude that the costs should solely be paid by the Plaintiffs and that this should be paid on a party and party basis and not on an indemnity or solicitor and client basis. This is because the Plaintiffs had not persisted with their case and had “not unnecessarily increased the cost of litigation.”
16. In light of my conclusion, the cases cited are not relevant to the sole issue herein. It would therefore not be expedient for me to discuss them.
17. In fine, I hereby order the 1st and 2nd Plaintiffs to pay costs in both actions which I summarily assess in the aggregate sum of \$1,000.00 to the Defendant.

Delivered at Suva this 6th day of April 2016



David Alfred
JUDGE of the High Court