

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

MISCELLANIOUS ACTION NO. HBM 26 2023.
IN THE MATTER OF BLUE VIEWS LLC.

AND

IN THE MATTER of an Application by the Plaintiff under section 516 to 518 of the Companies Act 2015 to set aside Statutory Demand dated 11th April 2023 issued by **VUNABAKA BODY CORPORATE (FIJI)** Limited against BLUE VIEWS LLC.

BETWEEN : : BLUE VIEWS LLC a limited liability corporation incorporated in USA and registered as a foreign company in Fiji and having its principal place of business at Lot-3 Vunabaka Bay , Malolo.

PLAINTIFF

AND : VUNABAKA BODY CORPORATE (FIJI) LIMITED a limited Company limited by guarantee having its registered Office at Unit 16 – Retail & Commercial Centre , Port Denarau

DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie
COUNSEL : Ms. Tabuadua S. Seru - for the Plaintiff
: Ms. Choo. N. – for the Defendant.
HEARING : Disposed by way of Written Submissions.
WRITTEN SUBMISSIONS : By the Plaintiff on 27.09.2023
: By the Defendant on 09.11.2023
: Reply Submissions by the Plaintiff on 22.12.2023
DATE OF RULING : On 2nd December 2024.

RULING

1. Pursuant to the hearing held on 27th September 2023 into the Plaintiff's Originating Summons filed on 2nd May 2023 seeking reliefs, *inter alia*, for setting aside the Statutory Demand dated 11th April 2023, when the matter came up for Ruling on 26th October 2023, as the counsel for the Defendant withdrew the said Statutory Demand, the Plaintiff's Counsel also instantly withdrew the Application for Setting aside, however, leaving the issue of indemnity costs to be decided by the Court.
2. Factually, the above withdrawal was eventuated on account of the settlement of \$108,554.23 , which had been deposited at the Court of Appeal, out of the total sum of \$119, 108.36 demanded by the Statutory Demand, being the Body Corporate Levis and Utility Charges, alleged, to be in arrears by the Plaintiff to the Defendant.
3. Thus, the Ruling hereof is confined only to the relief of indemnity costs prayed for in terms of paragraph 4 of the Originating Summons.
4. As the counsel for both parties agreed to have the said issue disposed by way of written submissions, leave being granted, necessary submissions have been filed and now it is my turn to pronounce the ruling on it.
5. In paragraphs 59 to 61 of the Affidavit in support, the Director of the Plaintiff Company, Mr. ANDREW HUGH GRIFFITHS, had averred the following as the basis for the claim of costs Indemnity basis
 59. *"Despite the matters currently before the Court of Appeal and the Plaintiff's claim against the Defendant, the Defendant issued the Statutory Demand.*
 60. *The Defendant, through the 27th April letter, has been notified of the Plaintiff's intention to seek indemnity costs.*
 61. *The Defendant abused the Winding up process by putting forward the Statutory Demand which from the outset it knew was disputed thus amounting to an abuse of the process of the Court".*
6. The Defendant did not deny the receipt of the said letter dated 27th April 2023. Accordingly, the Plaintiff is insisting for costs on indemnity basis. Neither the Court suggested nor did the parties agree on an amount as cost in lieu of costs on Indemnity basis.
7. It is pertinent to briefly mention here the history behind the impugned Statutory Demand, though, it is not in existence now due to its withdrawal. Parties are not at variance on the facts and circumstances that led to the issual of the said Statutory Demand by the Defendant's Solicitors. The issual of Statutory Demand Notice and filing of the Setting aside Application occurred in the midst of the substantial action bearing No- HBC 50 of

2021 commenced by the Plaintiff against the Defendant hereof and another, seeking reliefs, inter alia, injunctive orders. Some of the events unfolded therein, as per the pleadings thereof, are;

- A. On filing of the above substantial action, the Plaintiff had on 23rd February, 2021, obtained ex-parte- injunctive orders from my predecessor to the following effects. Vide (“AHG-C 14”)
 - a. **An interim injunction Order** restraining the Defendants, their servants and / or agents from disconnecting the Power, the Water connection and the Gas connection to the residence known as Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2 comprised in Native Lease No.851717, until further order from this Court or final determination of this matter.
 - b. **An interim injunction Order** restraining the Defendants, their servants and / or agents from restricting the quiet enjoyment of the property at Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2, comprised in Native Lease No.851717 until further order from this Court or final determination of this matter.
 - c. **An interim injunction Order** restraining the Defendants, their servants and / or agents from entering the land and premises in Lot 3 being Lot 1 on SO-6756 known as Vunabaka (part of) containing an area of 2836m2 comprised in Native Lease No.851717 until further order from this Court or final determination of this matter.
- B. Subsequently, the inter-partes hearing being held before me on 9th November 2022 in relation to the injunction Application, by my Ruling dated 14th March 2023 the aforesaid ex-parte injunctive Orders were dissolved. Vide Ruling marked (“**AHG -C15**”) and the sealed Order on it marked a (“**AHG-C16**”).
- C. Against the said Ruling, the Plaintiff on 4th April 2023, having filed an Ex-parte Notice of Motion marked (“AHG-C18”) at the Court of Appeal, on 18th April 2023 obtained restraining Orders marked as (“AHG-C19”) in order to continue to enjoy the Utility facilities that had been secured from being disconnected by the aforesaid ex-parte injunctive orders granted by my predecessor on 23rd February 2021. Thus, my order dated 14th March 2023 became inoperative or stayed. .
- D. It was during this period on 11th April 2023, the Defendant’s Solicitors issued the impugned Statutory Demand seeking the immediate payment of \$119, 108.36 being the arrears of Utility Charges.
- E. However, by the time the plaintiff obtained the restraining Orders from the Court of Appeal on 18th April 2023, the 2nd Defendant had already on 16th March 2023 disconnected the utility services to the Plaintiff’s lot No-03. Vide (“AHG-C21”). The Court of Appeal Orders had not made any provision for the reconnection of the services.

- F. It was pursuant to an Application made by the plaintiff to the Court of Appeal for reliefs, inter alia, to release the Sum of \$108,554.33 that had been deposited into the Trust Account to the Defendant, and subsequent to numerous written communication between the parties and the intervention of the Fijian Competition & Consumer Commission(FCCC) on the instance of the Plaintiff , the Court of Appeal made the Consent Order on 17th August 2023 giving reliefs, inter alia, for the release a said sum of \$108, 554.33 unto the 2nd Defendant , for the reconnection of the Utility Services to the Plaintiff's lot 3, and for the withdrawal of the Appeal Proceedings No- ABU 24 of 2023 that had been commenced by the Plaintiff on this issue.
8. Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing "indemnity costs". Order 62, rule 37 of the High Court Rules of 1988 empower courts to award indemnity costs at its discretion. For the sake of completeness, Order 62, rule 37 is reproduced below.

Amount of Indemnity costs (O.62, r.37)

"37.- (1) The amount of costs to be allowed shall (subject to rule 18 and to any order of the Court) be in the discretion of the taxing officer"

9. In the case of ***Prasad v Divisional Engineer Northern (No 2) [2008] FJHC 234; HBJ03.2007 (25 September 2008)***, the principles on indemnity costs enunciated in various authorities were summarized.
- a. *'A court has 'absolute and unfettered' discretion vis-à-vis the award of costs but discretion 'must be exercised judicially': Trade Practices Commission v. Nicholas Enterprises (1979) 28 ALR 201, at 207*
 - b. *The question is always 'whether the facts and circumstances of the case in question warrant making an order for payment of costs other than by reference to party and party': Colgate-Palmolive Company v. Cussons Pty Ltd [1993] FCA 536; (1993) 46 FCR 225, at 234, per Sheppard, J.*
 - c. *A party against whom indemnity costs are sought 'is entitled to notice of the order sought': Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd (1995) NSWLR 242*
 - d. *That such notice is required as 'a principle of elementary justice' applying to both civil and criminal cases: Sayed Mukhtar Shah v. Elizabeth Rice and Ors (Crim Appeal No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA*
 - e. *'...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':*

State v. The Police Service Commission; Ex parte Beniamino Naviveli (Judicial Review 29/94; CA Appeal No. 52/95, 19 August 1996), at 6

- f. Usually, party/party costs are awarded, with indemnity costs awarded only ‘where there are exceptional reasons for doing so’: ***Colgate-Palmolive Co. v. Cussons Pty Ltd at 232-34; Bowen Jones v. Bowen Jones [1986] 3 All ER 163; Re Malley SM; Ex parte Gardner [] 2001] WASCA 83; SDS Corporation Ltd v. Pasonnay Pty Ltd & Anor [2004] WASC 26 (S2) (23 July 2004)***, at 16, per Roberts-Smith, J.
- g. Costs are generally ordered on a party/party basis, but solicitor/client costs can be awarded where ‘there is some special or unusual feature of the case to justify’ a court’s ‘exercising its discretion in that way’: ***Preston v. Preston [1982] 1 All ER 41, at 58***
- h. Indemnity costs can be ordered as and when the justice of the case so requires: ***Lee v. Mavaddat [2005] WASC 68 (25 April 2005), per Roberts-Smith, J.***
- i. For indemnity costs to be awarded there must be ‘some form of delinquency in the conduct of the proceedings’: ***Harrison v. Schipp [2001] NSWCA 13, at paras [1], [153]***
- j. Circumstances in which indemnity costs are ordered must be such as to ‘take a case out of the "ordinary" or "usual" category ...’: ***MGICA (1992) Ltd v. Kenny & Good Pty Ltd (No. 2) [1996] FCA 862; (1996) 140 ALR 707, at 711, per Lindgren J.***
- k. ‘...it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus, if it represents an abuse of process of the Court the conduct may attract such an order’: ***Dillon and Ors v. Baltic Shipping Co. (‘The Mikhail Lermontov’) (1991) 2 Lloyd’s Rep 155, at 176, per Kirby, P.***
- l. Solicitor/client or indemnity costs can be considered appropriately ‘whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known ... he had no chance of success’: ***Fountain Selected Meats (Sales) Pty Ltd v. International Produce Merchants Ltd & Ors [1988] FCA 202; (1998) 81 ALR 397, at 401, per Woodward, J.***
- m. *Albeit rare, where action appears to have commenced/continued when ‘applicant ... should have known ... he had no chance of success’, the presumption is that it ‘commenced or continued for some ulterior motive or ... [in] wilful disregard of the known facts or ... clearly established law’ and the court needs ‘to consider how it should exercise its unfettered discretion’:* ***Fountain Selected Meats, at 401, per Woodward, J.***
- n. Where action taken or threatened by a defendant ‘constituted, or would have constituted, an abuse of the process of the court’, indemnity costs are appropriate: ***Baillieu Knight Frank (NSW) Pty Ltd v. Ted Manny Real Estate Pty Ltd (1992) 30 NSWLR 359, at 362. per Power, J.***

- o. Similarly where the defendant's actions in conducting any defence to the proceedings have involved an abuse of process of the court whereby the court's time and litigant's money has *'been wasted on totally frivolous and thoroughly unjustified defenses'*: **Baillieu Knight Frank, at 362, per Power, J.**
- p. Indemnity costs awarded where *'the defendant had prima facie misused the process of the court by putting forward a defence which from the outset it knew was unsustainable ... such conduct by a defendant could amount to a misuse of the process of the court'*: **Willis v. Redbridge Health Authority (1960) 1 WLR 1228, at 1232, per Beldam, LJ**
- q. *'Abuse of process and unmeritorious behavior by a losing litigant has always been sanctionable by way of an indemnity costs order inter partes. A party cannot be penalized [for] exercising its right to dispute matters but in very special cases where a party is found to have behaved disgracefully or where such behavior is deserving of moral condemnation, then indemnity costs may be awarded as between the losing and winning parties'*: **Ranjay Shandil v. Public Service Commission (Civil Jurisdiction Judicial Review No. 004 of 1996, 16 May 1997), at 5, per Pathik, J. (quoting Jane Weakley, 'Do costs really follow the event?' (1996) NLJ 710 (May 1996))**
- r. *'It is sufficient ... to enliven the discretion to award [indemnity] costs that, for whatever reasons, a party persists in what should on proper consideration be seen to be a hopeless case'*: **J-Corp Pty Ltd v. Australian Builders Labourers Federation Union of Workers (WA Branch)(No. 2) [1993] FCA 70; (1993) 46 IR 301, at 303, per French, J.**
- s. *'... where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost. Persisting in a case which can only be characterized as "hopeless" ... may lead the court to [determine] that the party whose conduct gave rise to the costs should bear them in full'*: **Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101, at paras [6]-[7], per Wheeler, J.**
- t. *However, a case should not be characterized as 'hopeless' too readily so as to support an award of indemnity costs, bearing in mind that a party 'should not be discouraged, by the prospect of an unusual costs order, from persisting in an action where its success is not certain' for 'uncertainty is inherent in many areas of law' and the law changes 'with changing circumstances'*: **Quancorp Pty Ltd & Anor v. MacDonald & Ors [1999] WASC 101, at paras [6]-[7], per Wheeler, J.**
- u. The law reports are replete with cases which were thought to be hopeless before investigation, but were decided the other way after the court allowed the matter to be tried: *Medcalf v. Weatherill and Anor [2002] UKHL 27 (27 June 2002), at 11, per Lord Steyn*
- v. Purpose of indemnity costs is not penal but compensatory so awarded *'where one party causes another to incur legal costs by misusing the process to delay or to defer the trial and payment of sums properly due'*; the court *'ought to ensure so far as it can that the sums eventually recovered by a plaintiff are not depleted by irrecoverable legal costs'*: **Willis v. Redbridge Health Authority, at 1232, per Beldam, LJ**

10. On careful perusal of the records, it appears that the Defendant's claim of **\$119, 108.36**, raised in its connected action No-HBC 50 of 2021, being the arrears on account of corporate services and Utility Bills, which turned out to be the subject matter of the Statutory Demand notice hereof, was not a sham or an unfounded claim.
11. All what the 2nd Defendant in that action (the Defendant hereof) wanted was the timely payment of utility bills by the Plaintiff, with no pending arrears. If, the Plaintiff had any grievance over the Utility Bills issued by the 2nd Defendant, there was a Mechanism in place for the Plaintiff to have resorted to. Instead, the Plaintiff chose to include this grievance too in his Statement of Claim filed for other substantial reliefs, and obtained ex-parte injunctive orders restraining the disconnection of Utility Services.
12. Once the injunctive orders were dissolved by this Court on 15th March 2023, as the Plaintiff had proceeded to make an Appeal to the Court of Appeal, the Defendant wanted to make sure that the pending arrears for the Utility bills and other Services, which was around in a sum of **\$119, 108.33** at that point of time, to be settled by the Plaintiff in order to ensure the uninterrupted services.
13. However, as the Plaintiff continued to be in arrears, the Defendant proceeded to issue the impugned Statutory Demand by considering the said sum as a debt. It was only after the Court of Appeal's Consent Order was made on 17th August 2023, the Defendant was at liberty to withdraw the sum of \$ 108, 554.33 that had been deposited in the Trust Account as per the suggestion of the Court of Appeal. However, there was still a balance of **\$11,000.00**, out of the full sum claimed by the Statutory Demand.
14. As a result, the Plaintiff was able to have his Utility Services restored. I am mindful that the consent Orders and the payment were made without prejudice to the rights of the parties. Subsequently, on the very first opportunity, when the matter came up for Ruling on the Setting aside Application before me on 26th October 2023, the Defendant's Counsel informed the Court that they are withdrawing the Statutory Demand Notice, on which the Plaintiff's Counsel too withdrew the Application for setting aside. As a result no necessity arose for delivery of the ruling on setting aside Application.
15. The Application before this court for setting aside the Statutory Demand has lasted only for around 5 months from the date of filing of it on 22nd May 2023 till it was withdrawn by the Plaintiff's Counsel on 26th October 2023, being triggered by the withdrawal of the impugned Statutory Demand Notice by the Defence Counsel.
16. I don't find any reprehensible conduct on the part of the Defendant hereof in issuing and maintaining the impugned Statutory Demand, in order to warrant costs on indemnity basis

against the Defendant, other than ordering the summarily assessed costs in favor of the Plaintiff on account of filing and maintaining the proceedings for setting aside of the Statutory Demand. The issual of the Statutory Demand Notice, in my view, was not an abuse of process as alleged by the Plaintiff.


17. I also cannot find any special or unusual circumstances in the Plaintiff's Application for setting aside, which may warrant the imposition of costs on indemnity basis against the Defendant, instead of imposing a reasonable amount as summarily assessed costs. I am satisfied that the Statutory Demand was issued and maintained by the Defendant for a good and valid purpose, as the disputation of the amount therein by the Plaintiff was not well-founded and could not have been substantiated.
18. The facts and the circumstances surrounding the issue of Statutory Demand notice and the resultant Application for the setting aside of it do not warrant the imposition of costs on indemnity basis as prayed for by the Plaintiff in its Originating Summons.
19. For the reasons stated above, this court is of the view that the Plaintiff is not entitled to costs on indemnity basis, and ordering a sum of 1,250.00 as costs (summarily assessed) will do justice in the circumstances.

ORDERS:

- a. The plaintiff's claim for Costs on indemnity basis is declined.
- b. The Defendant shall pay \$1,250.00 to the Plaintiff as summarily assessed cost.

On this 2nd December 2024 at the High Court of Lautoka.




A.M. Mohamed Mackie.
Judge.
High Court (Civil Division)
Lautoka.

SOLICITORS:

For the Plaintiff – Messrs. Lowing Lawyers - Barristers & Solicitors.

For the Defendant- Messrs. R. Patel Lawyers – Barristers & Solicitors.