

IN THE HIGH COURT OF FIJI AT LAUTOKA.
COMPANIES JURISDICTION.

Winding Up Action NO. HBE 21 of 2024.

IN THE MATTER of INTERGROUP (Fiji) PTE LIMITED (Entity number RCBS2014L1072) a limited liability Company having its Registered Office at Lot -6, Viria Road, Vatuwaqa, Suva.

AND

IN THE MATTER of THE COMPANIES ACT 2015.

R U L I N G

[On Indemnity Costs]

A. Introduction & Background facts:

1. This ruling pertains to the hearing held before me on 6th December 2024, in relation to the Applicant's (Mr. NITIN GANDHI's) claim for costs from the Respondent company in a sum of \$7,604.38 on indemnity basis.

2. This issue of costs came up only after the winding up Application hereof became redundant on settlement of the debt in a sum of \$19,400.00 that had been demanded by the Applicant's Statutory Demand letter dated 3rd July 2024.
3. Prior to the hearing, following events had transpired between the parties;
 - a. On 4th July 2024, statutory demand dated 3rd July 2024, for a sum of **\$19,400.00**, together with a claim for cost on it in a sum of **\$1,150.00**, was served by the Applicant, namely, NITIN GANGHI on the Respondent Company.
 - b. The Respondent Company did not move the Court to have it set aside, as a result the above styled winding up Application was filed on 27th August 2024, and a copy of it was served on the Respondent Company on 19th September 2024.
 - c. Subsequently, on 22nd October 2024, the Respondent Company, admittedly, paid the Applicant a sum of \$10,000.00, being the part payment of the said debt.
 - d. Despite the above payment made by it, the Respondent Company on 24th October 2024 filed its Notice of Intention to appear, together with an Affidavit thereto, seeking leave to appear and oppose the Application for winding up at the hearing, and the same was served on the Applicant on 25th October 2024.
 - e. On 4th November 2024, on the oral Application of the Applicant's counsel, the Court gave direction for the Applicant to file Affidavit in reply and fixed the matter for hearing to be held on 06th December 2024. The Affidavit in reply was accordingly filed by the Applicant on 20th November 2024.
 - f. On 4th December 2024, the Respondent Company, just 2 days prior to the hearing on 6th December 2024, made a further payment of \$9,400.00 and fully settled the debt demanded by the Applicant as per his statutory demand letter. However, the costs in a sum of \$1,150.00 demanded by it remained unpaid.
 - g. Thus, the Court has been called upon to adjudicate on the claim of costs made by the Applicant, the total amount of which is \$7604.38 as per the Statements of Accounts submitted by the Applicant at the hearing. This is the bone of contention between the parties now.
4. In addition to the oral submissions made at the hearing, both parties have filed their respective written submissions as well.

B. Preliminary Issues:

5. At the hearing, learned Counsel for the Applicant raised a preliminary objection, as averred in paragraph 4 of the Affidavit in reply, to the effect that the Respondent Company cannot be represented by its employee in Court, and nor can an employee of the Respondent Company file an Affidavit on behalf of the Respondent Company as an “in person” litigant, instead it must be represented in Court by a Lawyer, and their documents too must be filed by a Lawyer. Counsel drew my attention to the Order 5 Rule 6(2) of the High Court Rule 1988 in this regard, which states as follows;

“Except as expressly provided by or under any enactment, a body Corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor”
6. The person who represented the Respondent Company in this matter, is none other than a Branch Manager of the Respondent Company, namely, **Shalendra Kumar**, being duly authorized by the Director of the Respondent Company, who was said to be in Australia during the time material.
7. On cursory reading of the above Order 5 Rule 6(2) of the High court Rules 1988, I find that it speaks only about the **beginning of a proceedings or carrying on of any such proceedings by a Body Corporate**, which requires it to be done only by a Barrister and Solicitor. This Rule does not mention about the defending of a proceedings by a Body Corporate, and nor my attention was drawn to any such provision in any other Act, Rules or to a case law authority on it.
8. However, it is observed that it was the said representative **Shalendra Kumar**, that the Applicant appears to have liaised with and obtained the payments in settlement of the debt. Now, the substantive matter being resolved as aforesaid, I don’t see any hard and fast rule that curtails this Court from giving an audience to him for the purpose of resolution of the remaining issue of costs.
9. The total amount demanded in the statutory demand was only \$19,400.00. The winding up Application was filed on the basis of the alleged inability of the Respondent Company to pay the said sum. However, when the winding up Application was served on the Respondent Company, it paid a sum of \$10,000.00 despite filing its Affidavit seeking leave to oppose the Application, and subsequently settled the remaining debt of \$9,400.00
10. Accordingly, it is to be observed that once the Respondent Company paid the initial sum of \$10,000.00, the Application and proceedings for winding up could not have been maintained or proceeded with as the amount of debt had come down to

\$9,400.00 . From this point, the Applicant could not have proceeded with the winding up Application and should have resorted to other means to recover the said balance sum of \$9,400.00, particularly when the Respondent was ready to pay the balance in installments.

11. Thus, from that point onwards, the matter lost its identity as a winding up action and took the form of a normal money recovery proceedings. Thus, there could not have been any legal barrier for the Respondent Company to be represented in Court by an authorized officer of it. Hence, I overrule the, purported, preliminary objection raised on behalf of the Applicant.

C. The Law and the Principles that Govern the Indemnity Costs.

12. Order 62, Rule 37 of the High Court Rules empowers courts to award indemnity costs at its discretion. For the sake of easy reference 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.

Dal Pont, in “Law of Costs”, Third Edition, writes at Page 533 and 534;

‘Indemnity’ Basis

“.....“Although all costs ordered as between party and party are, pursuant to the ‘costs indemnity rule’, indemnity costs in one sense, an order for ‘indemnity costs’, or that costs be taxed on an ‘indemnity basis’, is intended to go further. Yet the object in ordering indemnity costs remains compensatory and not penal. References in judgments to a ‘punitive’ costs order in this context must be seen against the backdrop of the reprehensible conduct that often justifies an award of indemnity costs rather than impinging upon the compensatory aim. Accordingly, such an order does not enable a claimant to recover more costs than he or she has incurred.”

D. Principles Governing Indemnity Costs:

13. Principles governing the award of indemnity costs are set out in a number of authorities.
 - 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***

- 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 and Colgate Palmolive Pty limited v. Cussons Pty Ltd**; [1993] FCA 536; (1993) 46 FCR 225, at 234, per **Sheppard, J.**
- 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
- That such notice is required is ‘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**

‘... 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

- Usually, party/party costs are awarded, with indemnity costs 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.**
- 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.
- 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.**
- 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]
- 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.**

'...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 Lloyds Rep 155, at 176, per Kirby, P.**

- 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.**

E. Discussion:

14. At the outset, it is observed that the Applicant, in his Application for winding up, had not specifically moved for the relief of costs. However, it is common knowledge that there are expenses involved in commencing and maintaining the application. The Respondent in its written submissions acknowledges and does not deny that the Applicant has incurred some cost in initiating and maintaining this winding up proceedings.
15. However, it is observed that the Applicant has not submitted the relevant evidence in proof of the expenses, purportedly, incurred as depicted in the aforesaid Account Statements, except for submitting a photocopy of the receipt for a sum of \$805.00 in proof of the payment to the Official Receiver.
16. Once a sum of \$10,000.00 was paid and settled subsequent to the service of winding up Application, and the Respondent had suggested the balance payment of \$9,400.00 will be paid in installment, there was no necessity to proceed with the winding up Application as aforesaid.
17. Further, filing of the Affidavit in reply also not warranted for which \$500, 00 has been billed. On top of the said \$500.00, another sum of \$500.00 has been added as the amendment charges of the reply Affidavit. No such an amended Affidavit was filed in court, and even if such an amendment was done, the Respondent need not be charged on account of it.
18. No official receipts for the payment for Newspaper Publication and Gazette Notification were filed to show the actual amounts paid for the same. Also, the amounts quoted under other headings appear to be excessive, given the nature of the proceedings and the time taken for it, particularly when the Respondent had settled the Debt in two installments, instead of opposing the Application.

Was there reprehensible conduct on the part of the Applicant?


19. To justify an award of indemnity costs, the Court needs to be satisfied that the Respondent Company conducted itself wholly in an unreasonable manner in connection with the winding up proceedings before this Court, and that such conduct was “reprehensible...to warrant and signify the Court’s condemnation as to the way the Applicant has conducted the litigation. (***Tuidama v Devi Civil Action No. HBC105.2008 (18 February 2009)***; ***Rokotuiviwa v Seveci Civil Action No. HBC374.2007 (12 September 2008)***; ***Singh v Naupoto (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 8 August 2008)***)
20. The Respondent opted not to challenge the Statutory Demand. This saved the time and money for the Applicant, which he would have spent otherwise. Further, no sooner the winding up Application was served on it, the Respondent decided to settle the debt claimed by the Applicant and paid \$10,000.00, which was a substantial amount of the debt.
21. Though, the Respondent filed his Affidavit seeking leave to oppose the winding up Application and made a proposal to pay the balance of \$9,400.00 in installments, subsequently decided to pay the balance sum of \$9,400.00 at once and did so just 2 days before the hearing.
22. If not for the Applicant’s demand for an exorbitant amount as costs, this matter would have come to an amicable end, preserving the time, money and the business relationship between the parties.
23. I don’t find any reprehensible or unreasonable conduct on the part of the Respondent in these proceedings to warrant the imposition of indemnity cost on it, other than imposing a reasonable sum as stated bellow. The amount claimed by the Applicant has not been substantiated. Thus, by exercising the discretionary power of this Court, I refuse to grant costs on indemnity basis and decide to grant summarily assessed costs only.
24. It was the Applicant, who prolonged with the matter, unnecessarily, still as a winding up proceedings, when he was not supposed to do so. Having done so, the Applicant is not entitled to move for costs on indemnity basis.
25. In my view, an order for the payment of summarily assed costs in a sum of \$ 2,500.00 (Two Thousand Five Hundred Fiji Dollars) by the Respondent unto the Applicant would do justice on account of this winding up Application and connected matters thereto.

F. FINAL ORDERS:

- a. The preliminary objection by the Applicant overruled.
- b. The Applicant's claim, for costs in a sum of **\$7604.38** (Seven Thousand Six Hundred Four and Thirty-Eight Cents) on indemnity basis is declined.
- c. The Respondent is ordered to pay the Applicant a sum of \$ 2,500.00 (Two Thousand Five Hundred Fijian Dollars) being the summarily assessed costs on account of these proceedings, within 28 days from today.
- d. The winding up Application stands terminated on settlement of relevant debt.

On this 14th Day of February 2025 at the High Court of Lautoka.




A.M. Mohamed Mackie
Judge
High Court. -
Lautoka.

SOLICITORS:

MILLBROOK HILLS LAW PARTNERS- Barristers & Solicitors- For the Applicant.

Mr. SHALENDRA KUMAR (In person) for the Respondent Company.