IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 99

Tribunal Appeal No 7 of 2015

In the matter of Order 55 of the Rules of Court (Cap 322, R 5)

And

In the matter of section 117 of the Employment Act (Cap 91)

And

In the matter of orders made under sections 115 and 119 of the Employment Act (Cap 91)

And

In the matter of a complaint by Islam Md Ohidul against his employer SATS Construction Pte Ltd to the Commissioner of Labour

Between

SATS Construction Pte Ltd

… *Appellant*

And

Islam Md Ohidul

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure] — [Costs] — [Pro Bono Services]

SATS Construction Pte Ltd
v
Islam Md Ohidul

[2016] SGHC 99

High Court — Tribunal Appeal No 7 of 2015
Debbie Ong JC
29 January, 11 March; 27 April 2016

17 May 2016

Debbie Ong JC:

Introduction

1 On 29 January 2016, I dismissed the Appellant's appeal against the decision of the Assistant Commissioner for Labour ("the Assistant Commissioner") who had made an award in the Respondent's favour. The Assistant Commissioner had earlier awarded the Respondent, a Bangladeshi foreign worker employed by the Appellant for a salary of $22 a day (excluding over-time pay, meals and transport allowances), a sum of $1,931.13 for unpaid salaries due to him. The Appellant employer had appealed against the award.

2 After dismissing the appeal, I ordered costs in favour of the Respondent despite his lawyer telling the court that the law firm was acting for the Respondent on a *pro bono* basis and that any costs recovered would be

donated to the Humanitarian Organization for Migration Economics ("HOME"), a registered charity dedicated to upholding the rights of migrant workers in Singapore. I subsequently fixed the matter for hearing on 11 March 2016 in order to hear any submissions parties may have on whether costs may be ordered in favour of a party whose lawyers are representing him on a *pro bono* basis. My concern was that the award of costs to a successful litigant represented on a *pro bono* basis could be viewed broadly as allowing a champertous agreement. Further, it could be argued that a party with the benefit of *pro bono* services does not need to be indemnified for any costs. At the hearing on 11 March 2016, both counsel made submissions on this issue of costs. Counsel for the Respondent also informed the court that he had sought guidance from the Law Society of Singapore ("the Law Society") on the matter as well. He then relayed a request from the representatives of the Law Society to seek clarification on the legal position from this Court, urging this Court to make available its grounds of decision to guide the legal profession. I write these Grounds of Decision to set out my views and decision on this narrow issue.

The legal principles

3 The award of costs is a matter in the court's discretion. The Court of Appeal in *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 ("*Aurol*") reiterated that (at [103] – [104]):

> 103 … The power to award costs is fundamentally and essentially one that is discretionary. Even though the general principle is for costs to follow the event, the overriding concern of the court must be to exercise its discretion to achieve the fairest allocation of costs …
>
> 104 The court has a very wide discretion in determining what the fairest allocation of costs is and in this regard it is not confined to considering the particular outcome of the litigation. …

4 While the Court of Appeal's findings were directed at the allocation of costs between parties and did not specifically address the issue of whether a successful litigant represented on a *pro bono* basis could be awarded costs, there is no ambiguity as to the broad discretion the court exercises in ordering costs.

5 In *JBB v JBA* [2015] 5 SLR 153, I cited the decision of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 ("*Maryani*") at [30] for the general principle that costs should follow the event:

> One fundamental aspect of our scheme of costs recovery is a *cost-shifting rule* which dictates that the *successful litigant* is ordinarily *indemnified by the losing party* for the legal costs incurred as between the successful party and his solicitor. This is commonly referred to as the principle that costs should generally follow the event ... [emphasis added]

These principles are enshrined in O 59 rr 2(2) and 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In the present case, there was nothing on the facts that warranted a departure from the general principle that the Respondent, as the successful party, ought to be entitled to recover costs from the losing party. However, whether such costs should be awarded required further consideration in view of my concerns highlighted at [2] above.

The indemnity principle

The present costs arrangement

6 As pointed out in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*") at [153]–[154], the rule that costs should generally follow the event is one aspect of the indemnity principle. Another aspect relates to the quantification of costs

— the indemnification operates in relation to the sums for which the winner is under a legal obligation to pay his solicitors for the legal services rendered (see *Mohamed Amin bin Mohamed Taib and others v Lim Choon Thye and others* [2011] 2 SLR 343 at [21], referring to *Gundry v Sainsbury* [1910] 1 KB 645 ("*Gundry*")). A party ought not to enjoy any windfall by virtue of costs awards (see *Wentworth v Rogers* (2006) 66 NSWLR 474 ("*Wentworth*") at [50]). The reason is well stated by the court in *Harold v Smith* (1860) 5 H & N 381 at 385 (cited in *Gundry* at 649) — costs are neither imposed as a punishment to the losing party nor as a reward to the winning party.

7 This was not a concern in the present case. On the facts, the arrangement between the Respondent and his solicitors had crystallised in the following manner: after his employment was terminated by the Appellant on 13 March 2015, the Respondent had remained in Singapore on a special pass issued by the Ministry of Manpower for the purpose of resolving his dispute before the Assistant Commissioner. That decision was rendered on 25 May 2015 and the Respondent, apparently in anticipation of his impending return to Bangladesh, executed a Power of Attorney in favour of a case worker from HOME ("the Respondent's Representative") on 16 July 2015, authorising her to instruct counsel in respect of the appeal. He returned to Bangladesh shortly thereafter on 20 July 2015. It was then clarified and agreed between the Respondent's Representative and his counsel subsequent to the first hearing that any costs awarded in this appeal would go to pay the professional fees of his counsel, which in turn would be donated to HOME. There was thus no worry that costs awarded would be a windfall to the Respondent. I accepted that on the facts of this case, the Respondent and the solicitors had proceeded on the basis that the Respondent would not be required to pay any costs to his solicitors but the arrangement did not preclude them, if successful in the

proceedings, from seeking costs from the court, which would be paid to the solicitors.

8 In my view, where the order of costs does not unjustly benefit the successful party or punish the unsuccessful one, there is no inconsistency with the rationale behind the indemnity principle. Indeed, it redresses what in my view is an unjust benefit to an unsuccessful party litigating against a *pro bono*-aided party; any advantage that the unsuccessful party may have in never being liable for costs falls away. This position results in an even playing field as far as cost orders are concerned and may have a positive effect in encouraging responsible conduct in litigation. I note the useful guidance given by the court in *Wentworth* at [50] that "the indemnity principle is not immutable, and should be applied flexibly rather than made into a rigid rule". The flexibility of the indemnity principle is capable of accommodating costs arrangements such as that in the present case. It is also in accord with the underlying objective of enhancing access to justice to allow an order of costs in *pro bono* cases.

Access to justice in pro bono *cases*

9 Our courts have held that the indemnity principle is ultimately steeped in policy considerations going beyond the compensation of a successful litigant. In *Then Khek Koon* at [156], Coomaraswamy J noted:

> [*T*]*he ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice.* The indemnity principle facilitates a meritorious litigant's pursuit of justice by ensuring retrospectively that he attains justice at his opponent's expense rather than his own. [emphasis added]

10 In a similar vein, the Court of Appeal held in *Maryani* at [32]:

> The Judge explained that this was a result of the policy considerations which inform the indemnity principle. As the Judge aptly observed, "while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice" …. We also agree with the Judge's elaboration on two further (albeit "subordinate") policies of our law on costs which centre on *the need to achieve finality in litigation as well as the need to suppress parasitic litigation* … [emphasis in original]

11 Indeed, the underlying basis of the indemnity principle is the enhancement of access to justice, which has been the subject of concern in more recent years. There is little comfort in the assurance of a strong justice system in Singapore for a party who has not the means to obtain access to such justice. The broader concept of a strong justice system must include access to the system.

12 In his speech at the Opening of the Legal Year 2013, Chief Justice Sundaresh Menon exhorted (Response by Chief Justice Sundaresh Menon, Opening of the Legal Year 2013, 4 January 2013):

> Lawyers have a vital responsibility to ensure that there is access to justice. From those to whom much has been given, much will be expected … We must ensure that we do not price the law out of the reach of the average Singaporean; that we are guided by our care and concern for those whose lot it is to come face to face with the law; and that we do not allow the law to become the preserve of the rarefied few as a result of systems, processes and outputs that seem obscure or even confounding to the reasonably informed lay person.

13 This was followed later in the year by his Honour's advice to the lawyers newly admitted to the bar on the importance of *pro bono* work to the legal profession (Address by the Chief Justice at the Admission of Advocates and Solicitors, 27 July 2013, at para 13):

> … A visceral sense of distress sets in when society perceives that the scales of justice do not balance evenly between those

> who can and those who cannot access suitable representation. As members of the profession dedicated to justice, it is incumbent upon us to do whatever we can to ensure that this does not happen … I have spoken on several occasions of the need to make legal services affordable if we are to speak of access to justice in a meaningful way. Providing pro bono services is a necessary part of making this a reality. …

14 The laudable aspirations of the law student and the lawyer, to join the legal profession and answer the call to help others, particularly those marginalised in society, ought to be supported and nurtured. Providing *pro bono* services will no doubt involve some personal sacrifices, but such contribution to the society is recognised as most honourable and noble. It speaks volumes of a legal profession dedicated to the highest pursuit of justice. What an honour and privilege it is to be the hand that pulls a party drowning in anxiety out to the shore of assurance that legal assistance will be provided and justice is within reach.

15 This is not to say that such personal sacrifices need necessarily go wholly uncompensated, particularly where the compensation is in the form of party-and-party costs that the losing party would have had to pay in non-*pro bono* situations. Allowing lawyers providing *pro bono* services to recover some fees in the form of party-and-party costs does no discredit to them, and if by doing so, brings us a step closer to a legal system where no one is denied legal representation by reason only of his impecuniosity, it is a right step forward.

16 This position is consistent with the legislation providing for costs in proceedings in which a legally aided person is a party. The Legal Aid and Advice Act (Cap 160, 2014 Rev Ed) provides:

> 16.—(1) In proceedings to which an aided person is a party, the court shall make, in favour of the aided person, the like order for costs (except against another aided person) as the

> court would have made in favour of the aided person had he not been an aided person, and in proceedings in which costs follow the event an aided person shall (except against another aided person) be entitled to costs in the like manner as if he were not an aided person, notwithstanding that no amount is or will be payable by the aided person, or that the costs are in excess of the amount which is or will be payable by the aided person.
>
> (2) Where any moneys are recovered by an aided person (whether in proceedings or by virtue of a settlement or compromise), he shall be liable to pay to the Director [of Legal Aid] so much of the moneys so recovered as is recovered in respect of costs.

17 One could argue that it is precisely because such costs orders are not permitted that legislation was required to provide for such situations. I do not find this argument persuasive, for, in my view, the policy and principle behind the two situations are similar: *pro bono* and legal aid services are provided to enhance access to justice and it is fair for the providers of such services to be paid for the work they have done by virtue of costs orders.

Champerty

18 The present arrangement in respect of the retainer between the Respondent and his counsel could arguably be construed as a form of conditional fee agreement in which the Respondent's liability to pay the solicitors is contingent on costs being awarded in his favour. While I have held above that this arrangement does not impinge on the indemnity principle (see, *eg*, the Victorian Court of Appeal decision in *Mainieri v Cirillo* [2014] VSCA 227), it could be argued that such arrangements are champertous in nature. Section 107 of the Legal Profession Act (Cap 161, 2009 Rev Ed) provides:

> 107.—(1) No solicitor shall —
>
> (*a*) purchase or agree to purchase the interest or any part of the interest of his client or of any party in any suit, action or other contentious proceeding brought or to be brought or maintained; or

> (*b*) enter into any agreement by which he is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding.

19 In my view, notwithstanding the apparent breadth of s 107(1)(*b*), the provision does not extend to cases such as the present where the Respondent would otherwise be unable to afford legal representation. This is supported by the decision of the Court of Three Judges in *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] 4 SLR 91 ("*Kurubalan*"), in which a distinction was drawn between "impecunious clients who would not otherwise be able to afford legal representation" and other litigants. The case of *Kurubalan* did not involve such an impecunious client, but the Court of Three Judges remarked that (at [82]):

> [I]t would be permissible and even honourable for an Advocate and Solicitor to act for an *impecunious* client in the knowledge that he would likely only be able to recover his appropriate fees or disbursements if the client were successful in the claim and could pay him out of those proceeds or if there was a costs order obtained against the other side. [emphasis in original]

This observation is particularly apposite in cases similar to the present. I did not see why party-and-party costs ought not to be ordered when the *pro bono* lawyer had rendered substantial work, expending time and effort in representing his client. There was no windfall for the client in the present appeal, who would not have kept the cost sums ordered. There was no prejudice to the Appellant who would have had to pay costs to the winning party in non-*pro bono* situations. On the other hand, the legal representation offered *pro bono* has allowed the impecunious party access to justice that he otherwise would not have had. As I have emphasised above, the underlying basis of the indemnity principle is the enhancement of access to justice, and

the award of costs is a matter in the court's discretion to achieve the fairest allocation in the particular instance.

My decision in the present case

20 I decided that costs should be ordered to the Respondent. There was nothing in law or in principle that prohibited the award of costs to the successful litigant on the facts before me. The costs were ordered to be paid to the solicitors, who had put in substantial work in representing the Respondent. I noted that these solicitors acting *pro bono* would not be obtaining any solicitor-and-client costs from the client. I ordered that costs fixed at $6000, inclusive of disbursements, be paid by the Appellant to the Respondent.

Debbie Ong
Judicial Commissioner

Dhanwant Singh and Krishna Morthy (S K Kumar Law Practice LLP) for the Appellant;
Chan Kah Keen Melvin and Hannah Tjoa Kai Xuan (TSMP Law Corporation) for the Respondent.