

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Winding Up Action No. HBF 18 of 2009

Re : **SHABU SHABU RESTAURANT COMPANY LIMITED**

Before : Master Anare Tuilevuka

Counsel : Ms. Vasantika Patel for the Petitioner
 Hong Suk Hwang, director of Shabu Shabu Restaurant Company Limited

Date of Hearing: 23rd October 2009
Date of Ruling: 05th November 2009

J U D G M E N T
(on Costs)

- [1] This Winding Up matter has taken an unusual case. The parties have approached this Court to assess costs but no final order was ever made. The Defendant company Shabu Shabu Restaurant Company Limited (“**Shabu Shabu**”) did send a cheque to the Petitioner, Yees Cold Storage Seafood Limited (“**Yees**”) to settle its debt six days after the Petition was presented in Court. Yet, despite the presentation of that cheque, the Petitioner pressed on and advertised the Petition in the Fiji Times and in the Fiji Government Gazette **on Tuesday 28th August 2009** and on **Friday 21st August 2009** respectively (that is some 3 weeks after the Petition was presented and the debt settled).

- [2] The Petitioner now asks this Court to accept its lawyer's *Bill of Costs for Taxation* which amounts to \$7,819.58 in total. In contrast, the debt alleged in the Petition is a meagre \$3,168.53 (\$4,814.38 including interest plus legal costs of \$1,125.00).
- [3] Against that background, I am now asked to assess costs.
- [4] On 21st July 2009, Ms. Patel presented a Petition for and on behalf of Yees to this court to Wind Up Shabu Shabu. On 23rd of July 2009, Yees filed its Affidavit Verifying the Petition.
- [5] Mr. Hwang produced in Court a bundle of invoice statements of Yees'. An Agreement between Yees and Shabu Shabu is etched in ink on one of the invoice statements. That Agreement records the following: "*parties have come to a full settlement with no concern of any legal action to any amount of \$2,839.03*". The Agreement bears two signatures. Ms Patel does not dispute the Agreement nor what it says. The Agreement is dated 27th July 2009. As it turns out, the debt was settled by Shabu Shabu just six days after the Petition was presented.
- [6] Ms Patel does not dispute the Agreement. She concedes that Shabu Shabu had sent a cheque to Yees but Yees had advised Shabu Shabu that it would not cash the cheque until Shabu Shabu has settled Yees legal fees.
- [7] When the Petition was first brought before Mr. Justice Inoke on 07th August 2009, Ms. Draunidalo appeared for Muaror & Company who were then solicitors for Shabu Shabu. She advised the Court that the debt had been paid off but that parties were talking on costs. Mr. Shalen Krishna who appeared on instructions of Ms .Patel sought a date for filing of compliance papers. Inoke J later transferred the matter to me on the same day and I adjourned it to 29th September 2009 for mention.
- [8] Henceforth, as it turns out, Ms. Patel proceeded with the Winding Up application **and advertised the Petition in the Fiji Times on Tuesday**

28th August 2009 and in the Fiji Government Gazette on Friday 21st August 2009.

- [9] Notably, that was some three weeks after first call when Shabu Shabu had advised that the debt had been settled.
- [10] On the 21st September 2009, Ms Patel advised that Shabu Shabu had presented a cheque to Yees which the latter was not accepting until the former settles the latter's legal costs. When I queried Ms Patel as to why Yees had to then press on with advertising the Petition three weeks after Shabu Shabu had presented a cheque to Yees, her response was that Yees had not accepted the cheque (though had received it) and would only accept it upon Shabu Shabu settling Yees' costs. Ms Patel agreed though that the only issue left for this Court to decide is the costs to be paid.
- [11] Thereafter, the matter was again called before me on the 9th, 16th and 23rd October before me. These adjournments were requested by Mr Kemueli Qoro, who, though not on record for Shabu Shabu, appeared on some limited instruction.
- [12] The parties have asked me to assess costs.
- [13] Ms. Patel has prepared a Bill of Costs for Taxation. It shows a total amount of \$7,819.58 in costs and disbursements. As I have stated above, this amount is almost double the debt (including interest and costs) alleged in the Petition. Mr. Hwang, who now appears in person however says he is prepared to pay Ms. Patel between \$500 to \$700 dollars in costs. He cannot understand how the Petitioner's legal costs on such a simple matter and which was settled early could accumulate such an exorbitant amount in costs and disbursements.
- [14] As between litigants, the general principal is that costs follow the event. In other words, the loser will be ordered to pay the winner's costs and will be left to bear his own. This is reflected in **Order 62 Rule 3(3)** of the High Court Rules .

[15] However, that general principle sometimes will give way in particular circumstances. For example, the Court may award the winner only a proportion of his or her costs, or the court will award the winner his or her costs from up to a specified stage of the proceedings, or the Court will not make any order as to costs at all and leave each party to bear their own costs. In certain interlocutory proceedings, the winner is usually ordered to pay the loser's costs (for example, for costs occasioned by an amendment without leave). **Order 62 Rule 6** also sets out cases where costs shall not follow the event.

[16] To reiterate, it is only a general principle that costs will follow the event. The determination of what costs to award when costs follow the event is entirely a matter of judicial discretion.

[17] Where a Bill of Costs for Taxation is presented by the winner, under **Order 62 Rule 12** the court may either tax "**on the standard basis**" or on an "**an indemnity basis**".

[18] Taxing Costs on the **standard basis**, according to **Order 62 Rule 12(1)**, will involve the taxing officer allowing:

"a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party..."

[19] Taxing Costs on an **indemnity basis**, according to **Order 62 rule 12(2)** will involve allowing:

"all costs...except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party..."

[20] The difference between the two approaches is that in the former, the benefit of any doubt in any costs raised is given to the loser. In the latter, it is given to the winner.

[21] I ask myself whether I should award Yees a portion only of their costs particularly in light of the fact that Shabu Shabu had sent Yees a Cheque only 6 days after the Petition was presented. I ask myself also whether all attendances after the presentation of the cheque were really necessary. In my view, they were not called for. What Yees should have done was to simply cash the cheque immediately upon receiving it and then instructing its lawyers to withdraw the Petition once the cheque is cleared and after the Court has assessed its costs up to that point. Had Yees taken that step, the superfluous expenses incurred by its lawyers would have been avoided. Accordingly, in my view, Shabu Shabu should only have to bear Yees costs up to the point of the Affidavit Verifying Petition, which I would summarily assess at \$800-00. A court is not obliged to make the unsuccessful party pay for the opponents' desire for "*Rolls Royce representation*" (see ***South Pacific Recording Ltd. v Tabs (1997) Court of Appeal, Civil Appeal No: ABU 0039/1996***).

[22] I therefore Order as follows:

- (i) as the debt alleged in the Petition has been settled, and considering the peculiar history of this case, Shabu Shabu is to pay part only of the Petitioner's costs which, doing the best that I can, I summarily assess at \$850 – 00.
- (ii) the Petition is hereby dismissed.

A. Tuilevuka
Master

05th November 2009