IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 44

Civil Appeal No 61 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Appellant*

And

Attorney-General

… *Respondent*

In the matter of Originating Summons No 1109 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Plaintiff*

And

Attorney-General

… *Defendant*

Criminal Motion No 30 of 2021

Between

Nagaenthran a/l K Dharmalingam

… *Applicant*

And

I

Public Prosecutor

… *Respondent*

EX TEMPORE JUDGMENT

[Criminal Procedure and Sentencing — Compensation and costs — Prosecution urging court to make costs order against defence counsel personally]
[Civil Procedure — Costs — Personal liability of solicitor for costs]

II

Nagaenthran a/l K Dharmalingam
v
Attorney-General and another matter

[2022] SGCA 44

Court of Appeal — Civil Appeal No 61 of 2021 and Criminal Motion No 30 of 2021
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA, Judith Prakash JCA, Belinda Ang Saw Ean JAD and Chao Hick Tin SJ
25 May 2022

26 May 2022

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

Introduction

1 On 29 March 2022, the Court of Appeal ("the CA") dismissed both Civil Appeal No 61 of 2021 ("CA 61") and Criminal Motion No 30 of 2021 ("CM 30") in *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] SGCA 26 ("the Judgment"). In the Judgment at [70], the CA gave leave to the parties to raise by notice in writing any question of costs within seven days of the date of the Judgment. On 12 April 2022, the CA directed, among other things, that (a) the Attorney-General's Chambers ("AGC") was to file and serve its written submissions on costs by 26 April 2022, and (b) Ms L F Violet Netto ("Ms Netto") and Mr Ravi s/o Madasamy ("Mr Ravi") were to file and serve their reply written submissions on costs within two weeks from the filing and service of AGC's submission on costs.

2 By way of its written submissions dated 26 April 2022, AGC sought personal costs orders against both Mr Ravi and Ms Netto as follows:

(a) In respect of CA 61, Mr Ravi and Ms Netto are to be jointly and severally liable for costs of $30,000; and

(b) In respect of CM 30, Mr Ravi and Ms Netto are to be jointly and severally liable for costs of $10,000.

3 On 12 May 2022, Mr Ravi filed a document entitled "Applicant's Submissions on Costs". On the same day, AGC stated that it had no objections to the late filing of Mr Ravi's submissions. In the said document, Mr Ravi purported to submit, on behalf of Ms Netto and himself, that it is not just, in all the circumstances, to order personal costs against Ms Netto and him. Mr Ravi also stated that "a separate consideration should apply to [Ms Netto]", though it is not clear what Mr Ravi meant by this. On 13 May 2022, we directed that (a) Ms Netto was to confirm that the submissions were filed on her behalf, and (b) Mr Ravi was to state the basis on which he purported to file the submissions on behalf of Ms Netto by 18 May 2022. On 18 May 2022, Ms Netto clarified by way of letter that the submissions were filed in Mr Ravi's personal capacity and not on her behalf.

4 At the hearing before us today, Ms Netto appeared some ten minutes or so after we had started the proceedings. Shortly before the hearing, she had tendered a medical certificate which was not valid for excusing the subject of the certificate from attendance in court. This was issued yesterday but for unknown reasons was only advanced today. In any event, she made it clear she was not requesting an adjournment and said only that she was associating herself with Mr Ravi's position.

Our decision

5 In our judgment, this is an appropriate case in which personal costs orders ought to be made against both Mr Ravi and Ms Netto.

6 We begin by setting out the legal principles pertaining to personal costs orders against counsel.

7 For CA 61, the relevant provision is O 59 r 8(1)(*c*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). This provision empowers the court to order costs against solicitors personally where costs have been incurred "unreasonably or improperly" in any proceedings or have been "wasted by failure to conduct proceedings with reasonable competence and expedition". As summarised most recently by the CA in *Munshi Rasal v Enlighten Furniture Decoration Co Pte Ltd* [2021] 1 SLR 1277 ("*Munshi Rasal*") at [17]:

> … The applicable test in deciding whether to order costs against a solicitor personally is the three-step test set out by the English Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 231, which has been endorsed by this court in *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576 at [71] and *Ho Kon Kim v Lim Gek Kim Betsy and others and another appeal* [2001] 3 SLR(R) 220 at [58]:
>
> > (a) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently?
> >
> > (b) If so, did such conduct cause the applicant to incur unnecessary costs?
> >
> > (c) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

8 In relation to CM 30, the court hearing criminal proceedings has the power under s 357(1)(*b*) of the Criminal Procedure Code 2010 (2020 Rev Ed) ("CPC") or its inherent powers to order that defence counsel pay costs directly to the Prosecution (see the decision of the CA in *Abdul Kahar bin Othman v*

Public Prosecutor [2018] 2 SLR 1394 ("*Abdul Kahar*") at [77]–[80]). In *Syed Suhail bin Syed Zin v Public Prosecutor* [2021] 2 SLR 377 ("*Syed Suhail*") at [16], [18]–[19] and [21], the CA found that the principles developed in the context of civil cases, which were outlined at [7] above, were of general application as well, with the ultimate question being whether it was just in all the circumstances to make such a personal costs order.

9 The approach to be taken to the words "improperly", "unreasonably" and "negligently" is as follows (see *Syed Suhail* at [20], citing *Ridehalgh v Horsefield* [1994] Ch 205 at 232–233):

> 'Improper' … covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
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> 'Unreasonable' … aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
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> …
>
> … [The term] 'negligent' should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

10 In this regard, we note that in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 ("*Bintai Kindenko*") at [67], the CA was of the view

that one situation where a solicitor may be regarded as having acted improperly, unreasonably or negligently, such that a personal costs order pursuant to O 59 r 8(1) of the ROC may be made, is "where the solicitor advances a wholly disingenuous case or files utterly ill-conceived applications even though the solicitor ought to have known better and advised his client against such a course of action."

11 We approach the present matter with those principles in mind. Specifically, we consider whether Mr Ravi and Ms Netto acted improperly, unreasonably or negligently by considering the following questions:

(a) Did Mr Ravi and Ms Netto advance arguments which were unsustainable?

(b) Did Mr Ravi and Ms Netto act in such a manner to frustrate the lawful process of execution in abuse of the court's processes?

(c) If so, did such conduct cause AGC to incur unnecessary costs?

(d) If so, is it in all the circumstances just to order Mr Ravi and Ms Netto to compensate AGC for the whole or any part of the relevant costs?

12 Turning to the first question, in the Judgment, we explained in considerable detail why there was no basis for CA 61 and CM 30. In the Judgment at [33]–[34], we held there was no admissible evidence showing any decline in the appellant's mental condition after the commission of the offence. In OS 1109, all that was before the court was the bare assertion of Mr Ravi as to the appellant's mental age. This evidence was irrelevant and inadmissible. Mr Ravi himself acknowledged that he had no medical expertise and it cannot

be disputed that his purported opinion appeared to be based on a single interaction with the appellant over the course of the last three years, which lasted less than half an hour. In CM 30, we also explained why Mr Navinkumar's evidence was wholly unreliable (see the Judgment at [48]–[50]).

13 These factual weaknesses and problems with the case would have been apparent to any reasonable defence counsel.

14 Mr Ravi contended that it was because of his lack of medical expertise that he sought experts overseas to determine the appellant's medical condition, but this fails to address the nub of the issue which is that the proceedings were undertaken when there was *no factual basis*. Proceedings may not be instituted on the basis of speculation. In any event, we also noted in our judgment that *none* of the appellant's experts had examined or even spoken to the appellant or had seen the appellant's present medical reports (see the Judgment at [54]). Coupled with the evidence of the prison officer in charge of observing the appellant (see the Judgment at [35] and [50]), we think that it should have been apparent to any reasonably diligent defence counsel that CA 61 and CM 30 lacked factual basis. Further, as we also highlighted in the Judgment at [36]–[37], in so far as there was highly probative evidence to aid the court's assessment of the appellant's mental condition, objections were mounted on the appellant's behalf to prevent the court from accessing that evidence.

15 Mr Ravi also submitted that novel issues and questions of public importance were raised, but this is irrelevant without a relevant substratum of facts to support raising those issues and questions before the court. In the present case, there is simply no relevant substratum of facts.

16 Aside from this, in our Judgment, we had also traced the timeline of events which led us to find that the proceedings constituted a blatant and egregious abuse of the court's processes (see the Judgment at [8]–[24]). This is not the occasion to repeat all that we have said. But we do observe, for example, that instead of putting their best case forward at the first instance, Mr Ravi and Ms Netto each drip-fed the supposed evidence and arguments. For instance, upon the court declining his request on 9 November 2021 for an adjournment, Mr Ravi then sought to file two expert reports dated 5 November 2021 and 7 November 2021 respectively. To date, Mr Ravi has also failed to provide a satisfactory explanation as to why the evidence of Mr Navinkumar was not provided to the court earlier when the same could have been provided to the appellant's expert days before. As for Ms Netto, no explanation was provided for her tendering of a speaking note and further expert report at the last possible moment, during the hearing on 1 March 2022 itself. As we observed in the Judgment at [24]:

> … when every single action on the part of one party is done in a manner that is contrary to the applicable rules and contrary even to basic expectations of fairness to the other party and of courtesy to the court, it becomes difficult to accept that there is an innocent explanation for this. This is heightened when either no explanations are offered, or explanations that are offered are shown to be untrue.

17 In this light, it is simply impossible to contend that the AGC did not incur unnecessary costs.

18 This leads to the question of whether it is just to make the order. Mr Ravi first contended that such an order could not be made against a solicitor who is no longer practising. No authority was cited and we think this is because it is a plainly bad point. The court imposes a personal costs order to reprobate the unsatisfactory conduct of counsel appearing before it. The fact that counsel

subsequently ceases or is unable to practice cannot affect the ability of the court to make such an order.

19 Mr Ravi also made some general comments and submissions to the effect that this would constitute a reprisal against the Bar and claimed that both advocates and forensic psychiatrists were being chilled and discouraged from taking on engagements to act for accused persons if such orders were made. With respect, this was a baseless submission. No person, psychiatrist or lawyer, has a licence to appear before a court and act improperly; and if the making of an adverse costs order would deter such conduct, then that is precisely what the power is there for.

20 We turn finally to the quantum of costs. We have outlined the AGC's costs submissions, but we do not accept this as it stands. Although AGC has referenced the Costs Guidelines and asked for costs of $30,000 for CA 61 which falls at the lower end of those guidelines, and $10,000 for CM 30, we consider that costs orders of $15,000 for CA 61 and $5,000 for CM 30 are appropriate because the facts in this case were not complex (as can be seen from the short reply affidavits tendered by AGC) and the applications in CA 61 and CM 30 concerned the same factual matrix and essentially made very similar arguments, which was in fact a point we noted in explaining that there was an abuse of process.

21 We also disagree with AGC's submission that Mr Ravi and Ms Netto should be jointly and severally liable for the costs incurred in the proceedings. AGC does *not* contend that Ms Netto was involved in the commencement and conduct of CA 61 and CM 30 *prior to* 17 January 2022. It is not clear then, why she should bear responsibility or the attendant consequences for actions in which she played no part. Conversely, for conduct which took place *after* 17

January 2022, notwithstanding Mr Ravi's plainly substantial role (such as in drafting the consolidated submissions and in apparently giving instructions to Ms Netto throughout the course of the hearing; see the Judgment at [22]), it was *Ms Netto* who was the solicitor on record. In short, and without more, we do not think that Mr Ravi's and Ms Netto's conduct of the proceedings, when they were each the solicitor on record at different points in time, can or should be attributable to the other.

22 In the circumstances, we consider that Mr Ravi and Ms Netto should each be liable only for the costs incurred and wasted as a result of their personal conduct during their respective periods acting as the appellant's solicitor on record. AGC has provided a breakdown of the work it undertook for CA 61 and CM 30 and it appears that the majority of the work undertaken by AGC took place before the change in solicitor, and is therefore attributable to Mr Ravi's initiation and conduct of the proceedings, rather than to Ms Netto's subsequent continuance of the proceedings.

23 In all the circumstances, we hold that:

(a) For CA 61, a costs order of $15,000 is appropriate. Mr Ravi and Ms Netto should be liable for 75% of the costs ($11,250) and 25% of the costs ($3,750) respectively.

(b) For CM 30, a costs order of $5,000 is appropriate. Mr Ravi and Ms Netto should be liable for 75% of the costs ($3,750) and 25% of the costs ($1,250) respectively.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Judge of the Appellate Division

Chao Hick Tin
Senior Judge

The appellant in CA/CA 61/2021 and applicant in CA/CM 30/2021 not in attendance and unrepresented;
Wong Woon Kwong, Tan Wee Hao and Andre Chong (Attorney-General's Chambers) for the respondent in CA/CA 61/2021 and CA/CM 30/2021.