Re Shankar Alan s/o Anant Kulkarni
[2007] SGHC 12

Case Number : OS 668/2006

Decision Date : 23 January 2007

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Jimmy Yim SC, Adeline Wong (Drew & Napier LLC) for the Law Society of Singapore; R S Bajwa (Bajwa & Co) and Mahmood Gaznavi (Mahmood Gaznavi & Partners) for the applicant

Parties : —

Administrative Law – Disciplinary proceedings – Applicant succeeding in application to quash findings of disciplinary committee – Whether principles on costs in normal civil proceedings applicable to disciplinary proceedings

23 January 2007 *Judgment reserved.*

Sundaresh Menon JC:

1 On 27 October 2006, I gave judgment in *Re Shankar Alan s/o Anant Kulkarni* [2006] SGHC 194.

2 That concerned an application for judicial review brought by Mr Shankar Alan s/o Anant Kulkarni ("the applicant") seeking an order quashing findings by a Disciplinary Committee ("DC") established under the Legal Profession Act (Cap 161, 2001 Rev Ed) ("the Act") that he was guilty of professional misconduct. In the judgment that I have referred to, I found for the applicant and quashed the findings of the DC. However, I left the question of costs to be addressed at a subsequent hearing. Both parties have since made their submissions on costs and I now deal with this question.

3 Mr R S Bajwa, who appeared for the applicant, submitted that his client, having succeeded in obtaining the primary relief he had sought, was entitled to the benefit of the general rule that costs follow the event. He further submitted that there was no reason to depart from the general rule simply because this was a case concerning disciplinary proceedings.

4 As against this, Mr Jimmy Yim SC, who appeared for the Law Society, submitted as follows:

(a) The DC is established pursuant to a statutory regime regulating the legal profession;

(b) Once the DC had made a finding of sufficient gravity for disciplinary action, the Law Society was obliged to initiate show cause proceedings under s 94(1) of the Act;

(c) The application for a quashing order included an application to stay the show cause proceedings;

(d) In truth, the Law Society was doing no more than fulfilling its statutory duty by participating in the proceedings since it had done so in order to assist this court by presenting the opposing arguments to those advanced on the applicant's behalf; and

(e) The Law Society had not acted frivolously or vexatiously. Moreover, there was no finding that went to the merits of the complaint or the prosecution since the quashing order was sought on the basis of procedural failings only.

5 Both Mr Bajwa and Mr Yim made reference to a number of cases to which I turn shortly. However, at the outset, I should make some brief observations. First, there was no suggestion at all that the Law Society had not acted in good faith.

6 Second, leaving aside for the moment the question of its relevance to the present issue, I do not consider that the Law Society had a statutory or any other obligation either to resist the application for a quashing order or to present *opposing* arguments to those advanced on behalf of the applicant in order to assist the court.

7 Mr Yim based this part of his argument on the decision of L P Thean J (as he then was) in *Chew Kia Ngee v Singapore Society of Accountants* [1988] SLR 999 ("*Chew Kia Ngee*"). That was a case where the applicant had been convicted by the Disciplinary Committee of the Singapore Society of Accountants and was suspended from practice for 5 years. The appeal was allowed, though it appears, as suggested by Mr Yim, that the court imposed a fine of $500 on the applicant. On the question of costs, Thean J noted as follows at 1009 – 1010:

> I now turn to the question of costs. Clearly, in view of what I have decided, there should be no order as to costs before the committee. The only question is whether the appellant should be awarded costs of the appeal. I refrain from making this order, and my reason is this. The society has to discharge its duty under the Act; it has not acted improperly or vexatiously as against the appellant. The committee at their inquiry had made a finding and given their decision against the appellant, [upon] appeal by the appellant it seems to me that it is incumbent on the society, in this case at any rate, to resist the appeal and present its argument to court to assist the court in arriving at its decision. Having regard to all the circumstances, I make no order as to costs here and below.

8 Mr Yim submitted that I should take the same approach and in the absence of any finding that the Law Society had acted improperly or vexatiously I should make no order as to costs.

9 I would note first that Thean J's decision on costs in *Chew Kia Ngee* was predicated on his view that it was incumbent on the Singapore Society of Accountants in that case to resist the appeal. This, in my judgment, is sufficient to distinguish it from the case before me.

10 In the present case, it was open to the Law Society to agree to adjourn the show cause proceedings pending the court's determination on the application for the quashing order. Indeed, that was precisely what the Law Society did. Accordingly, the question of acting upon the statutory duty to prosecute the show cause proceedings properly arose only if and when the application for the quashing order was dismissed. As to the application for the quashing order, I do not consider that there was any duty or obligation upon the Law Society to *oppose* that application simply so as to present the court with an alternative position. To some degree, it is almost invariably the case in an adversarial system that the court in arriving at its decision finds the greatest assistance in a vigorously contested argument. However, that does not mean a prospective litigant is obliged to contest a position simply to facilitate this, or that he can avoid the usual consequence of being made liable for costs if he is unsuccessful in his efforts to persuade the court.

11 In my judgment, upon being presented with the application for a quashing order, it was open to the Law Society to take no active position on the application, which is what it did in *Re Singh*

Kalpanath [1992] 2 SLR 639, a case which both counsel referred to; or to oppose the application if it fairly concluded that there was a basis to do so, which is what it did in this case. Having chosen the latter course, it cannot then maintain that because it had sought to assist the court, this should exclude the possibility of its being made liable for costs. That having been said, I would like to acknowledge the considerable assistance I did receive from both counsel in the arguments I heard both in relation to the primary relief as well as the present application for costs.

12 I have referred to *Re Singh Kalpanath*. That was a case where Chan Sek Keong J (as he then was) allowed the application to quash the DC's findings but made no order as to costs. Mr Yim relied on this decision to support his position. As against the Law Society, the fact that in *Re Singh Kalpanath* it played no active part in relation to the application to quash the DC's findings clearly distinguishes that case from the present. On the other hand, the chairman of the DC did appear and contest the proceedings there but not before me. Mr Yim submitted that Chan J had decided as he did on the question of costs even in relation to the chairman of the DC because he did not wish to make an adverse costs order against a party in disciplinary proceedings, who was going no further than to discharge his proper function. With respect to Mr Yim, I am unable to accept this reading of Chan J's judgment. Indeed, it is evident from the following passage in the judgment at [114] that the basis upon which Chan J made his ruling was that the chairman had in fact succeeded on the main issue to which his defence had been directed while the applicant failed on this ground though he succeeded nonetheless in obtaining the relief he sought on a lesser ground:

> My view is this. It is true that in this case, CS participated in the proceedings and also strenuously resisted the applicant's application. The cause of this strong opposition was the applicant's move to put his case at a level at which CS was given no choice but to defend his conduct and reputation. *The applicant's main charge against CS was of a most serious nature, viz actual bias in the form of his threat, intimidation and warning to SS not to give evidence. The substance of the charge was that there was an attempt to pervert the course of justice. CS had directed his defence primarily to this charge, and to the extent that the applicant has failed to prove this charge, CS has succeeded in this defence. If the motion had been based solely on this charge, it would have been dismissed and the applicant would have been liable for costs. The applicant has succeeded on a much less serious charge. In the circumstances, each party should pay his own costs.*
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> (emphasis added)

13 In my judgment, on the facts before me, *Re Singh Kalpanath* avails Mr Bajwa more than it does Mr Yim.

14 I turn then to consider the principles and authorities. In my view, the starting point of the analysis is O 59 r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which provides:

> If the court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the court shall, subject to this order, order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

15 In my judgment, this provision makes it clear that the power to award costs is fundamentally a matter for the discretion of the court. This is a wide discretion although there is a general principle that costs follow the event so that a party who succeeds in the proceedings may ordinarily expect to be compensated for his costs. However, this may be departed from where the circumstances of the case so warrant.

16 The following pronouncement in the judgment of Goh Joon Seng J writing for the Court of Appeal in *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609 at 619 is instructive:

> The power to award costs is fundamentally and essentially a discretionary power. Even though the general principle is for the substantially successful party to receive his costs, the overriding concern of the court must be to exercise its discretion to achieve the fairest allocation of costs.

17 The court is thus to be guided by the beacon of achieving the fairest allocation of costs in the circumstances of the case at hand. In the usual case, that will result in costs being awarded to the successful party: see the decision of the Court of Appeal in *Tullio v Maoro* [1994] 2 SLR 489 at [24] where, following the decision of the English Court of Appeal in *Re Elgindata (No. 2)* [1993] 1 All ER 232, the following principles were articulated:

> The principles on which costs were to be awarded were (i) that costs were in the discretion of the court, (ii) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made, (iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (iv) that where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs. The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs …

18 Mr Yim submitted that these principles should not apply in the context of disciplinary proceedings or more generally, where the unsuccessful party was acting under some sort of duty. In so far as he relied on *Chew Kia Ngee* I have already set out my reasons for considering that case as being of limited value outside its immediate facts. Mr Yim also relied on the decision of Tay Yong Kwang JC (as he then was) in *Chua Ah Beng v The Commissioner of Labour* [2002] 4 SLR 854 ("*Chua Ah Beng*") where he said as follows at [40]:

> The plaintiff has succeeded where the construction of s 33(3) of the WCA is concerned but has failed in his application to obtain the remedies prayed for. The points raised by all parties are important and the arguments put forward have been fair. I also have no doubt that the position taken by the Commissioner for Labour in this case is taken in good faith. In the circumstances, I make no order as to costs for these proceedings.

19 In my judgment, that case also is distinguishable. The facts before Tay JC were that the plaintiff there had succeeded in some respects but failed in others *particularly in relation to securing the reliefs he sought*. In that context, the court considered it relevant that fair points had been raised and that positions had been taken in good faith and therefore held there should be no order as to costs. However, *Chua Ah Beng* does not stand for the general proposition that in the sort of proceedings that Mr Yim referred to there should be no order as to costs if both litigants act in good faith and raise only fair points.

20 In my judgment, the case of greatest assistance is the recent decision of the High Court constituted as a court of three judges in *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR 709 ("*Joyce Lim*"). The appellant, a medical practitioner faced three charges of professional misconduct. She pleaded guilty to two charges and defended the third on which, following a three-day hearing, she was acquitted. However, the Disciplinary Committee ordered the

appellant to pay all the costs of the proceedings and she appealed against that order. The Singapore Medical Council sought to defend that order on the basis that the tribunal had an unfettered discretion to order costs as it saw fit. The following passages from the judgment of the court delivered by Chao Hick Tin JA (as he then was) at [15], [17] and [18] are of relevance:

> The notion of a completely subjective or unfettered discretion is contrary to the rule of law: see *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 156, [86]. It would be inconsistent with principle, and contrary to the notion of fairness, for the DC to punish a [registered medical practitioner] with having to pay the costs of the SMC if he is exonerated from the charge preferred against him. The function of a disciplinary process is to determine wrongdoing and to punish the person, be he an employee or a member of a profession or association, for having committed the wrong. There is no justification for punishing a person with having to pay costs if he is acquitted of the charge. …
>
> Another established rule on costs is that costs should always follow the event unless the circumstances of the case warrant some other order: see *Elgindata Ltd (No 2)* [1992] 1 WLR 1207 at 1214 ("*Elgindata*"). In *Tullio v Maoro* this court set aside that part of the trial judge's order which deprived the successful appellant of half his costs. There, this court noted (at 496, [23]) that the judge below had "disregarded the principle that a successful party who had acted neither improperly nor unreasonably ought not to be deprived of any part of his costs".
>
> *We are unable to see why the above principles on costs in normal civil proceedings should not apply to the disciplinary process.*
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> (emphasis added)

21 In my judgment, although the court is vested with a wide discretion in awarding costs in civil proceedings, such discretion is to be exercised judiciously. In general, a successful party is entitled to expect that it will get its costs. A successful party that has acted improperly or unreasonably may be deprived of some or all of its costs. However, it does not follow that an unsuccessful party should be excused from paying costs simply because it has acted properly and reasonably. I also consider in keeping with the decision in *Joyce Lim* that the same principle applies in disciplinary proceedings.

22 Mr Bajwa further submitted that this was consistent with cases such as Chia Shih Ching James v Law Society of Singapore [1984-1985] SLR 53, Jeyaratnam JB v Law Society of Singapore [1988] SLR 1 and Ang Boon Keng Lawrence v Law Society of Singapore [1990] SLR 1312 where the Law Society had been held liable to pay costs following prosecutions that were ultimately unsuccessful. Mr Yim did seek to distinguish each of these cases on their facts but he accepted as a proposition that the Law Society would generally be liable for costs in the event of an unsuccessful prosecution. He submitted however that the present case was different because the quashing order was made on grounds of a procedural failing rather than on the merits. In my judgment, this is not a valid distinction. It is true that the ultimate merits of the complaint were not before me. However, that can only mean that the merits of the complaint are irrelevant to how I should approach the exercise of my discretion on costs.

23 The issue before me was whether the findings of the DC should be quashed by reason of the applicant's complaints as to process. In the context of that application, I was not to consider the merits of the complaint and I did not. However, I cannot see any principled basis upon which that can be relied upon to justify an order denying the applicant the costs of the proceedings.

24 In *Schaftenaar v Samuels* (1975) 11 SASR 66, Wells J considered a number of authorities

concerning the exercise of the judicial discretion on costs albeit in a slightly different context. He then set out a number of principles at 274-275 including the following which I consider are of relevance in the present case:

> The discretion must be judicially exercised; that is, the court cannot act arbitrarily or upon the ground of some misconduct wholly unconnected with the prosecution, or of some prejudice. …
>
> The court may act upon any facts connected with, or leading up to, the prosecution which have been satisfactorily proved or which have been observed during the progress of the case. …
>
> In the exercise of the discretion, there is no question of onus on one party or the other. A successful party has, in the absence of special circumstances, a reasonable expectation of obtaining an order for payment of costs by the complainant; but he has no right to costs unless and until the court awards them to him, and the court … has 'absolute and unfettered discretion to award or not to award them'. The court should not, however, exercise the discretion against the successful party 'except for some reason connected with the case' (ibid., page 812).

25 In my judgment, this is consistent with the terms of O 59 r 3(2) of the Rules of Court which specifically contemplate that the court may deviate from the general expectation that costs follow the event when it appears appropriate "in the circumstances of the case". It follows that the fact that the merits of the complaint have yet to be determined cannot properly be called in aid to deny the applicant his costs in the present proceedings because that has nothing to do with the merits of the matter before me.

26 This is also consistent with a further aspect of the judgment of Chao Hick Tin JA in *Joyce Lim* where, following the Australian case of *Beard v Wilde* (1985) 41 SASR 226, he noted at [25] that it was not open to the Disciplinary Committee of the Singapore Medical Council in making its decision on costs to take into account any "errors of judgment" on the part of the applicant that did not amount to unprofessional conduct. As noted by Matheson J in *Fung & Wilde* (1986) 41 SASR 232 at 236, an order that a successful party pay his own costs is properly to be characterised as an order for costs that is adverse to him. In my judgment, it is simply not appropriate to penalise a litigant in disciplinary proceedings where, as here, he has not yet been convicted of any professional misconduct and to do so by way of an adverse costs order is wholly without basis.

27 After the arguments in this case had concluded, pursuant to leave I had given, Mr Yim drew my attention to the decision of the House of Lords in *Swain v Law Society of England & Wales* [1983] AC 598 ("*Swain*"). That was a case concerning certain aspects of a professional indemnity scheme established pursuant to the English Solicitors Act. Under the scheme, the Society received from the brokers a percentage of the commissions which the brokers received from the insurers. The applicant brought proceedings for a determination as to whether the Society was accountable to its members in respect of the commissions it received. The Court of Appeal found for the applicant but this was reversed on appeal by the House of Lords. However, no costs were ordered against the applicant even though he lost the appeal. The lack of any reasoning whatsoever that explains the decision of the House of Lords on the question of costs somewhat weakens its force as a precedent but Mr Yim submitted that some assistance could be derived from the following passage of the judgment of Lord Brightman at 623:

> My Lords, I venture to emphasise once more that the respondent, Mr Swain, is not arguing this case before your Lordships' House at his own volition. I doubt whether he is remotely interested in recovering for himself a few pounds of premium. His challenge was to the validity of the scheme as a whole, because he would rather fend for himself in the insurance market than have

> the work done for him. With that I sympathise. Mr Swain has only been represented before your Lordships because The Law Society desired the decision of your Lordships' House. I venture these observations only because the arguments of unconscionable conduct on the part of The Law Society ought not, I think, to be interpreted as a reflection of Mr Swain's sentiments towards his professional body.

28 Mr Yim submitted that this passage supported his submission that in the final analysis, the Law Society should not be made to bear the costs if it was in fact seeking to assist the court. He submitted that the Law Society should only be made to pay costs to the applicant if it could be shown that it had acted with some fault. In my judgment, this is not the right perspective from which to approach the issue.

29 In the first place, as I have already noted, no reasons were in fact offered by the House of Lords in support of its decision on costs. The passage from Lord Brightman's judgment which was relied on by Mr Yim seems to have been directed more at making it clear that the remarks of the solicitor in question directed against the Society were to be seen in a proper context. Secondly, the function of a costs award is not primarily to punish an unsuccessful litigant but to provide a successful litigant with at least some measure of recovery in respect of his costs. Hence, the question in general terms is whether there is some reason why the successful party should be deprived of his costs. The cases hold that where that litigant has acted improperly or unreasonably in the conduct of the matter, he may, at the discretion of the court, be denied such recovery notwithstanding his success. The mere fact that the unsuccessful party has raised only fair arguments or has acted reasonably would not in my view suffice to displace the general rule that the successful party ought nonetheless to recover his costs and this is none the less so just because this arises in the context of professional disciplinary proceedings. The court ultimately has a wide discretion in dealing with this but I consider that the present case is not one where the circumstances warrant a departure from the general rule.

30 In the premises, I order that the applicant is entitled to his costs in the action. These are to be taxed if not agreed and paid by the Law Society.