

plaintiff until after some time had passed. Instead, Newaz kept demanding payment from the plaintiff on the pretext that the agreement was still on foot and that the vendor had decided to increase the purchase price. Overall, the plaintiff paid a total of \$37,000 to Newaz at the Office of Iqbal Khan & Associates. She had filed the claim in order to recover the \$37,000 which she had paid Newaz.

3. The one-day trial of this case was conducted on 31 July 2017.

ORDERS OF THE HIGH COURT

4. On 03 April 2018, Mr. Justice Ajmeer entered judgement in favour of the plaintiff. Ajmeer J then ordered as follows:
 1. the defendants jointly and severally refund the sum of \$37,000-00 to the plaintiff.
 2. the defendants jointly and severally pay general damages in the sum of \$20,000-00 and punitive damages in the sum of \$30,000-00to the plaintiff.
 3. the defendants jointly and severally pay costs on an indemnity (full solicitor-client) basis to be assessed before the Master if not agreed.

PAYMENT OF \$87,000 INTO COURT AS CONDITION FOR STAY

5. On 30 November 2018, Iqbal Khan deposited the sum of \$87,000 – 00 into the Judicial Trust Fund Account, Receipt No. 357187 as a condition of stay being granted pending appeal. I take special note that Mr. Newaz did not contribute towards this payment.

APPEAL TO FIJI COURT OF APPEAL

6. Mr. Iqbal Khan then appealed the above judgment to the Fiji Court of Appeal. In its judgment dated 29 November 2019, the Fiji Court of Appeal ruled as follows:
 1. Appeal is partly allowed.
 2. Defendants to jointly and severally refund the sum of \$37,000 – 00 to the plaintiff/respondent
 3. First defendant to pay FJ\$10,000 as general damages to the plaintiff
 4. 2nd defendant to pay general damages in the sum of \$20,000 – 00 and punitive damages in the sum of \$30,000 – 00 i.e. a total of \$50,000 – 00 to the plaintiff.
 5. The defendants to jointly and severally pay costs of this court in a sum of \$5,000 – 00 and of the High Court.

SUPREME COURT

7. The defendants further appealed the Fiji Court of Appeal’s Ruling to the Supreme Court. In its judgment dated 28 October 2022, the Supreme Court held as follows:

1. Leave to the Petitioner to appeal, limited to ground 21 in the Petition for leave to appeal
2. The award of punitive damages against the Petitioner be set aside.
3. Apart from (2), the appeal be dismissed,
4. The Petitioner must pay the Respondent the sum of \$5,000 towards her costs of the appeal.

MASTER

8. Following the Supreme Court's Judgment, the matter was referred back to the Master. On 30 November 2022, the Master ordered as follows:

1. the Registry to release the sum of \$67,000 – 00 from the deposited amount of \$87,000 – 00 to the bank account of the Plaintiff's Solicitor.
2. No need of assessment of indemnity costs;
3. Balance of \$20,000 – 00 to be released to the Defendants.
4. Balance of \$20,000 – 00 to be released to the Defendants.

APPEAL OF MASTER'S DECISION

9. On 01 December 2022, Messrs Iqbal Khan & Associates filed an *ex-parte* Notice of Motion for Stay of Execution Pending Appeal of the Master's decision. The application is supported by an affidavit of Aloesi Degei sworn on 01 December 2022.

10. The affidavit in support annexes the proposed Notice of Appeal which sets out the following grounds of appeal:

- 1) The Learned Master erred in law and in fact in releasing a sum of \$67,000.00 from the deposited amount of \$87,000.00 paid by the 1st Defendant to the Bank account of the Plaintiff's Solicitor without taking adequate and/or proper consideration the decisions of The Fiji Court of Appeal dated 29th November, 2019 and The Supreme Court of Fiji dated 28th October, 2022 and as such there has been a substantial miscarriage of justice.
- 2) The Learned Master erred in law and in fact in not giving full reasons as to why a sum of \$67,000.00 was released to the Plaintiff's solicitor and as such there has been a substantial miscarriage of justice.
- 3) The Learned Master erred in law and in fact when he made the said ruling when the matter was set down only for mention to check for compliance of documents by both parties and not for hearing of the matter instead the Learned Master gave the said ruling in breach of the rules of natural justice and as such there has been a substantial miscarriage of justice.
- 4) The Learned Master erred in law and in fact in not exercising his discretion judicially to grant an adjournment to the 1st Appellants Counsel for the 1st Appellant to appear personally in his matter on the following day, 1st December, 2022 to

address the Court as to why the Learned Master should not release the sum of \$67,000.00 and as such there has been a substantial miscarriage of justice.

- 5) The Learned Master erred in law and in fact in ordering that the balance sum of \$20,000.00 be released to the Defendants when there was evidence before the Court that only the 1st Defendant had deposited the sum of \$87,000.00 and no monies were paid in Court by the 2nd Defendant and as such there was a substantial miscarriage of justice.
- 6) The ruling delivered by the Learned Master in all the circumstances of the case was unfair and/or unjust against the 1st Appellant and in the interest of justice.
- 7) The Appellant reserved the right to add and file further grounds of Appeal within (14) days from the date of the hearing of the Appeal on receiving the Court Record.

11. On 02 December 2022, I did grant an interim stay of the Master’s Ruling until further orders and made directions for the service of all documents by close of business on 07 December 2022. I then adjourned the matter to Friday 09 December 2022.

12. On 05 December 2022, Messrs Fazilat Shah Legal filed a Notice and Grounds of Appeal. On 07 December 2022, they filed a Notice of Motion seeking the following Orders:

- (i) That the 1st Defendant whether by himself or his servants or agents or howsoever be reinstated from uplifting the sum of \$20,000.00 (Twenty Thousand Dollars) or any other sum from the High Court of Fiji until the determination of the Plaintiffs Appeal.
- (ii) That the Deputy Registrar of the High Court at Lautoka be directed to withhold payment of the sum of \$20,000.00 (Twenty Thousand Dollars) or any other sum to the 1st Respondent /Original 1st Defendant until determination of the Appellant / Original Plaintiff’s Appeal before a Judge of the High Court.
- (iii) That the 1st Defendant / 1st Original Respondent do pay cost of this appeal.

13. The above Motion is supported by an affidavit of Shaveena Kumari sworn on 01 December 2022. I set out below the grounds of appeal proffered by Messrs Fazilat Shah Legal:

1. *The Learned Master erred in law and in fact in miscalculating the total amount to be paid out to the Appellant in the sum of \$67,000.000 (SIXTY-SEVEN THOUSAND DOLLARS ONLY) where in fact the total amount payable to the Appellant was \$115,431.05 (ONE HUNDRED AND FIFTEEN THOUSAND FOUR HUNDRED THIRTY-ONE DOLLARS AND FIVE CENTS ONLY) as appears from the tabulation contained herein below.:*

LIABILITY OF IFTIKAR IQBAL AHMED KHAN

$2018 - 2019 \quad 4\% \text{ of } \$47,000 = \$1,880.00$ $\$47,000 + \$1,880.00$ $= \underline{\underline{\$48,880.00}}$	$2019-2020 \quad 4\% \text{ of } \$48,880.00 = \$1,955.20$ $\$48,880.00 + \$1,955.20$ $= \underline{\underline{\$50,835.20}}$
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2020 – 2021	4% of \$50,835 = \$2,033.40 \$50,835.00 + \$2,033.40 = \$52,868.40	2021 – 2022	4% of \$52,868.40 = \$2,114.75 \$52,868.40 + \$2,114.75 = \$54,983.15
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LIABILITY OF ESTATE OF SHAH NAWAZ KHAN

2018 – 2019	4% of \$50,000 = \$2,000.00 \$50,000 + \$2,000.00 = \$52,000.00	2019–2020	4% of \$52,000.00 = \$2,080.00 \$52,000.00 + \$2,080.00 = \$54,080.00
2020 – 2021	4% of \$54,080.00 = \$2,163.20 \$54,080.00 + \$2,163.20 = \$56,243.20	2021 – 2022	4% of \$56,243.20 = \$2,249.70 \$56,243.20 + \$2,249.70 = \$58,492.90

2. *The Learned Master erred in law and in fact by failing to consider the tabulations preferred by the Appellants Counsel.*
3. *The Learned Master erred the law and in fact by ordering the release of the sum of \$20,000 (**TWENTY THOUSAND DOLLARS ONLY**) deposited in Court to the 1st Respondent was not entitled to the said sum.*
4. *The Learned Master erred in law and in fact by failing to realize that notwithstanding the deposit of the sum of \$87,000.00 (**EIGHTY-SEVEN THOUSAND DOLLARS ONLY**) the 2nd Respondent was still short by a sum of \$28,476.05 (**TWENTY EIGHT THOUSAND, FOUR HUNDRED SEVENTY SIX DOLLARS AND FIVE CENTS ONLY**).*
5. *The Learned Master erred in law and in fact by misreading the Orders of the Court of Appeal and the Supreme Court and in the process miscalculated the total amount to be paid to the Appellant.*

Appeal Against Master’s Dismissal of the Application for Assessment of Indemnity Cost

6. *The Learned Master erred in law and in fact in his summary dismissal of the Appellants Application for assessment of indemnity costs without giving the Appellant an opportunity to be heard through her Counsel.*
7. *The Learned Master erred in law and in fact by completely misreading the orders of the Court of Appeal as to costs.*
8. *The Learned Master erred in law and in fact by not reading the Court of Appeal Judgment to confirm that there was no appeal against the indemnity cost order.*
9. *The Learned Master’s summary dismissal of the indemnity costs application has caused substantial prejudice to the Appellant.*
10. *The Learned Master erred in law and in fact by failing to properly interpret the cost order of the Court of Appeal.*
11. *The Appellant reserves the right to argue further and or revised Grounds of Appeal upon receipt of the record of the proceedings.*

14. On 11 January 2023, Messrs Fazilat Shah Legal filed a Summons for Directions of Appeal from Master pursuant to Order 59 Rule 17 (2) of the High Court Rules 1988. After several adjournments, the appeals were finally heard on 21 September 2023. The main argument raised by Messrs Fazilat Shah Legal is that, at the time the matter was placed before the

Master from the Supreme Court, there were two applications pending before the Master. The first was a Summons for the Payment Out of the full \$87,000 – 00. The second was a Summons for Assessment of Indemnity Costs. Messrs Fazilat Shah Legal further submits as follows in terms of the calculation of the award due:

	Principal Sum	Add 4% p.a. post judgement interest	
Award Against Iqbal Khan	\$37,000 - 00	\$45,016.15	
	Punitive Damages	General Damages	Total plus 4% p.a. post judgement interest
Award Against Mustaffa Newaz Khan	\$20,000 - 00	\$30,000 - 00	\$60,822.90
TOTAL DUE	\$105,839.05		

15. In addition to the above, there was still indemnity costs to be assessed, according to Messrs Fazilat Shah Legal. Iqbal Khan submits that he is only required to pay \$10,000 and not \$67,000.

COMMENTS

16. Below I tabulate what I gather from the Orders of the three Courts:

	Principal Award	General Damages	Punitive Damages	Costs
High Court	\$37k (jointly and severally)	Def's jointly & severally \$20k	Def's jointly & severally \$30k	Def's jointly & severally - full indemnity
Fiji Court of Appeal	\$37k (jointly and severally)	<ul style="list-style-type: none"> Iqbal Khan FJ\$10k Newaz \$20k 	<ul style="list-style-type: none"> N/A for Iqbal Khan Newaz \$30k 	Def's jointly & severally - costs of this court in sum of \$5k and of High Court.
Supreme Court	Not disturbed	No mention.	Award of punitive damages against petitioner set aside	Petitioner to pay Resp \$5k towards her costs of the appeal.

17. As both counsel are aware, the principle of joint and several liability means firstly that the defendants who are named will share in the responsibility for settling the award and that the plaintiff may recover from all or any one or two of them a part or the whole sum because each named defendant is still independently liable for the full sum.

18. With regards to post judgement interest, the law in Fiji fixes this at the rate of 4% (see Pathik J's discussion of this in **Fa v Rabi Island Council of Leaders** [2002] FJHC 250; HBC0520j.1993s (16 July 2002).

CALCULATION

19. From the above, it is clear that Iqbal Khan is liable for:
- (i) \$37,000* for which he is liable jointly and severally with the estate of Newaz.
 - (ii) \$10,000 for general damages as imposed by the FCA and which was left undisturbed by the Supreme Court.
 - (iii) \$5,000* costs for Court of Appeal costs (jointly and severally)
 - (iv) \$5,000 costs for Supreme Court costs.
 - (v) 4% post judgment interest from date of judgment to date of payment on \$37,000 and the \$10,000 general damages.
20. Notably, the Supreme Court had set aside the award for punitive damages. This means that if Iqbal Khan settles the \$37,000; and the \$5,000 costs imposed by the Fiji Court of Appeal; and the 4% post judgment interest on the \$37,000, Newaz will only liable for the following:
- (i) \$20,000 in general damages imposed by the FCA and left undisturbed by the Supreme Court.
 - (ii) 4% post judgment interest on \$20,000.
21. In my view, it was not the intention of the appellate court for Iqbal Khan to be vicariously liable for the \$20,000 noted above. The Fiji Court of Appeal had imposed \$10,000 general damages against Iqbal Khan and \$20,000 general damages against Newaz. Since Iqbal Khan was the party who paid the \$87,000 into Court, then the amount which may be deducted from the \$87,000 would be any sum for which he is liable jointly and severally with Newaz and also any sum for which he is liable solely. This includes the indemnity costs granted by the High Court which is to be taxed if not agreed. The indemnity costs granted by the High Court was left undisturbed by both the Fiji Court of Appeal and the Supreme Court. This means that the \$5,000 costs awarded in the Fiji Court of Appeal and also in the Supreme Court are only for costs incurred in proceedings in those Courts. They are not meant to supersede the indemnity costs awarded by Ajmeer J.
22. I am fortified in that view by the fact that neither Iqbal Khan nor Newaz did ever raise a ground of appeal on the indemnity costs. There were altogether a total of twenty seven

(27) grounds of appeal placed before the Fiji Court of appeal. While grounds No. 22 and 23 dealt with the award for punitive damages and general damages respectively, there was no Ground proffered to challenge the award of indemnity costs. Accordingly, the High Court's award of indemnity costs must stand.

FINDINGS

23. Iqbal Khan is liable for the following:

\$87,000		
Less	\$37,000 - 00	
Less	\$10,000 - 00	General Damages
Less	\$ 5,000 - 00	FCA Costs
Less	\$ 5,000 - 00	FSC Costs
Less	4% post judgement interest on \$47,000 - 00	On \$47,000 (\$37,000 plus \$10,000)
Less	Indemnity costs	(at High Court) to be taxed if not agreed

24. Any left over after the above deductions must not be applied towards the reduction of Newaz's liability of \$20,000 in General Damages. Rather, any leftover is to be paid back to Iqbal Khan & Associates.

25. Subject to paragraph 20 above, Newaz is liable for the following:

- (i) **\$20,000 in general damages imposed by the FCA and left undisturbed by the Supreme Court**
- (ii) **4% post judgement interest on \$20,000 (General Damages imposed by FCA).**

ORDERS

26. On the above basis, I set aside the Master's Orders of and replace them with the following Orders:

1. The Registry is not to release the sum of \$87,000 until further Orders.
2. The Plaintiff's application for assessment of indemnity costs is to be restored and re-issued with a returnable date before the Master.
3. Deductions against the \$87,000 are to be made in accordance with the scheme in paragraph 23 above, after indemnity costs are assessed if not agreed.
4. Parties to bear their own costs.

5. Parties at liberty to apply.
6. The plaintiff is at liberty to pursue enforcement against the estate of Newaz for the \$20,000 general damages plus 4% post judgement interest.



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Anare Tuilevuka
JUDGE

30 April 2024