

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 115 of 2021**

**B E T W E E N**

**BAHAMAS POWER & LIGHT COMPANY LIMITED**

**Intended Appellant**

**AND**

**ERVIN DEAN**

**Intended Respondent**

**BEFORE:**           **The Honourable Sir Michael Barnett, P**  
                          **The Honourable Mr. Justice Isaacs, JA**  
                          **The Honourable Madam Justice Bethell, JA**

**APPEARANCES:**   **Mr. Dywan Rodgers, Counsel for the Appellant**  
                          **Mr. Sidney Cambridge, Counsel for the Respondent**

**DATES:**            **18 May 2022; 16 June 2022**

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**Civil Appeal – Employment Law – Section 24(5) of the Court of Appeal Rules - Costs**

On the 18 May, 2022 this Court delivered its judgment in this matter and reserved our decision on the costs to be awarded on the appeal of the judgment. The Court invited the parties to make written submissions as to the cost order to be issued by this Court within one week of the pronouncement of its judgment, otherwise the Court would not make any order as to costs as the intended appellant was only partially successful in its appeal. The intended appellant provided its submissions on costs within the stipulated period of time, to date no submission were received by the intended respondent. The Court reviewed the written submissions submitted by the intended appellant. This is the decision on the costs of the appeal.

**Held:** The intended appellant is entitled to eighty per cent (80%) of the costs of the appeal on the basis of their partial success on the true issue between the parties, to wit, quantum; such costs to be taxed if not otherwise agreed.

*Douglas Ngumi v The Honourable Carl Bethel, et al* SCCivApp. No. 6 of 2021 considered  
*Taylor v Burton and another* [2014] All ER (D) 42 considered

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## J U D G M E N T

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### **Judgment delivered by the Honourable Mr. Justice Jon Isaacs, JA:**

1. On 18 May 2022, we granted leave to extend the time for appealing which enabled the appellant to challenge the trial judge's order that it pay the respondent for seventy-four (74) months as the appropriate sum he should receive due to the failure of the appellant to compensate him adequately upon terminating his contract of employment. Concurrent to our grant of leave to appeal out of time, we determined that the appellant's submissions in respect of the 74 months' pay should succeed as we found that the trial judge had overcompensated the respondent. However, we did not find that the Judge erred when she decided to make an award to the intended respondent over and above the minimum payment mandated by section 29 of the Employment Act.
2. Consequent upon our findings, we quashed the award of 74 months' pay and substituted an award of eighteen (18) months' pay as reasonable compensation in lieu of notice.
3. We invited the parties to provide submissions on who if anyone ought to be ordered to pay the costs of the appeal; but that if no submissions were received one week after the delivery of our judgment, there would be no order as to costs. Only the appellant provided its submissions on costs within the stipulated period of time. Thus, this decision is predicated solely on those submissions.
4. Mr. Rodgers submitted, inter alia, that we should order that the costs of the appeal be the appellant's because the only real issue embodied in the case was one of quantum, to wit, the respondent made a wholly unreasonable claim for 74 months' pay and that meant that the appellant "had to" defend it. He argued that the sole issue for the Court's consideration - as it should have been in the court below - was that of quantum.
5. He contended that the appellant ultimately succeeded on the true issue for determination in the case and alluded to that portion of paragraph 84 of our decision where we said:

**"In my view, the amount the Judge awarded is so excessive that an appellate tribunal would be justified in interfering with her assessment."**
6. There is no gainsaying that the appellant succeeded in attacking the award made by the trial judge as that sum was reduced significantly by us. Still, it was due to the appellant's stubborn reliance on section 29 of the Employment Act, probably played as large a part in precipitating the respondent's action as much as they claim that the respondent's exaggerated claim for compensation necessitated that they mount a defence. If the respondent was being unrealistic in his claim, the appellant was no less so in their offer of one (1) month's pay in lieu of notice.

7. The matter of costs is addressed in Rule 24(5) of the Court of Appeal Rules; and provides that:

**"(5) The court may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."**

8. The award of costs is a discretionary power of the Court; and it is expected that the discretion will be exercised judicially.

9. The Court, differently constituted, in **Douglas Ngumi v The Honourable Carl Bethel, et al** SCCivApp. No. 6 of 2021 had allowed an appeal against an award of damages but had not increased it to the amount the appellant had sought, said at paragraph 10:

**"10. I begin with the observation of Lord Lloyd in Bolton Metropolitan District Council and others v Secretary of State for the Environment [Practice Note] [1995] 1 WLR 1176:**

**"...As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the Court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule..."**

10. The Court went on to say, inter alia, at paragraph 13:

**"13. In Scherer and another v Counting Instruments Ltd and another [1986] 2 All ER 529 Buckley, LJ said:**

**"...we derive the following propositions. (1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably either brought another party before the Court or given another party cause to have recourse to the Court to obtain his rights is required to recompense that other party in costs." [Emphasis added]**

11. In **Taylor v Burton and another** [2014] All ER (D) 42, a case referred to by Barnett, P in **Ngumi** (Supra), the English Court of Appeal observed as follows:

**"With respect to the first ground of appeal, the defendant had been the successful party as regarded that issue. However, the claimants had been the successful parties in respect of the other four grounds. Accordingly, both sides could claim to have achieved a material degree of success in the appeal. It was unrealistic to identify who between them had been overall the successful party. The reality was that the outcome of the appeal was that the honours had broadly been even. That pointed to making no order as to costs. No order as to the costs of the appeal would be made."**

12. In the present appeal engaging our attention, the appellant successfully challenged the 74 months' pay but the Court did not reduce the sum to the amount for which it contended. This led to the Court's holding that the appellant was only partially successful in its appeal.
13. In my view, had the appellant approached the respondent's claim with a counteroffer commensurate with the respondent's position under Article 14(2) of the Industrial Agreement, legal action may have been forestalled. Still, I am satisfied that in the circumstances of this case, the appellant is entitled to eighty (80) per cent of the costs of the appeal on the basis of their partial success on the true issue between the parties, to wit, quantum.
14. I would not interfere with the trial judge's order as to costs in the court below.

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**The Honourable Mr. Justice Isaacs, JA**

15. I agree.

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**The Honourable Sir Michael Barnett, P**

16. I agree, also.

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**The Honourable Madam Justice Bethell, JA**