

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: Confiant v. Confiant, 2016 NSSC 322

Date: 2016-11--23

Docket: *SFSND* **Court No.:** 1206-006852

Registry: Sydney

Between:

David Confiant

Applicant

v.

Dorothy Confiant

Respondent

Revised Decision: The text of the decision has been corrected according to the attached erratum.

Judge: The Honourable Justice Lee Anne MacLeod-Archer

Heard: October 21, 2016

Oral Decision: October 21, 2016

Costs Submissions: Received from Applicant-
November 3, 2016
November 8, 2016

Received from Respondent-
November 21, 2016

Counsel: Elaine Gibney, Counsel for David Confiant
Dorothy Confiant, Self-Represented

By the Court:

[1] This is a costs decision arising from a divorce hearing which was held on October 21, 2016. The Petitioner was represented by counsel, while the Respondent is self-represented.

[2] The Court rendered an oral decision on October 21, 2016, and invited written submissions on costs. Counsel for Mr. Confiant filed submissions on November 3, 2016, with corrected figures supplied on November 8, 2016. Ms. Confiant filed written submissions on November 21, 2016.

[3] Mr. Confiant has brought a formal offer to the attention of the Court. The formal offer was communicated to Ms. Confiant along with a letter outlining the costs implications of not accepting the offer on May 6, 2016. Counsel laid out several recent decisions of this Court dealing with costs after settlement offers were made, and invited Ms. Confiant to obtain advice from legal counsel of her choice.

[4] The offer to settle spelled out the settlement offer in very specific terms. In particular, it dealt with the amount of spousal support, which was proposed at a lower figure than was awarded by the Court. In addition, the offer included a

waiver of retro-active spousal support. The Court's decision included an award for retro-active spousal support to the date of the commencement of the proceedings.

[5] There were also several ancillary issues addressed in the offer, all of which were awarded by the Court.

[6] Counsel relies upon **Civil Procedure Rule** 77.02, 77.07, 10.03, 10.09 and the case law arising. She cites and relies on the decision of Justice Jollimore in *Hamilton v. Hamilton*, 2010 NSSC 381, which referenced Justice MacDonald's decision in *Fermin v. Yang*, 2009 NSSC 222, where the following principles were laid out:

1. Costs are in the discretion of the Court.
2. A successful party is generally entitled to a cost award.
3. A decision not to award costs must be for "very good reason" and be based on principle.
4. Deference to the best interests of a child, misconduct, oppressive and vexatious conduct, misuse of the court's time, unnecessarily increasing costs to a party, and failure to disclose information may justify a decision not to award costs to an otherwise successful party or to reduce a cost award.

5. The amount of a party and party cost award should “represent a substantial contribution toward the parties’ [sic – party’s] reasonable expenses in presenting or defending the proceeding but should not amount to a complete indemnity”.

6. The ability of a party to pay a costs award is a factor that can be considered, but as noted by Judge Dyer in *M.C.Q. [sic M.Q.C.] v. P.L.T.*, 2005 NSFC 27 (Can LII), 2005 NSFC 27:

“Courts are also mindful that some litigants may consciously drag out court cases at little or no actual cost to themselves (because of public or third-party funding) but at a large expense to others who must “pay their own way”. In such cases, fairness may dictate that the successful party’s recovery of costs not be thwarted by later pleas of inability to pay. [See *Muir v. Lipon*, 2004 BCSC 65 (CanLII)].”

7. The tariff of costs and fees is the first guide used by the Court in determining the appropriate quantum of the cost award.

8. In the first analysis the “amount involved” required for the application of the tariffs and for the general consideration of quantum is the dollar amount awarded to the successful party at trial. If the trial did not involve a money amount other factors apply. The nature of matrimonial proceedings may complicate or preclude the determination of the “amount involved”.

9. When determining the “amount involved” proves difficult or impossible the court may use a “rule of thumb” by equating each day of trial to an amount of \$20,000 in order to determine the “amount involved” .
10. If the award determined by the tariff does not represent a substantial contribution towards the parties’ reasonable expenses “it is preferable not to increase artificially the “amount involved”, but rather, to award a lump sum”. However, departure from the tariff should be infrequent.
11. In determining what are “reasonable expenses”, the fees billed to a successful party may be considered but this is only one factor among many to be reviewed.
12. When offers to settle have been exchanged, consider the provisions of the civil procedure rules in relation to offers and also examine the reasonableness of the offer compared to the parties position at trial and the ultimate decision of the court.

[7] Mr. Confiant’s counsel also cites and relies upon the Court of Appeal decision in *Armoyan v. Armoyan*, 2013 NSCA 136, which affirmed a number of these principles.

[8] In *Armoyan v. Armoyan*, *supra*, the court held that where there is a formal offer which is not accepted, but is favorable to the successful party, that party should receive 66% of their legal fees and disbursements incurred before the settlement offer is received, along with 80% of the fees and disbursements incurred after the settlement offer.

[9] Mr. Confiant incurred legal fees, including HST and disbursements of \$5,794.74 prior to the settlement offer being communicated. Thereafter, he incurred fees, taxes and disbursements of \$6,663.55. He seeks an award of 66% of his pre-offer fees, amounting to \$3,824.60. In addition, he seeks 80% of his fees and disbursements post-offer in the amount of \$5,330.84, for a total cost award of \$9,155.44.

[10] Counsel notes that there were a number of court appearances required to advance her client's case. There was a Date Assignment Conference, a Settlement Conference, two Pre-Trial Conferences and a one day Trial.

[11] Ms. Confiant suggests it is "unbelievable" and "shocking" that Mr. Confiant would seek costs in the range suggested for a trial lasting "little more than three hours of actual court time". Although Ms. Confiant seems to recognize there were other court appearances required, she characterizes these as short appearances of

approximately five minutes each. She seems not to appreciate that preparation of documents, preparation for trial, and settlement negotiations added significant time to Mr. Confiant's bill.

[12] In her submissions, Ms. Confiant says she communicated an offer to Mr. Confiant in writing before the trial, to which she received no response. She did not attach a copy of the offer for the court's consideration. However, by her description, it appears that her offer was not as favorable as the court's decision.

[13] Ms. Confiant further states in her submissions that by going to trial, she hoped the court would see things from her "point of view". She wanted her "day in court" so that she could explain her position. Ms. Confiant is entitled to be heard in court, but where she was largely unsuccessful in advancing her position, she must accept the consequences of forcing Mr. Confiant to respond. He incurred legal costs associated with this case which she did not, as a self-represented litigant.

[14] Ms. Confiant asks the court not to award costs, given her financial situation. She attaches calculations purporting to show the amount of net disposable income left to her, after paying spousal support and her other bills. Her calculations do not reflect the reduced income tax she will pay as a result of the deductibility of the

spousal support award. And fairness dictates that a claim of impecuniosity should not thwart Mr. Confiant's recovery of costs (*Muir v. Lipon, supra*).

[15] I am satisfied based on my review of the case law and Rule 77 (Rule 10 does not apply to these proceedings per Rule 59.39(7)), as well as the briefs and Mr. Confiant's legal bills attached to his brief, that Mr. Confiant should receive costs. He was the successful party. The amount claimed by Mr. Confiant would constitute a reasonable, but substantial contribution to his actual legal fees and disbursements. It is not "excessive" as suggested by Ms. Confiant. Had Ms. Confiant accepted the offer advanced by Mr. Confiant, his legal expenses would have been significantly less, and she would have a lower monthly spousal support payment.

[16] Mr. Confiant was forced to pursue the matter through a contested trial and incurred legal expenses which Ms. Confiant did not incur. She should have been aware of the risk after reviewing the cases attached to Mr. Confiant's offer, and she should have obtained legal advice on the implication of that offer, as suggested by Ms. Gibney. She had her day in court, but she was unsuccessful in advancing her position.

[17] In all of the circumstances of this case, I award costs to Mr. Confiant in the amount of \$9,155.44. That award shall be set off against any equity in the matrimonial home to which Ms. Confiant may be entitled. She will pay the net amount owing in monthly increments of \$50.00 per month, until the balance is paid in full.

MacLeod-Archer, J.

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Dorothy Confiant, Self-Represented

Erratum: Paragraph 6 is changed as follows:

Counsel relies upon **Civil Procedure Rule**

77.02...

Paragraph 12 is changed as follows:

In her submissions, Ms. Confiant says she communicated an offer to Mr. Confiant in writing before the trial, to which she received no response. She did not attach a copy of the offer for the court's consideration. However, by her description, it appears that her offer was not as favorable as the court's decision.

Paragraph 15 is changed as follows:

I am satisfied based on my review of the case law and Rule 77 (Rule 10 does not apply to these proceedings per Rule 59.39(7)), as well as the briefs and Mr. Confiant's legal bills attached to his brief, that Mr. Confiant should receive costs. He was the successful party. The amount claimed by Mr. Confiant would constitute a reasonable, but substantial contribution to his actual legal fees and disbursements. It is not "excessive" as suggested by Ms. Confiant. Had Ms. Confiant accepted the offer advanced by Mr. Confiant, his legal expenses would have been significantly less, and she would have a lower monthly spousal support payment.