

*Kunoth-Monks v Healy & Anor [No 2] [2014] NTSC 1*

PARTIES: KUNOTH-MONKS, Rosalie  
v  
HEALY, Rebecca  
and  
AUSTRALIAN BROADCASTING  
CORPORATION

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING ORIGINAL  
JURISDICTION

FILE NO: 10 of 2012 (21227719)

DELIVERED: 7 January 2014

HEARING DATES: On the Papers

JUDGMENT OF: MILDREN AJ

**CATCHWORDS:**

COSTS – Indemnity costs – Libel action – Offer made at settlement conference – Offer included apology – Need to value apology – General principles discussed – Application for indemnity costs refused.

*Defamation Act* (NT) s 37  
*Supreme Court Rules* (NT) OO 48.12(12), 26.02(2), 26.02(3), 26.11(1), 26.11(1)(a)

*Assaf v Skalkos* [2000] NSWSC 935, applied.

**REPRESENTATION:**

*Counsel:*

Plaintiff: T Molomby SC, S O'Connell and  
L Goodchild

First and Second Defendants: A Harris QC and H Bennett

*Solicitors:*

Plaintiff: O'Brien Solicitors  
First Defendant: Gardiner & Associates  
Second Defendant: CridlandsMB Lawyers

Judgment category classification: B

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT ALICE SPRINGS

*Kunoth-Monks v Healy & Anor [No 2] [2014] NTSC 1*  
No 10 of 2012 (21227719)

BETWEEN:

**ROSALIE KUNOTH-MONKS**  
Plaintiff

AND:

**REBECCA HEALY**  
First Defendant

AND:

**AUSTRALIAN BROADCASTING  
CORPORATION**  
Second Defendant

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 7 January 2014)

- [1] On 13 November 2013 I entered judgment for the plaintiff against both defendants for the sum of \$133,972.60, comprised of \$125,000 for general damages and interest thereon making up the balance. I reserved the question of costs.
- [2] The parties have since delivered written submissions. There is no dispute that, subject to an award of costs made in favour of the defendants by the Master by order dated 23 June 2013, the plaintiff is entitled to her costs of

the action on the standard basis. However, the plaintiff seeks also an order that the defendants pay her indemnity costs from 2 July 2013 based on a final offer made at a settlement conference held on that day, relying on O 48.12(12) of the *Supreme Court Rules*. No submission was made that the plaintiff was entitled to be awarded indemnity costs because the provisions of s 37 of the *Defamation Act* (NT) had been engaged.

- [3] Order 48.12(12) provides that an offer of settlement made at a settlement conference ‘may be taken into consideration by the Court in exercising its discretion to award costs once final judgment in the proceeding is given.’ Mr Harris QC for the defendants correctly submitted that the plaintiff’s offer is one factor which may be taken into account in the exercise of the Court’s discretion. He also observed that none of the plaintiff’s offers complied with the relevant requirements of O 26.02(2) or (3) nor O 26.11(1)(a) which provide for indemnity cost orders in certain circumstances where formal offers of settlement have been made. Order 26.02(2) and (3) do not apply to libel actions, although it would have been possible for the plaintiff to have made an offer under O 26.11(1). Whether or not the plaintiff made such an offer is not determinant where the claim for costs is based solely on O 48.12(12).

- [4] At the settlement conference, the plaintiff offered to settle the whole action for \$120,000.00 inclusive of costs on condition that the defendants publish an apology in terms which addressed both the allegations that the plaintiff

had ‘incited the crowd to violence’ and that the plaintiff had ‘spoken in a racist manner.’

[5] There are two matters which make an assessment of the plaintiff’s submission difficult. The first is that the offer was inclusive of costs, and I have no information as to what the plaintiff’s costs were likely to have been at the time the offer was made. The proceedings had been issued over 12 months before the date of the offer, so it is likely that they would have amounted to a considerable sum, perhaps at least \$20,000, if not more. The second difficulty is that the offer included an apology which in itself was of considerable value to the plaintiff if it had been given. In my opinion it is necessary for me to ask the question whether, in the light of the value of the apology requested, the plaintiff has succeeded in obtaining a judgment worth more than her offer: see *Assaf v Skalkos*<sup>1</sup> and cases therein cited. In considering this question it may be necessary to look at the apology sought, and whether it substantially was in accord with the ultimate verdict of the Court. In the present case it seems to me that what is of prime significance is the nature of the apology sought, when and how it would have been made and what it would have been worth to the plaintiff in vindicating her reputation and reducing the hurt to her feelings. Obviously the sooner a fulsome apology is made, the more valuable it is likely to be. In this case, the apology sought, if it had been made, would not have been published until some 18 months after the initial publications. By then, the poison had had

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<sup>1</sup> [2000] NSWSC 935 at [69]-[118].

the opportunity to spread widely and the hurt to feelings had lasted a lot longer than might otherwise have been the case. The form of the publication would most likely have been published on ABC radio and on the ABC's website.<sup>2</sup> A third consideration is the amount of interest included in the award of damages, whether the offer included an amount for interest, and if so the extent to which the interest would have been less given that the amount sought in the offer was less and the period of time over which the interest is calculated is less. In this case, that is not a significant amount. Finally it is necessary for me to consider what additional amount for general damages would have been appropriate if the apology had been given, and whether the plaintiff has been able to show that the plaintiff's award exceeded the value of the offer it made.

[6] Having considered all of these matters carefully, I am not satisfied that the plaintiff has established that the value of the award exceeded the value of its offer so that it is appropriate for the Court to award costs on an indemnity basis.

[7] I order that, subject to the order of the Master dated 23 June 2013, the defendants must pay the plaintiff's costs of the action to be taxed on the standard basis.

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<sup>2</sup> See the letter of 25 July 2013, Exhibit A to the affidavit of Hugh Bennett sworn 20 November 2013.