

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

Civil Action HBC 037 of 2011

BETWEEN : **MOHAMMED ALEEM KHAN** f/n Mohammed Hakim Khan, Businessman of Kennedy Avenue, Nadi, Fiji.

Plaintiff

AND : **AIYESHA KHAN** d/o Sant Lal, Domestic Duties of Lot 14, Kartaram Estate, Votualevu, Nadi.

Defendant

Counsel : Mr. N. Vere for the Plaintiff
Mr. Roopesh Singh for the Defendant

R U L I N G

INTRODUCTION

1. There is a clear social and gender policy underlying the Domestic Violence Decree 2009 to redress the inequality that women experience in the way the law was applied to them in relation to a domestic violence. The Decree came into being as a result of Fiji's commitment to CEDAW. As Shameem¹ has observed:

....frequently, it was the way in which the law is applied, that a gender inequality is seen. A woman who resisted reporting an assault by a spouse, who was under pressure from family and church not to report, who demanded a police investigation and prosecution, was then often persuaded to "reconcile" by the courts.

2. Many commentators have bemoaned the social and cultural attitudes in Fiji that inhibit the reporting of domestic violence. Section 19 of the Decree provides for a rather broad range of persons who may apply for a DVRO². Clearly, section 19 is designed to encourage the reporting of domestic violence. For the Decree to fulfil its underlying social and gender policy, victims must feel free and empowered without inhibition to report instances of domestic violence.
3. In the application before me now, Mr. Singh for the defendant seeks to strike out a claim for damages for malicious prosecution and false imprisonment which arose out of a domestic violence scenario. In addition to arguing that the

¹ (see Paper by former High Court Judge and Fiji's Permanent Representative to the UN in Geneva, Her Excellency, Madam Shameem The Domestic Violence Decree 2009, Fiji, Fiji Judiciary Criminal Law Workshop for Judges & Magistrates, 14th June 2012)

² Section 19 of the Decree allows a victim, a carer of the victim, a parent or guardian of child, a person who normally resides with a child who is the victim, children over the age of 16 years if they are victims, a police officer, a social welfare officer, the Public Trustee or "any other person where it appears to the court to be necessary for the safety or well being of the victim" to apply for a DVRO.

facts pleaded by the plaintiff cannot support a claim for malicious prosecution and false imprisonment, Mr. Singh submits that if the claim is entertained, it will only work to arm an abuser with the legal power to punish victims for seeking protection from abuse. This, he submits, will only impede the reporting of domestic abuse. Eventually, it will only perpetuate in the civil law the gender inequality in domestic violence cases.

4. As Mr. Singh submits, there is a far deeper constitutional and a policy question involved. Should the courts adopt a bright line rule, as some jurisdictions do to some extent, that a spouse, or a family member seeking some form of protection from violence through a DVRO, cannot be the subject of a malicious prosecution action, or any other tort action for that matter?

BACKGROUND

5. The writ-claim for malicious prosecution and false imprisonment was filed by a Mohammed Aleem Khan (“**Aleem**”) against his estranged wife Aiyesha Khan (“**Aiyesha**”).
6. Aleem had a Domestic Violence Restraining Order (“**DVRO**”) taken out against him on 12 January 2011 by the Nadi Police. The DVRO was based on a report lodged by Aiyesha.
7. Aleem claims that Aiyesha’s report contained fabrications to the effect that he (Aleem) had threatened to kill Aiyesha, their son, and also Aiyesha’s mother. Aleem refutes all these. He pleads that Aiyesha had lodged the report out of malice and without reasonable and probable cause.
8. Notably, Aleem pleads that he and Aiyesha had had a very heated argument on 12 January 2011. Aleem had been very upset over rumours of Aiyesha’s sexual involvement with one Yakesh Naidu. The argument he had with Aiyesha had been about that affair.
9. Shortly after their argument, Aiyesha had gone to the police station to lodge the report in question. Acting on that report, the Nadi Police Station then filed for, and obtained, the DVRO.
10. In compliance with the DVRO, Aleem was not allowed to set foot in his house for some time. During that time, he had to book into a hotel in Nadi. Aleem claims that he was falsely imprisoned during all that time he spent in the hotel away from home.

11. On 13 January 2011, the day after the DVRO was granted, Aleem filed a motion at the Nadi Magistrates Court to set it aside on the argument that the DVRO was an abuse of process as it was based on a false report.
12. As it turned out, the Magistrates Court would set aside the DVRO on 08 March 2011. It did so on account of Aiyesha's failure to file an affidavit in opposition to Aleem's application. It is important to note that the Magistrates Court did not make any finding of fact in favour of Aleem's allegations about Aiyesha's report.
13. Aleem then filed civil proceedings at the Lautoka High Court seeking damages against Aiyesha for malicious prosecution and false imprisonment.

THE APPLICATION

14. The application to strike out is filed under Order 18 Rule 18 (1)(a) of the High Court Rules 1988. It is argued that Aleem's claim discloses no reasonable cause of action. The Court's jurisdiction to strike out a claim on this ground is used sparingly and only where a cause of action is obviously unsustainable.
15. The question to ask is, assuming the facts pleaded in the statement of claim are proved, do they support a claim for malicious- prosecution?

DISCUSSION

16. The law on malicious prosecution is clear. The four elements which a plaintiff must establish are³:
 - (i) that proceedings of the kind to which the tort applies (generally, as in this case, criminal proceedings) were initiated against the plaintiff by the defendant.
 - (ii) that the proceedings terminated in favour of the plaintiff.
 - (iii) that the defendant, in initiating or maintaining the proceedings acted maliciously.
 - (iv) that the defendant acted without reasonable and probable cause

Whether DVRO Proceedings Are of The Kind To Which The Tort Applies?

17. In my view, a DVRO proceeding is not of the kind to which the tort applies. The kind of proceedings to which the tort applies are mostly of the kind which are initiated by the filing of a criminal charge. As **Clerk & Lindsell on Torts** (15th ed) say:

³ see High Court of Australia decision in **A v New South Wales** [2007] HCA 10; (2007) 233 ALR 584; 81 ALJR 763 (21 March 2007).

In an action for malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge....

18. Having said that, under common law, an action for malicious prosecution may lie also out of certain types of falsely and maliciously prosecuted civil proceedings. These instances however, are a rarity.

...the word 'prosecution' in the title of the action is not used in the technical sense which it bears in criminal law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings for instance, falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company [Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883) 11 QBD 674].

19. The reason why an action for malicious prosecution will not lie ordinarily with regards to a falsely and maliciously prosecuted civil action was explained thus by the Privy Council in Mohammed Amin v Jogendra Kumar Bannerjee (1947) A.C. 322.

The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, ..., that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing ... But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage, and in such a case damage to reputation will be presumed.'

20. Having established that the types of proceedings to which the tort of malicious prosecution applies are of the kind which are initiated by the filing of a criminal charge, I then ask whether the DVRO application which the police filed based on Aiysha's report was a criminal charge?
21. The short answer to that is "No".
22. While most acts of "domestic violence" as defined in section 3⁴ of the Domestic Violence Decree 2009 will match with, and correspond to, a

⁴ Section 3 defines "domestic violence" as follows:

Definition of domestic violence

3.-(1) "Domestic violence" in relation to any person means violence against that person ('the victim') committed, directed or undertaken by a person ('the perpetrator') with whom the victim is, or has been, in a family or domestic relationship.

(2) In relation to subsection (1), "violence" means any of the following –

- (a) physical injury or threatening physical injury;
- (b) sexual abuse or threatening sexual abuse;
- (c) damaging or threatening to damage property of a victim;
- (d) threatening, intimidating or harassing;
- (e) persistently behaving in an abusive, cruel, inhumane, degrading, provocative or offensive manner;
- (f) causing the victim apprehension or fear by -
 - (i) following the victim; or
 - (ii) loitering outside a workplace or other place frequented by the victim, or
 - (iii) entering or interfering with a home or place occupied by the victim, or

particular definition of a criminal offence under the Crimes Decree 2009, and for that reason, a perpetrator of such an act of domestic violence brought before the Courts under the Decree will likely be charged and prosecuted separately under the Crimes Decree 2009, it is important to note that the Domestic Violence Decree 2009 does not *per se*, create a domestic violence offence⁵.

23. Accordingly, in my view, any report of domestic violence lodged pursuant to the Decree, on its own, cannot be said to constitute an act of “instituting criminal proceedings” in terms of the language of the law on malicious prosecution.
24. On the same token, any proceeding instituted under section 19 of the Decree⁶ should not qualify as a “proceeding” of the kind to which the tort of malicious prosecution applies.

(iv) interfering with property of the victim, or
(v) keeping the victim under surveillance;

(g) causing or allowing a child to see or hear any of the violence referred to in paragraphs (a) to (f) inclusive;
(h) causing another person to do any of the acts referred to in paragraphs (a) to (g) inclusive towards the victim.

(3) Subject to subsection (4), causing or allowing a child to see or hear violence, as specified in paragraph (g) of subsection (2), includes putting the child, or allowing the child to be put, at real risk of seeing or hearing that violence.

(4) A person who suffers the violence is not to be regarded, for the purposes of paragraph (g) of subsection (2) or of subsection (3), as having caused or allowed or put the child at real risk of seeing or hearing the violence.

(5) A single act may amount to violence for the purpose of subsection (1) in addition a number of acts that form part of a pattern of behaviour may amount to violence even though some or all of those acts, when viewed in isolation, may appear minor or trivial.

⁵ see Paper by Her Excellency, Madam Shameem The Domestic Violence Decree 2009, Fiji, Fiji Judiciary Criminal Law Workshop for Judges & Magistrates, 14th June 2012
(http://www.fijileaks.com/uploads/1/3/7/5/13759434/naz_on_the_domesticviolence-decree2009.pdf)

⁶ Section 19 provides:

Who can apply

19.-(1) An application for an order under this Decree may be made in respect of -

(a) an adult, by -

(i) the person themselves; or

(ii) another person who normally cares for, or is currently caring for, the person;

(b) a child, by -

(i) a parent or guardian of the child;

(ii) an adult with whom the child resides (either usually or on a temporary basis);

(iii) a child themselves where the child has attained the age of 16 years and is a married person; and

(iv) a child themselves where the child has attained the age of 16 years and the court has granted leave to the child to make the application on their own behalf;

(c) an adult or a child, by -

(i) a police officer, where a person has been charged with a domestic violence offence or the police officer suspects or believes that a domestic violence offence has recently been committed, is being committed, is imminent, or is likely to be committed, and the victim's safety or wellbeing is at risk; or

(ii) the Director of Social Welfare or a welfare officer appointed under section 37(2) of the Juveniles Act (Cap. 56); or

(iii) the Public Trustee when undertaking management and care of the property of a person of unsound mind under section 17(1) of the Public Trustee Act (Cap. 64) or another person holding an appointment in respect of the affairs of a person of unsound mind under section 23 of that Act; or

(iv) the Public Trustee when holding an appointment under section 17(2) of the Public Trustee Act (Cap. 64) to undertake the management and care of the property of an incapable person; or

(v) any other person where it appears to the Court to be necessary for the safety or wellbeing of the victim.

(2) Where an application is made under section (1) for the protection of a person over 16 years and the applicant is not the person intended to be protected, the applicant must demonstrate to the satisfaction of the Court that -

(a) the applicant has the consent of the person to be protected to make the application; or

25. Mr. Vere appears to argue on Martin v Watson [1995] 3 All ER 559; [1996] AC 74 that a report of domestic violence on its own can amount to an act of “instituting criminal proceedings” so long as the report was false and malicious.
26. In Martin v Watson, the House of Lords held that, where **A** gave false information to the police, out of malice for **B**, stating that **B** had committed an offence, and where **A** had indicated that he was willing to testify in court against **B** on the facts **A** alleges against **B**, and where the circumstances were such that only **A** could testify as to the truth or falsity of the facts **A** alleges against **B**, such that it was impossible for the police to exercise any independent discretion or judgment, and where the police actually prosecuted **B** - then **A** would be liable for malicious prosecution, because the prosecution of **B** by the police would have been procured by **A**.⁷
27. McMullin J of the New Zealand Court of Appeal had echoed similar sentiments much earlier in Commercial Union Assurance Co of NZ Ltd v Lamont [1988] NZCA 247; [1989] 3 NZLR 187 at 207-208 that a person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge.
28. The above pronouncements make good law. However, they would only apply in a situation where the information given has compelled an officer to lay a charge. As I have said above, Fiji’s Domestic Violence Decree does not create a domestic violence offence and the DVRO proceedings brought under the Decree does not amount to a bringing of a charge.
29. However, having said that, in my view, a report of domestic violence may be caught under Martin v Watson and Commercial Union (supra) if the report were to later compel the laying of a criminal charge under the Crimes

(b) the person to be protected lacks the capacity to understand the proceedings or the nature and extent of the risk and the proceedings are necessary for the victim's safety or wellbeing; or

(c) it is not reasonable in the circumstances for consent to be required.

⁷ Martin v Watson is authority that:

The mere fact that a person gave information to the police which led to their bringing prosecution did not make that person the prosecutor, but if that person falsely and maliciously gave a police officer information indicating that some person was guilty of a criminal offence and stated he was willing to give evidence in court of the matters in question, it was properly to be inferred that he desired and intended that the person he named should be prosecuted. Where the circumstances were such that the facts relating to the alleged offence could be within the knowledge only of the complainant, as was the position in the case of the Defendant, that it was virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution was instituted by the police officer the proper view was that the prosecution had been procured by the complainant. The fact that he was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having being brought.

Decree 2009. Of course, such a claim will only succeed if all the other conditions of the tort were to be established.

30. In this case, it is not pleaded that the police did lay some criminal charges against Aleem on account of the report Aiyasha gave, let alone, if they were compelled so by the report.
31. To reiterate the point I have said above in paragraph 17, the DVRO proceedings in this case are not of the sort to which the tort of malicious prosecution applies. It is not necessary for me to discuss the other ingredients of the tort.

THE POLICY QUESTION

32. The Domestic Violence Decree 2009 is part of Fiji's response to its ongoing commitment to the UN Convention on the Elimination of All Discrimination Against Women (CEDAW) which Fiji is a party to. As I have said, part of the conceptual footing of the 2009 Decree was the removal of the social and cultural barriers that inhibit women from reporting domestic violence and abuse.
33. Indeed, it would be counter-productive to the social and gender policy behind the Domestic Violence Decree 2009 if a domestic violence report could give birth to a malicious prosecution suit. How so? The threat of a suit will only impede victims from reporting an abuse and these victims almost always happen to be women and girls.
34. In some jurisdictions in North America, there is a bright line judicial rule that proceedings of a "family – law" nature cannot be the subject of a malicious prosecution action for various reasons (see **Bidna v. Rosen** (1993) 19 Cal.App.4th 27; **S.A. v. Maiden**, 14 S.O.S. 3717; **Caudle v. Mendel** (12/30/99) sp-5228, the Supreme Court of Alaska).
35. This approach acknowledges the "unique propensity for bitterness" that permeates family law proceedings. It is also based partly on a concern that the threat of a malicious prosecution claim can operate to deter victims of domestic violence and abuse from seeking effective relief. The same reasoning is applied in these jurisdictions to disallow a claim for malicious prosecution out of a domestic violence restraining order.

36. In **Caudle v. Mendel** (12/30/99) sp-5228, the Supreme Court of Alaska said as follows:

Malicious prosecution cases arising out of domestic relations litigation have encountered a cold reception in some courts. In California they are not allowed at all. [Fn. 7] In Indiana, an appellate court held that certain family law matters such as motions to modify custody cannot give rise to a malicious prosecution claim. [Fn. 8]

A number of reasons explain the disfavoured status of malicious prosecution cases arising in a domestic relations context. Divorce and custody cases are often characterized by bitterness and emotional distress. [Fn. 9] If parties are permitted to widen the field of battle to the tort arena, many will do so. Such cases will delay the disposition of the domestic relations case from which they spring. They will worsen the antipathy between the parties. And they will burden the court with a category of cases which, in large part, lack substantial merit. Further, in most instances, sanctions and attorney's fees assessed in the suit in which the legal proceedings are misused are a sufficient remedy. [Fn. 10]

In **McGee v. McGee**, [Fn. 11] we recognized reasons why divorce and tort actions should be litigated separately:

Divorce actions will become unduly complicated if tort claims must be litigated in the same action. . . .

[R]equiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations. [Fn. 12]]

These reasons also support non-simultaneous litigation of domestic relations cases and tort claims based on claims that legal proceedings have been misused.This rule will avoid the added bitterness and complexity that simultaneous tort litigation would bring to a domestic dispute. It will also impose a waiting period in which antipathies may cool and sound judgment may assert itself. Based on this rule, we affirm the dismissal of Caudle's claims. The dismissal on this ground must, of course, be without prejudice.

The Competing Interests

37. It is not entirely unfathomable that a DVRO may be based on a false report.
38. In Australia a survey conducted by **Hickey and Cumines** in 1999⁸ of sixty eight Magistrates found that 90% agreed that AVOs (similar to our DVROs) were sought by a spouse as a tactic to aid their case and deprive the former spouse/partner of contact with the children.
39. To dismiss that such a thing could ever happen in Fiji, must be the height of naivety. A disgruntled spouse on a personal vendetta is quite capable of fabricating a story to incite the filing of DVRO proceedings and to manipulate court process in order to gain mileage.
40. How then is the legal system to ensure that cases of false reporting do not go unchecked and unpunished? What about the odd husband who might fall

⁸ Hickey, Jennifer. & Cumines, Stephen. & Judicial Commission of New South Wales. (1999). *Apprehended violence orders : a survey of magistrates*. Sydney : Judicial Commission of New South Wales.

victim to a genuine case of malicious false reporting? Where should the line be drawn?

41. A spouse who makes a malicious false report may still be charged under the provisions of the Crimes Decree 2009 which deal with the offence of perjury and/or the offence of giving false information to a public servant.
42. The spouse who falls victim to an incident of false and malicious domestic violence report can still have recourse to a malicious prosecution claim, provided that the report did compel the filing of a criminal charge, and if all the other ingredients of **Martin v Watson** and **Commercial Union** (see above) were satisfied.
43. I think this is the ideal point where the balance should be struck between, on the one hand, the right of a wrongly accused alleged domestic violence-perpetrator to access a court and seek redress for damages suffered as a result of a false and malicious report as provided for under section 15(2)⁹ of the Constitution and, on the other, without necessarily compromising the social and gender policies that the Domestic Violence Decree 2009 has set in motion in Fiji.

CONCLUSION

44. It is not pleaded in the claim that Aiysha's report did compel the filing of a criminal charge against Aleem, let alone that the said proceedings were terminated in favour of Aleem. Many bemoan that Fiji's Domestic Violence Decree 2009 does not create a domestic violence offence. However, the fact that the Decree does not do so may be a blessing in disguise after all. I dismiss Aleem's claim. \$2,500 (two thousand and five hundred dollars only) costs to the defendant summarily assessed.



.....
Anare Tuilevuka

JUDGE

29 April 2016.

⁹ Section 15(2) provides that:

Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.