

**IN THE FAMILY DIVISION OF THE HIGH COURT
AT LAUTOKA**

CASE NUMBER:	07/NAN/0250
BETWEEN:	ALFRED APPELLANT
AND:	FRANCES RESPONDENT
Appearances:	Mr. Qoro for the Appellant. Mr. F. Koya for the Respondent.
Date/Place of judgment:	Thursday, 20th January, 2011 at Lautoka.
Judgment of:	The Hon. Justice Anjala Wati.
Category:	<i>All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymised Case Citation:	ALFRED v. FRANCES- Fiji Family High Court Case Number: 07/NAN/0250.

JUDGMENT OF THE COURT

Catchwords

APPEAL - CONTEMPT PROCEEDINGS - JURISDICTION-PRACTICE AND PROCEDURE- original application of appellant declined where he made an application in the Magistrate's Court that it did not have jurisdiction to hear contempt proceedings and if it did hear the same, the preliminary procedure was to grant leave to issue contempt proceedings-the lower court ruled against the appellants' application and aggrieved at that order, the appellant appeal-Family Law Act gives the Magistrate's Court powers to hear contempt proceedings without leave of the court and as Family Court is a creature of statute, its jurisdiction is derived from the Family Law Act which contains sufficient provisions to grant the Magistrate's Court powers to hear contempt proceedings-appeal dismissed-each party to bear their own costs.

Legislation

*Administration of Justice Decree 2009.
Family Law Act No. 18 of 2003.
Family Law Rules 2005.
Family Law Regulations 2005.

High Court Rules, 1988.*

Cases/Texts

*DK and MR [unreported] HBM 65 of 2008L.

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co; Sydney.*

The Appeal

1. This is an appeal against the decision of the learned Magistrate whereby his worship had on the 29th day of October, 2008 dismissed the appellants application and held that the Magistrates⁷ Court had powers to hear contempt proceedings. His worship had further ruled that there was no requirement for leave to be obtained before filing of the contempt proceedings.

The Grounds of Appeal

2. There are 3 grounds of appeal and they are as follows:-
 - o "The Learned Magistrate erred in law and in fact in holding that Division 1.2 Proceedings under the Act, Rule 1.05 adequately covers the proceedings with respect to applications for contempt other than Section 17(3) Family Law Act.
 - The Learned Magistrate erred in law and in fact in holding that the Family Division of the Magistrate's Court has powers to entertain contempt proceedings without leave.
 - o The Learned Magistrate erred in law and in fact in holding that no leave is required to institute contempt proceedings and the Family Division of the Magistrate's Court has jurisdiction to entertain contempt proceedings"
3. Grounds 2 and 3 are the same, but, worded differently.
4. Another observation I should make is that on the face of all the grounds, there is no error as to fact. The ruling was purely a matter of law, and so, the error if any, is an error in law. Grounds 1, 2 and 3, therefore, are drafted in its ordinary precedent. Counsels drafting grounds of appeal must give some due consideration and exercise some vigilance. Unnecessary time and resources are wasted in going through and dealing with each ground of appeal and even duplicated grounds need to be distinguished and commented on. Those grounds that are irrelevant and duplicated still need discussion as to why they are not proper for consideration. If Appeal proceedings are expected to be heard and determined expeditiously, it should then be carefully and comprehensively drafted and submitted upon.

The Orders Sought

5. The appellant seeks an order that the decision of the Learned Magistrate be set aside.

Yet again, I do not think that the orders sought are sufficient at this stage. If any orders have to be set aside, the court has to substitute it with some orders to outline the forum and the practice and procedure for hearing contempt proceedings.

The Appellants Submissions

6. The Appellants counsel submitted that the Family Law Act does not specify which Court has powers to punish persons for contempt. It was submitted that Section 9 of the Administration of Justice Decree 2009 only provided for the Supreme Court, the Court of Appeal and the High Court to punish persons for contempt. There is no indication of the Magistrate's Court. It was also submitted that section 5(2) of the Administration of Justice Decree 2009 also fortifies the contention.
7. In the alternative counsel submitted that if the Magistrate's Court had powers to punish persons for contempt, than leave of the court must first be obtained before the application for contempt is filed. Counsel submitted that s. 192(2) of the Family Law Act states that the rules of each Family Division may provide for practice and procedure relating to contempt proceedings. There are no provisions in the Family Law Rules that deal with the practice and procedure relating to contempt proceedings. He stated that in the case of DK and MR (No.3) unreported HBM 65 of 2008L, Scutt, J.J. had said that the Family Division of the High Court has powers in relation to contempt by reason of section 124 of the Constitution, section 196 of the Family Law and the High Court Rules 1988. Her ladyship had said in that judgment that presently there are no Family Division Rules. Counsel therefore contended that because there are no rules, s.22 of the Family Law Act provides that the High Court Rules must be followed.
8. Order 52 of the High Court Rules 1988 requires that no application for contempt shall be made unless leave has been granted. The rule of leave must be strictly complied with as a person's liberty is concerned.

The Respondents Submissions

9. The Respondents' submission is very simple indeed. It was submitted that s.196 of the Family Law Act gives Court powers to deal with persons for contempt and also states that the rules of each Family Division may provide for the practice and procedure as to charging with contempt proceedings and the hearing of the charge.
10. The respondents counsel also submitted that s. 6 of the Family Law Regulations

states that if there are inadequate provision on practice and procedure; or a difficulty arises or doubt exists as to the practice and procedure, the court may give such directions with respect to the practice and procedure to be followed in the case as the court considers necessary. So the court can give directions in this case.

11. It was further submitted that Form 7 which is used to initiate contempt proceedings is the form for the substantive application and not for leave. If the legislature intended that leave was necessary then a separate form for leave would have been produced. The omission indicates that leave is not required or necessary.

The Law and the Determination

12. I will first deal with the first part of ground 2 which states that the Family Division of Magistrates' Court does not have powers to punish persons for contempt.
13. A courts power to punish a person for contempt in the face of the court or for willful disobedience of any order made by the court is contained in s. 196(1) of the Family Law Act.

"196-(1) A court which has jurisdiction under this Act may punish persons for contempt in the face of the court when exercising that jurisdiction or for willful disobedience of any order made by the court in the exercise of jurisdiction under this Act".

14. The question that follows from s.196 (1) of the Act, is, does the Magistrates' Court have powers to punish persons for contempt?
15. Rule 1.05 of the Family Law Rules 2005 very clearly states that except for the proceedings in which the High Court has exclusive jurisdiction, the proceedings under the Act must be commenced in the Family Division of the Magistrates' Court. It is important to produce the material part of the rule:-

"Proceedings under the Act (other than proceedings to which section 17(3) of the Act applies) must be commenced in the Family Division of the Magistrates' court..."

16. S. 17(3) of the Act relates to proceedings in relation to which the High Court has exclusive jurisdiction and those are applications for orders for nullity of marriage and applications under s. 200 in relation to the Convention on the Civil Aspects of International Child Abduction (1980).
17. Contempt proceedings are proceedings under the Act by virtue of s. 196(1) of the Family Law Act.

18. There is therefore no confusion that the Family Division of the Magistrates' Court has jurisdiction to punish persons for contempt. Section 196(2) of the Family Law Act fortifies my judgment. It reads:-

"The Rules of each Family Division may provide for practice and procedure as to charging with contempt and the hearing of the charge".

Underlining is mine for emphasis

19. If the legislature did not intend to give the Family Division of the Magistrates' Court jurisdiction to punish persons for contempt then there was no need for the legislature to use the words "each Family Division". The legislature would have simply said "the Rules of the Family Division of the High Court..."

20. I am further fortified in my judgment after perusing Form 7 which is the respective form for bringing contempt proceedings. It carries two provisions, one of which must be ticked to indicate the court in which the proceedings are filed, the Magistrates' Court or the High Court. If only High Court was intended to be the jurisdiction then there was no need for the two provisions to be created as it goes without saying that the application must be filed in High Court.

21. It is very interesting and a useful exercise to compare form 7 (form to bring proceedings for contempt) with form 2 (form to bring proceedings to seek an order to have marriage nullified). Form 2 does not have two provisions to tick. It just simply is endorsed with the words "filed in the Family Division of the High Court". One must realise that nullity proceedings can only be brought in the Family Division of the High Court so there was no need to create two provisions. Similarly, if the contempt proceedings were to be exclusively brought in High Court than the form would have been similarly drafted and more over s. 17 (3) of the Family Law Act would have stated that the High Court has exclusive jurisdiction to punish persons for contempt.

22. S. 5(1) of the Administration of Justice Decree 2009 states that "Each of the High Court, the Court of Appeal and the Supreme Court has the jurisdiction, including the inherent jurisdiction, conferred on it by this Decree or by any other law". S. 5(2) further states that "No court shall be vested with jurisdiction save as is or may be conferred on it by this Decree or any law".

23. The Family Law Act is a written law and by virtue of s. 5(2) of the Administration of Justice Decree 2009 it can vest jurisdiction in Family Division of the Magistrates' Court.

24. S. 9 of the Administration of Justice Decree 2009 states that "the Supreme Court, the

Court of Appeal and the High Court have power to punish persons for contempt of court in accordance with law". A careful reading of s. 9 would indicate that there is nothing in s. 9 which states that only those courts mentioned in s. 9 has powers to punish persons for contempt. It is therefore safe to read this section in light of s. 5(2) of the Administration of Justice Decree 2009 and the Family Law Act as there will not be any inconsistency to s. 9.

25. I dismiss the appellants' first part of ground 2 of the appeal which states that Family Division of the Magistrates' Court does not have powers to punish persons for contempt.
26. I will now deal with ground 1 and the second part of ground 2 which is the requirement for leave.
27. Both counsels have indicated that there are no rules to clearly specify the practice and procedure of filing and hearing contempt proceedings. Mr. Qoro has taken his argument further and stated that the High Court Rules apply whilst Mr. Koya said that the court can give directions in absence of the rule. Mr. Koya does however say that there is no requirement for leave in the first place.
28. I do not accept any Counsels argument in this aspect. Order 7 Division 7.2 of the Family Law Rules 2005 contains comprehensive provisions on practice and procedure on contempt proceedings. The Rules are sufficiently clear and the court does not have to borrow or look at standard rules of the same Division for assistance. I think it prudent to recite the entire Division 7.2 verbatim:-

"7.08-(1) Where a person alleges that another person has committed a contempt of the court, other than a contempt in the face of the court, the Registrar may file an application in a registry of that court for the other person to be dealt with for that contempt.

(2) An application under subrule (1) shall be in accordance with Form 7.

(3) Where an application is filed under subrule (1), a copy of that application shall, unless the court otherwise orders, be served on the respondent.

(4) On the filing of an application under this Division, a registrar must-

(a) fix a date for hearing of the application; and

(b) endorse the date on the application.

(5) the date fixed for the hearing of the application must be as near as practicable to,

but not earlier than, 21 days after the date on which the application is filed.

(6) So far as practicable, the court must hear and determine an application on the date fixed for hearing of the application.

7.09. Where an application has been made under rule 7.08(1) and the person against whom the application is made does not appear before the court on the return day of the application, the court may issue a warrant for that person to be arrested and brought before the court.

7.10. On the hearing of an application under rule 7.08(1), and in proceedings for contempt in the face of the court, the court shall –

- (a) cause the person against whom the contempt is alleged to be orally informed of the contempt with which that person is charged and call upon that person to plead thereto;
- (b) hear such evidence as the court requires;
- (c) require that person to make any defence that a person may wish to make to the charge;
- (d) after hearing that person and any evidence that that person adduces, determine the matter of the charge and whether that person has purged his contempt; and
- (e) make such order as is considered just in all circumstances".

29. The reading of the above rules indicate that there is no requirement for leave and as such the substantive proceedings could be filed and heard in the Family Division of the Magistrate's Court without leave.

30. If there was requirement for leave then there would have been clear and precise indication to that effect. Such an issue could not have been left to be hunted for or left for implication. There would have been an express provision for leave.

31. Order 7 Division 7.2 applies to both Courts. It applies to Family Division of the Magistrates' Court and the Family Division of the High Court in the same manner. Rule 1.02 of the Family Law Rules is relevant. It reads:-

"1.02-(l) These Rules apply to all proceedings in the Family Division of the High Court or the Family Division of the Magistrates' Court under the Act, the Regulations or these Rules, including proceedings to which sections 4(2), (3), (4) and (5) of the Act apply.

(2) Unless the contrary intention appears, a provision of these Rules applies in the

same manner in relation to both the Family Division of the High Court and the Family Division of the Magistrates' Court.

(3) Where a practice or procedure is not provided for in these Rules, the standard rules of the court in which the proceedings are being conducted apply".

32. The reason why there is no requirement for leave in contempt proceedings arising out of willful disobedience of orders in the Magistrates' Court is that the contempt proceedings are classed as summary proceedings under Order 7 Division 7.2 of the Family Law Rules 2005.
33. The reason for it to be classified as summary proceedings and proceedings which must proceed without the leave of the Court, unlike the requirement under the High Court Rules 1988 via Order 52 Rule 1, is clear and logical. The legislature must have correctly speculated the voluminous applications that would be filed in court. This is because the nature of the cases and orders are such that there would be frequent breaches of the same. For example, many times family violence orders, other forms of restraining orders, residence and contact orders, orders relating to property are made and breached by a party to the marriage. Most breaches occur because of the bitterness that exists between the parties and the egoism of one partner to get back at the other partner. I have personal experience to this effect both as a magistrate and a judge. When these orders are breached, the court must be informed to take immediate steps to deal with the disobedient party and there is no time to waste, as some breaches are so serious that time must not be wasted in considering matters of leave. For example, a breach of a family violence order must be treated seriously and expeditiously. If time was to be wasted in dealing with leave matters, then there would be serious consequences on the victim. This also explains why the Magistrates' Court is the proper forum to deal with contempt proceedings. If one looks at the statistics of contempt proceedings initiated in the Family Court in a month, one would be alarmed as there are so many contempt proceedings filed. If all these matters were to be dealt with by High Court then there would be two basic problems. One, the High Court, which is vested to try much serious and complicated matters would be flooded with contempt proceedings and second the Magistrates' Court may not be able to efficiently proceed with some matters until the High Court has dealt with the application. For example, a positive injunction requiring a husband to leave the residential home of the parties to the marriage to enable the wife and the children to stay in the property, if breached, and proceedings are before High Court to try the husband for contempt, the Magistrate may not be able to make proper parenting orders regarding the children's place of residence

and contact. Whereas if the contempt proceeding is in possession of the Magistrate, counselling and conciliation conferences may lead to withdrawal of contempt proceedings and effective orders made to ensure future compliance and orders can also be made in respect of other related pending matters.

34. Both Counsels have submitted case authorities on their submission. I do not need to consider them as without any hesitation, I am of clear judgment that the Family Division of the Magistrates' Court has powers to punish persons for contempt without leave having first been granted.
35. The Family Law Act, the Rules and the Regulation are largely modelled on the Act, Rules and Regulations of the Family Court of Western Australia. In Western Australia there is no requirement for leave to be granted before filing of contempt proceedings and contempt proceedings are filed in the Family Division of the Magistrates Court.
36. The Family Law Act is a specific substantive legislative which gives powers to the Family Division of the Magistrates Court to punish persons for contempt and the Courts of both divisions are bound by the specific rules on the practice and procedure. If there were no rules then the court was obliged to cast its mind to the standard rules of each division.
37. Grounds 1 and second part of ground 2 which is the specific part on leave, is dismissed. Ground 3 is also dismissed as it is a duplicate of ground 2.
38. The appeal has no merits and must be dismissed.
39. On the issue of costs, I am of the judgment that this was an important aspect of law on which the appellant needed clarification on. There is no misconduct in bringing this proceeding. There is a judgment of the High Court, **DK and MR [unreported] HBM 65 of 2008**, in which Scutt, J had made a ruling to the effect that leave is required to issue contempt proceedings. This judgment would have given the appellant some light to proceed with the current appeal. I do not agree with her ladyship that leave is required. I have stated my reasons why leave is not required.
40. An order for each party to bear its own costs will be justified in the matter.

The Final Orders

41. The appeal is dismissed.
42. Each party to bear its own costs.

Anjala Wati
Judge
20.01.2011

To:

1. *Mr. Qoro for the Appellant.*
2. *Mr. F. Koya for the Respondent.*
3. *File Number 07/NAN/0250.*