

IN THE FAMILY DIVISION OF THE HIGH COURT

CASE NUMBER: 15/Ltk/ 0004

BETWEEN: ALAM

AND: PENINA

Appearances: Mr. F. Khan for the Appellant.
Respondent in Person.

Date/Place of judgment: Wednesday 19 August 2015 at Lautoka

Judgment of: Hon. Madam Justice Anjala Wati.

Category: *All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons are purely coincidental.*

Anonymised Case Citation: ALAM v. PENINA - Fiji Family High Court Appeal Case Number: 15/Ltk/0004

JUDGMENT OF THE COURT

Catchwords

FAMILY LAW - STAY PENDING APPEAL - INTERIM CHILD MAINTENANCE - stay sought on grounds that appellant does not have means to pay maintenance to the extent ordered - income, earning capacity, property and financial resources of the person liable to pay maintenance will be examined to assess the means to pay the maintenance.

Legislation

1. Family Law Act No. 18 of 2003 ("FLA"):ss, 86(1), 91 (1) (b).

1. The parties were married in 1994. They have three children of the marriage. Child 1, a female, born 1994, child 2, also a female, born, 1996, and child 3, a male, born in 2001.
2. On 9 April 2015, on the wife's application, the Magistrates' Court made an interim order for maintenance for the three children.
3. The order was for the father to pay maintenance for the three children in the sum of \$1,500 per fortnight being \$500 per child. The order took effect from the date of making the same.
4. The husband appealed against the said orders and filed a stay application pending determination of the appeal. The substantive appeal is now listed for hearing but the parties wanted the issue of stay to be heard and determined.
5. The basis for the stay application is that the father does not have the means to pay the amount of monies ordered as he only earns \$500 a week out of which he pays \$250 per week as monetary relief pursuant to orders made in the application for a domestic violence restraining order filed by the wife.
6. The father also raised that the children are supported by the grandparents and that the children are financially well looked after by the grandparents.
7. In determining this stay application I have had the benefit of the evidence tendered in the lower Court on the financial worth of the husband, affidavit evidence on the stay application and the submissions by both parties.
8. There is no issue before me regarding the appropriateness of the children's expenses as it is not denied that the children had lived and enjoyed a high standard of living. The children are still schooling and one of the daughters is studying overseas.
9. The issue before me centers on the income, earning capacity, property and financial resources of the father to pay maintenance in the sum of \$1,500 per fortnight.
10. The father of the children has been one of the directors of at least five family companies.

11. Company 1 and the husband claim that he was removed as director of Company 1 by his parents who are the other directors and majority shareholders of this company.
12. There is no evidence that he is no longer director of the other companies or whether the other companies have ceased to exist or not functioning.
13. The husband has failed to disclose how much income and benefit he is deriving from his position from the other companies. He certainly needs to be paid as a director of the other companies and the lack of evidence in this regard do not support the contention that his income is in the bracket claimed.
14. The wife's allegation will be determined in the substantive cause for maintenance and property whether the husband's removal from Company 1 was a transaction in sham organized by the husband and his parents to defeat the impending claim for maintenance and property. I must however remark that the husband's removal came at a time when the proceedings against the appellant was on foot and after the appellant had used his personal monies in the sum of at least \$465,000 for the benefit of the company by purchasing two cheques from his account in BSP.
15. On the evidence before the Court, it is apparent that the husband depleted his assets which were to be used for the benefit of the family. He used that income for the benefit of the company instead. These large sums of monies properly belong to him and should be paid to him for the benefit of the children. There was no satisfactory evidence before the Court to indicate or establish that these monies did not belong to him but to someone else.
16. On the evidence, there was no justification for personal funds to be utilized for the company and no evidence why the company will not and cannot refund the monies to him.
17. It remains for the trial court to make a finding on whether using these monies for the benefit of the company was also a transaction to defeat the claims of the family for maintenance and property.
18. For whatever purpose the cash assets were used for the benefit of the company, the husband has to account for this and retrieve the same. The children cannot be deprived of maintenance.
19. Before the Court, there was also evidence of the husband having had more than half a million dollars in his

account. Once again there was no satisfactory evidence that the cash asset did not belong to him.

20. If the monies were invested or kept on interest bearing accounts, the interest generated from the asset would have been at least to an extent to satisfy one third of the interim maintenance per annum.
21. A proper investment of the monies would have generated income once again for the benefit of the children but the monies were not properly utilized and spent on the company without any valid reasons.
22. Pursuant to s. 91 (1) (b) of the FLA, It is not only the actual income that is important to determine the ability to pay maintenance for the children but also the earning capacity and the properties that the appellant has. Indisputably, the appellant has capacity to earn large sums of money per year. His bank account is evidence of that fact. This is irrespective of the fact that the assets have been used or moved.
23. On 24 July 2014, Fiji Revenue & Customs Authority of Fiji identified that the appellant has had unidentified deposits from 2008 to 2013 in the sum of \$2,316,488.99. The family Company 1 accuses him of misappropriating funds from the company in the sum of \$2,000,000 which allegation came after FRCA tagged his account to be having unidentified deposits.
24. No such allegations were made against the husband from 2008 when these monies were being deposited in his personal account.
25. The appellant has the ability to be a director of so many companies at one time and manage the companies and earn substantial amount of monies to have more than half million Fijian dollars in his account. His earning capacity, on the evidence, has not been diminished and his actual income now cannot be used to shun away his responsibilities bestowed on him by s. 86 of the FLA.
26. On the question of his income, earning capacity and properties, I find that the appellant prima facie has the means to pay the maintenance and as such the children must be maintained to the extent of \$1,500 per fortnight which amount on the evidence before me is neither exorbitant nor unjustified.
27. The appellant had agreed to sell one of his properties in Ba to cater for the maintenance of his children and since the sale of the property is delayed, it is only justified that interim maintenance be paid to the extent ordered so that the children's education, living and general welfare is not disturbed.

28. The application for stay is refused and each party is ordered to pay their own costs of the proceedings.

Anjala Wati

Judge

19.08.2015

To:

1. Faiz Khan Lawyers for Appellant.
2. Respondent.
3. File: 15/LTK/0004