

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

**APPELLATE JURISDICTION**

**ACTION NUMBER:** 17/Suv/ 0002

*(Original Case Number: 11/Suv/0282)*

**BETWEEN:** **- LEE**

**APPELLANT**

**AND:** **- ZHAO**

**RESPONDENT**

Appearances: Mr. G. O' Driscoll the Appellant.

Mr. K. Jamnadas for the Respondent.

Date/Place of Judgment: Thursday 14 September 2017 at Suva.

Coram: 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 is purely coincidental.

Anonymised Case Citation: LEE v. ZHAO– Fiji Family High Court Appeal Case Number: 17/Suv/0002.

**JUDGMENT**

**A. Catchwords:**

***FAMILY LAW – APPEAL – discovery of documents - setting aside of orders made in absence of a party – discovery of company accounts before separation - discovery of company accounts after separation – limitations on discovery.***

**B. Legislation:**

**1. Magistrates' Court Rules 1945 ("MCR"): Order 30 Rule 5.**

## **Cause**

1. On 23 January 2017, the Family Division of the Magistrates' Court, in dealing with an application for variation of discovery orders, heard and granted in absence of LEE the following orders:
  - a. "The discovery of documents covering the period of separation and/or divorce and thereafter is reserved forthwith.*
  - b. The order for discovery of documents, prior to the period of separation and/or divorce, must be complied with.*
  - c. A hearing date be set to determine whether or not discovery of documents can be made for the period of separation and/or divorce and thereafter."*
2. The parties have a substantive application for property distribution pending in court. The application for discovery was filed by the wife as an interlocutory application.
3. The husband appeals paragraph (b) of the above order on the grounds that the court erred in exceeding the jurisdiction of the Family Magistrates Court by making orders in relation to issues under the Companies jurisdiction. The husband seeks on appeal that the accounts of the company be only disclosed from the date of separation until the date of the dissolution of marriage which is 28 October 2011.
4. The principal orders on discovery which was sought to be varied were for the husband to file and serve an affidavit containing:
  - a. copies of receipts for payments received for the rental of Property 1 and Property 2.*
  - b. Up to date annual returns and audited accounts of the following companies for*

**LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002**

*the period 2005 to 2014:*

- I. Company 1;*
- II. Company 2; and*
- III. Company 3.*

5. It is very difficult to fathom the actual reason why the variation application was refused. My understanding of the finding is that the court below first considered why the husband did not defend the main application for discovery. It found that despite being given an opportunity, he chose not to file any affidavits in opposition but to rely on the law in opposing the application.
6. The court further found that on the day of the hearing, no arguments were put forward by the husband or his counsel why discovery should not be ordered. The court found that the state of affairs created by the husband was unsatisfactory leading to the delay in the final hearing of the property distribution application.
7. On the question of law, there appears to be a finding by the Court that there is no legal provision to ask for variation of such orders.
8. The Court then revisited the issue as to whether discovery was essential for the purposes of determining the real issue in controversy. It found that it was and thus granted the orders in paragraph 1 above.

### ***Submissions***

9. Mr. O'Driscoll's argument is that the court ought to only order valuation of the property as at the date of separation and nothing before or after that. It is argued that the parties need not disclose the valuation of the property before separation. It was further argued

***LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002***

that parties' contribution to the property ceases after the separation and/or divorce and any orders for valuation after the date is not justified. In ordering discovery before the separation and after the same is beyond the jurisdiction of the Court.

10. Mr. Jamnadas argues that the appeal before the Court is an attempt to vary the original orders of the court which the husband had an opportunity to challenge in the lower court and did not. He did not file any affidavits in opposition when he was given the opportunity to do so.
11. Mr. Jamnadas contended that the husband should have told the court initially why discovery orders should not be made. He is raising all those in appeal. He ought to have raised it before the lower court.
12. It was further argued by Mr. Jamnadas that an order can only be varied under exceptional circumstances and generally four criteria have to be met. The four criteria according to Mr. Jamnadas are:
- a. that an order has to be made by some accident;*
  - b. without any blame of the party seeking to vary the order;*
  - c. the party has not been heard; and*
  - d. an order has been inadvertently made as if the party had been heard.*
13. Mr. Jamnadas extended his argument by saying that there is no assertion that the order was made by an accident. The husband was to be blamed for not filing any affidavit in opposition to the main application. The husband and his counsel did not appear on the hearing day or file any legal submissions. This shows that they are to accept the blame for not defending the application initially.

**LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002**

14. Mr. Jamnadas said that the husband was given an opportunity to be heard but he chose not to be heard and so the orders were made not inadvertently but with careful consideration.
15. It was further submitted by Mr. Jamnadas that in the substantive application for property distribution, the wife claims to be a shareholder in the companies. She is therefore entitled to know what the husband has done with the company. The husband had also agreed to provide the documents to the Deputy Registrar. He now

cannot be challenging that the periods for which discovery is sought is not relevant.

16. Mr. Jamandas also said that all these applications are delaying the main property distribution application. The husband should have at least complied with the orders for the period he asserts he should discover the documents.

### ***Law and Analysis***

17. On the question of law, I am asked to determine the right of the husband to ask for the variation of the orders in the first place.
18. The application for discovery was heard and determined in absence of the husband. The contention is that there is no provision for variation of the orders heard and granted in absence of the parties.
19. I agree that there is no specific provision in the Family Law legislation on setting aside of orders heard and granted in absence of a party. In absence of such a provision, guidance ought to be sought from the MCR.
20. Order 30 Rule 5 of the MCR states that:

*“Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit”.*

***LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002***

21. I find that the above provisions are adequate for the husband to make an application in the same court asking for setting aside of initial orders made in his absence. The parties are confusing themselves by using the word variation instead of the term setting aside. The husband in fact wants the orders made against him for discovery in the form to be set aside.
22. The Court below erred in not determining the application under the above provisions of the law. Since there were powers for the court to set aside its own orders, it should have determined whether sufficient cause has been shown for the orders to

be granted. The court did go onto examine that the husband did not present any legal argument and delayed the substantive cause. It also considered that the discovery was necessary for the purposes of trying the real issues between the parties.

23. I do not have the benefit of the reasons why the husband defaulted in the lower court by not presenting the arguments. I cannot say that he has satisfied me that he had good reasons not to file his written submissions as ordered by the Court. Notwithstanding that, what concerns me more and should be addressed is whether the order for discovery prior to separation is justified and valid. I will consider this in detail.

24. Let me first of all discuss whether the annual returns and the audited accounts of the companies before the date of separation is material. I find the answer in the negative. I say this on the basis that since the parties lived together before the separation; they both are responsible for the way the company managed its affairs. The accounts of the companies were a matter for them to manage. The Court will not interfere and require an explanation of the profits and losses of the company which occurred whilst the marriage subsisted.

25. Since the date of separation, one party definitely loses control and management to a large extent and how the funds of the company are utilized is not known to the party

***LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002***

who has been kept in the dark. How the other person in control manages or mismanages the affairs of the company is largely apparent through the audited accounts. In that regard the audited accounts since the date of separation is material and not any accounts before the date.

26. The second issue is whether audited accounts are necessary after the date of dissolution of marriage. The answer is in the affirmative. The simple reason is that, without any evidence being tested and tried, a party cannot assert that the other stopped contributing to the property after the dissolution of marriage. A party can

always continue to make contributions in very many forms and some of the ways are not to uplift the profits of the companies, by continuing to contribute to the welfare of the family by looking after the children or maintaining the family homes and so on. The examples are not exhaustive.

27. Whether a party has continued to contribute to the accumulation of the assets after the separation and /or dissolution of marriage is a question that is relevant to the aspect of contribution and can only be clarified in the evidence of the parties in the substantive hearing. The question is not relevant to the pool of assets.
28. In the matter before me, the wife is attempting to know the value of the company and the profits it made so far after the date of separation. That has to be disclosed to her and the court. The time period until which the disclosures are limited is as at the date of the trial.
29. If the husband asserts that the wife has not contributed to the value of the companies in any way, he is free to adduce that evidence in the trial when he is addressing the question of contribution. That can be done in the main property proceedings. That is the stage where the court will consider the contribution of the parties to the marriage and not in a mini trial which I find the court would have conducted as per its orders I have reproduced in paragraph 1 above. The court was intending to hear whether it should

***LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002***

order audited accounts of the companies after the date of separation or dissolution of marriage. There need not be a separate hearing on this issue.

30. Mr. Jamnadas has also set out the criterion on which an order can be varied. Those are not the applicable factors when an order is made in absence of a party. The Court needs to look at why the party did not appear in the first instance and whether the orders are justified upon hearing the parties. If there are satisfactory explanations for the non- attendance at the hearing and upon hearing both parties, if the orders are not justified, a setting aside is warranted.

31. In this case, Mr. O’Driscoll properly applied for a setting aside and when he was unsuccessful, he appealed. That is the proper procedure in law. The appellate court is free to consider why the orders are not justified on merits if it finds that the lower court had wrongly refused an order for setting aside.

32. I have already found that the lower court was not correct in refusing to set aside the orders on the basis that it did not have the mandate in law to consider such applications. Since there are powers to set aside, it was necessary for me to then delve into whether the setting aside should be considered and granted on merits. I have given my reasons why it should be.

***Final Orders***

33. In the final analysis I set aside all the orders of the lower court of 23 January 2017 and orders as follows:

***a. Within 21 days of the date of this order, the husband to provide the annual returns and the audited accounts of the company since or from the date of separation until date.***

***b. That the question of whether or not the wife has made any contributions to the properties of the parties since the date of separation and/or dissolution of marriage is***

***LEE v. ZHAO – FIJI FAMILY HIGH COURT APPEAL CASE NUMBER: 17/Suv/0002***

***a triable issue relevant to the question of contribution which must be heard and determined in the substantive hearing of the distribution proceedings and not in a separate mini hearing of any kind.***

***c. The substantive matter must be listed for hearing as soon as possible if all the preliminaries have been complied with.***

***d. Each party to bear their own cost of the appeal proceeding.***

**To:**



1. *O'Driscoll & Co. for the Appellant.*
2. *Jamnadas & Associates for the Respondent.*
3. *File: 17/Suv/0002.*