

IN THE FAMILY DIVISION OF THE HIGH COURT

APPELLATE JURISDICTION

CASE NUMBER:	19/Lab/ 0006 (Original Case Number: 18/LAB/O360)
BETWEEN:	AADAVAN
AND:	RAKA
Appearances:	Legal Aid Commission, Savusavu. Legal Aid Commission, Labasa.
Date/Place of judgment:	09 th Day of June, 2020 at Labasa.
Coram:	HON. VISHWA DATT SHARMA
Category:	<i>All identifying information in this judgment have been anonymised or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymised Case Citation:	AADAVAN v. RAKA - Fiji Family High Court Appeal Case Number: 19/Lab/0006

JUDGMENT OF THE COURT

A. Catchwords

FAMILY LAW - Spousal and Child Maintenance

B. Legislation

1. ss.86, 89, 90, 91, 155 and 157 of Family Law Act (FLA)

INTRODUCTION

- [1] This is the Husband's Amended Appeal against the decision of the learned Resident Magistrate of 29th May 2019.

[2] The Husband herein was ordered to pay a monthly sum of \$126 as spousal maintenance and \$50 per week as child maintenance commencing 28th June 2019 and until the child attains the age of 18 years.

[3] The Husband was aggrieved with the Court's decision and filed the current amended Appeal before Court on the following Grounds-

- i. The learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially without due consideration to his means.
- ii. The learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially even though she was examined by doctors and her state of health was fine.
- iii. The learned Magistrate erred in law and in fact as the order for child maintenance was excessive given that both parents have a responsibility to look after the child and maintain the child.

[4] The orders sought by the Husband in his amended Appeal are as follows-

- i. That the Order for child maintenance be reduced from \$50 per week to \$30 per week;
- ii. That the Magistrates Court Order for spousal maintenance be set aside;
- iii. That the aspect of spousal maintenance be referred back to the Magistrates Court for a proper hearing before another Magistrate; and
- iv. Any other Order this honourable Court deems fit and just.

[5] Both counsels representing the parties to the proceeding in their oral and written submissions submitted to Court that the spousal maintenance order be set aside and referred back to the Magistrates Court for re-hearing and determination before another Resident Magistrate accordingly.

GROUND (i)

[6] The learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially without due consideration to his means.

[7] The issue herein is whether the Appellant (Husband) is obligated to support the Respondent (Wife) financially without due consideration to his means.

GROUND (ii)

[8] The learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially even though she was examined by doctors and her state of health was fine.

[9] **Grounds (i) and (ii)** hereinabove are interrelated. It raises the issue of the Husband's obligation to support the Wife financially without considering the Husband's means and even though the Wife was examined by the doctors, the Wife's state of health was fine.

[10] Ss.155(a) to (c) of the FLA stipulates that a party to a marriage is liable to maintain the other party, to the extent that the 1st mentioned party is reasonably able to do so, if, and only if, that other party is unable to support himself or herself adequately, whether-

- (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
- (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or

(c) for any other adequate reason.

- [11] In determining the question of liability, the Trial Court must read s.155 together with the factors set out in s.157 of the FLA.
- [12] The issue that is raised herein by the Husband as well as the Wife is that the learned Magistrate did not take into account the means and/or expenses of the Husband when making the order for the spousal maintenance.
- [13] At paragraph 19 of the Judgment I find that the learned Magistrate had correctly applied the principle set out at s.155 of the FLA whilst determining the issue of liability and/or obligation to support the Wife financially.
- [14] The Wife's contention was that the Husband did not testify with regards to his expenses during trial.
- [15] However, the issue is whether the Court had taken into consideration all the facts of the case, in particular, the earning capacity, expenses and state of health of each of the parties to these proceedings.
- [16] S.157(d)(1) of the FLA requires the Court to examine the parties' income coupled with the commitments that are necessary to enable the party to support himself or herself.
- [17] S.157(c) of the FLA requires the Court to take into consideration whether either party has the care or control of a child of the marriage who has not attained the age of 18 years.
- [18] The Court found that the Wife was unable to work since she was physically incapacitated. On the other hand, the Court found that the Husband had an obligation towards the Wife.
- [19] However, the Court did not take into consideration the expenses and commitments of the Husband.
- [20] Further, there was oral evidence that he earned \$220 monthly in his capacity as a caretaker and currently pays interim spousal and child maintenance of \$60 per month. There was no evidence of any payslips tendered into evidence to support and confirm the Husband's oral version that his monthly income was \$220. This figure could have been easily plucked out of the air to enable the Court to accept the earning capacity of the Husband.
- [21] The fact of the matter is that a proper analysis of the income and expenses reasonable in the circumstances was not done as required in terms of s.157 factors of the FLA.
- [22] Further, prima facie, if the Husband stated in his oral evidence that he earned \$220 per month in his capacity as a caretaker.
- [23] Therefore, I find that the order for spousal maintenance is rather too substantial in nature.
- [24] Both counsels representing parties to this proceeding are aware of this flaw and have considered in their oral and written submissions that this aspect of the spousal maintenance should go for retrial.

[25] For the aforesaid reasons, I allow the Appeal on Grounds (i) and (ii) as set out at paragraph 3 of my Judgment hereinabove.

GROUND (ii)

[26] I will now proceed to deal with the final Ground of Appeal (iii) -

The learned Magistrate erred in law and in fact as the order for child maintenance was excessive given that both parents have a responsibility to look after the child and maintain the child.

[27] The issue by the Husband (Father) herein is that the child maintenance order made was excessive given the fact that both parents have a responsibility to look after and maintain the child.

[28] The FLA imposes a general child maintenance liability- that is, a liability that does not depend on the existence of a Court order- only upon the parents of a child.

[29] There are three (3) rules which apply in respect of the duty of the parents to maintain their children. *The first rule of priorities is that the duty of a parent to maintain a child is not of lower priority than the duty of the parent to maintain any other child. The second rule of priorities is that the duty of a parent to maintain a child has priority over all commitments of the parent other than those necessary to enable the parent to support himself or herself and any other child that she has a duty to maintain.*

Commitments herein signifies financial commitments. Necessary here obviously means absolutely necessary and/or reasonably necessary. Child support has to do with a person's continuing, day-to-day needs for basic necessities. Duty in the context hereinabove signifies legal duty, and not a moral duty.

The third specified rule of priorities is that the duty of a parent to maintain a child is not affected either by the duty of any other person to maintain the child, or by any entitlement of the child.

[30] The Court in deciding whether to make a child maintenance order, and if so what orders to make, the Court is required in terms of s.89(1) of the FLA to take two basic steps.

First the Court must consider what amount is required to maintain the child, and then decide how much of this the relevant party or parties should pay.

The way in which the Court must consider each of these matters are fully explained in s.90 and 91 of the FLA.

[31] The learned Resident Magistrate at paragraph 5 and 6 of the Judgment has taken into consideration the parental responsibility for the child, the primary duty to maintain the child and priority over all commitments of the parent.

[32] The learned Resident Magistrate has also taken into consideration the fact that the Wife (Mother) was the Child's caregiver and that her parents have provided the bulk of the Child's physical, emotional and financial needs.

[33] The Child herein was born in 2010 and has currently attained the age of about 10 years. she is currently in class 5 continuing her education.

[34] The learned Resident Magistrate upon consideration of the evidence tendered before the lower Court has found that "it was time the Husband (Father) contributes equal share for the care and maintenance of his child" and "ordered a sum of \$50 per week as child maintenance order until the child attains the age of 18 years."

[35] Bearing in mind all above, I will not disturb the current child maintenance of \$50 per week. However, the Husband and wife are at liberty to apply for modification of child maintenance order in terms of s.97 of the FLA however he thinks appropriate in the circumstances.

[36] Following are the final orders-

- i. **The Appeal is allowed on Grounds (i) and (ii) at paragraph 3 of my Judgment hereinabove accordingly.**
- ii. **The Appeal is declined on Ground (iii) hereinabove with respect to the issue of child maintenance. The Husband and the wife are at liberty to apply for modification of child maintenance order in terms of s.97 of the FLA.**
- iii. **Each party shall bear their own costs of the Appeal proceedings.**

VISHWA DATT SHARMA
JUDGE
SUVA
09th Day of June, 2020

cc: *Legal Aid Commission, Savusavu.*
Legal Aid Commission, Labasa.