

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER: 14/Suv/ 0004

BETWEEN: TAVITA

APPELLANT

AND: TENIZA

RESPONDENT

Appearances: Ms. P. Salele for the Appellant.

Ms. P. Narayan for the Respondent.

Date/Place of Judgment: Friday 20 February 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

Category: Anonymised.

JUDGMENT

Catchwords:

FAMILY LAW – CONTEMPT PROCEEDINGS – *Inchoate orders which does not clearly specify the rights and obligations of the parties is clearly unenforceable – father of children cannot be found fault for not complying with an open order to pay school related expenses when the order was misused and the specifics of his obligation not identified to him.*

FAMILY LAW – PROPERTY DISTRIBUTION – *Order made for husband to pay an amount on application for property distribution – property sold and the counsel for the wife retains sale proceeds in the trust account and thereafter makes deductions which were neither permitted by the court nor authorized by the husband –an exercise undertaken by the court as to which deductions are proper and which should not have been made – order made for counsel to pay a specified sum to the husband- order for costs made in favour of the husband.*

Cases:

1. *Harris v. Caladine (1991) 172 C.L.R. 84 at 96, 103-104,124,133.*

Cause

1. There are two matters before this court. The first is an appeal arising from the judgment of the Family Division of the Magistrates' Court of May 2014 delivered in contempt proceedings brought by the mother against the father of the children alleging wilful disobedience of the orders for payment of all school related expenses for the three children of the marriage.
2. The order for the payment of the school related expenses were made by consent of the parties on 09 August 2007. The aspect of consent is however under challenge and I will deal with the issue later.
3. The father was found guilty and sentenced to pay a fine of \$200 within 30 days in default of which he was to be committed to prison for 20 days.
4. The second application is also by the husband. He seeks an order that the wife's counsel provides to the court an account of how much money was received by her pursuant to the sale of the property of the parties to the marriage and for her to also provide to the court all invoices, receipts and particulars of all costs breakdown in respect of all the deductions that she has made from the proceeds of the sale. The husband is also asking for the proceeds of the sale to be released to him. The application was initially filed in the Family Division of the Magistrates' Court.
5. The Resident Magistrate had made an order on 21 November 2016 that the wife and her counsel provide to the husband and his counsel a copy of the cheque received from the purchasers as consideration for the sale of the property. The wife and her solicitors were restrained from making any further deductions from the monies belonging to the husband. The wife seeks a setting aside of these orders. She made this application through her response to the husband's application identified above.
6. The wife later filed an application for transfer of the proceedings to the High Court. The counsel for the husband conceded for an order for transfer.

7. I was initially of the view that the matter should be heard by the Magistrates' Court but since the issue on appeal had a bearing on the second application for accounts and release of proceeds of sale and that it involved a counsel deducting funds from the trust account belonging to a party who is not her client, I was prepared to hear the matter in the High Court. An order for transfer of the application was therefore made on 27 March 2017.
8. I will first of all deal with the appeal that is before me. I have not yet set out the background to the second application which I would do at an appropriate stage of the judgment.

The Findings in Contempt Proceedings

9. The charges that were put to the husband in respect of the non-payment of the school related expenses were that he:
 - a. *Failed to pay the school related expenses for the child A for years 2007 and 2008 in the sum of \$456 and in the sum of NZ 23,659 for the year 2009.*
 - b. *Failed to pay the school related expenses for the child B in the sum of \$25,959 made up as follows:*
 - (i) *\$240 for 2007*
 - (ii) *\$3,660 for 2008*
 - (iii) *\$3,679 for 2009*
 - (iv) *\$4,406 for 2010*
 - (v) *\$4,124 for 2011*
 - (vi) *\$4,070 for 2010, and*
 - (vii) *\$5,780 for 2013.*
 - c. *Failed to pay the school related expenses for the child C in the sum of \$240 per year from 2007 to 2013. The total sum alleged to be not paid in respect of Child C was \$1,680.*

10. On the allegation that the father had not paid the school related expenses for child A for the years 2007 and 2008, the court found that the father had admitted that he had not done so. On his admission, the court found that non-compliance was established.
11. Whether the father had access to the funds to pay Child A fees, it was found in the affirmative on the basis that he had withdrawn monies from his FNPF account upon turning 55. The court found that these monies should have been used for payment of the school related expenses for the children. The father was found guilty for non-payment of the fees for Child A..
12. On whether the father could be found guilty for non-payment of the school fees for Child A in the sum of NZD 23,659 for the year 2009, the court arrived at the conclusion that the term education in the order did not include overseas education. In addition to that the court found that the father was not aware of the fact that the child was studying overseas.
13. Having arrived at the conclusion, the court was of the view that the Family Division of the High Court was in a better position to make a finding on whether the term education includes overseas education under the provisions of the FLA. A finding of guilt was therefore not made in respect of non-payment of overseas school fees for Child A.
14. In respect of the child C, the court found that the father had admitted that he had not paid the school related expenses and he was thus guilty in that regard.
15. On the final allegation of non-payment of the school related expenses for the child B, the father denied that he was supposed to pay for the school related expenses as he did not know that the child was attending School which charged such exorbitant school fees. The evidence was that the child was attending a special school because the child had learning problems as stated by the mother.
16. The court found that on 28 January 2009, the father had sworn an affidavit in which he had stated that he did not have the means to pay for Child B school fees. Based on this, it was

concluded by the court that the father knew that the child was in School. On that basis the father was found guilty for non-payment of the school fees.

17. Aggrieved at the decision the father appealed.

Analysis

18. I will deal with the matter at hand under two heads.

A. Appeal Arising from Contempt Proceedings

19. In his appeal the father urged that he had raised a defence in the contempt proceedings that he never gave his solicitors instructions to concede to an order for payment of the school related expenses.

20. He also raised that the court erred in fact in finding that he knew that his son Child B was attending School and that he agreed for the payment of the school related expenses for him.

21. The counsel for the father argued that since it was raised that he did not concede to an order for payment of the school related expenses, it was the duty of the court to find whether he did concede to the orders. Apart from that, it had to be shown and established that he had knowledge of the order.

22. The consent order that is subject to challenge appears in the copy record. It was made on 9 August 2007 and indicates that the counsel for the father Mr. A. Bale appeared for him. The orders read as follows:

“It is this day ordered as follows:

a. By consent the respondent is to pay an increased maintenance of \$30.00 per week for the two older children and that is \$60.00 per week plus \$20.00 per week of (sic) the younger child a total maintenance of \$80.00 per week with effective from today until the children attain 18 years of age or are at school.

b. Respondent is also to meet all school related expenses of the 3 children.

c. 20 December 2007 for review.”

23. It was found by the court below that subsequent to the making of the consent orders above, the father had appeared in court twice October 2007. Further he had deposed an affidavit on 28 January 2009 in which he had stated that he could meet some of the school expenses for Child C and Child A but not Child B. On that basis the court found that the father's assertion that he did not know about the order and only learnt of it in December 2013 when he was in Fiji was not correct.
24. The Resident Magistrate also stated that when the father stated in his affidavit that he could not meet the school related expenses of Child B, it was clear that he knew that the child was in the Suva Christian Community School.
25. The court below found that having known about the order, the father should have either moved for a setting aside of the same and/or reported his lawyer to the Legal Practitioner's Unit. There was no such action on the part of the father and therefore he cannot rely on the basis that he did not concede to the order or that he had no knowledge of it.
26. I have a different view in regards the consent order that was made. There are three considerations that arises from the same. The first is whether the father gave instructions to Mr. Bale to concede to such orders. This is a matter that cannot be tried without hearing Mr. Bale. This was perhaps an exercise that the court could not undertake and dispose fully in the contempt proceedings.
27. The father had to make an application for setting of the orders in which he could have subpoenaed Mr. Bale to give evidence. That would be the proper application to decide whether he had given instructions to concede to the orders. In that regard, the court was correct in stating that whenever the father found out about the order, he should have applied for a setting aside of the same.
28. The second consideration that arises from the consent order is directly relevant to contempt proceedings. The consideration is whether the father knew that such order existed against him. When he raised that he was not aware of the order, the first aspect that needed to be

established was whether the order was ever served on him for him to have the full knowledge of the same.

29. If it was proved that he was in court on the day the order was made, I would not insist on the aspect of service. I do not have the affidavit of 28 January 2009 before me but I do not find that the father's statement that he could meet some of the school expenses and not the rest as admitting that he had the knowledge of the order to the full extent.
30. I do not find that the order was served on the father for him to be fully aware of his obligations. There is no affidavit of service in the copy records to establish this.
31. The matter does not end there. The third consideration concerns the clarity of the order. The consent order based on which the contempt proceedings was founded stated that the father was to meet the school related expenses of the children. This order lacks specificity and is inchoate.
32. An order of such a nature is clearly unenforceable and open to abuse and misinterpretation. An order should always stipulate the rights and obligations of each party unequivocally. An order which is equivocal is neither encouraged nor enforceable.
33. The order does not express what the term "*school related expenses*" means. Does it only mean the school fees or does it include matters such as the children's transport, stationary and pocket expenses.
34. There is lack of specificity in regards the exact financial responsibility that the father had in a year for the court to make a finding that such an amount was necessary for the children and that the father was in a proper financial position to meet those expenses. Without the father knowing the exact extent of his liability, how can he concede to an amount?
35. The order does not state whether the children were free to go to private or expensive or schools overseas to expose the father to huge costs such as in this case. Such orders obviously is open to misuse by a party like what happened in this case.

36. The mother sent one child to overseas to study and the other child to a special school. The evidence reveals that the father's sanction was not obtained or that he was informed about the expenses involved in sending the children to schools which was not contemplated by the order. Both the children were attending normal public schools in Fiji before.
37. I do not find that either the court or the father's counsel had envisaged this trouble when the orders were being thought to be made final. Such errors happen when orders are given merely to dispose of cases without any regard as to its meaningfulness and practical effect.
38. I reiterate that the evidence clearly lacked in establishing that the mother had ever informed the father what the school fees were and given him a time frame to pay. She has tendered no evidence that she has sought the father's permission to enroll one child in a school overseas and another child to such an expensive school.
39. The evidence clearly showed that the mother interpreted the order in a way that she could to expose the father to liability even if he could not cater for it or had explicitly agreed to.
40. In my observation and finding, this was a unilateral act of the mother to incur such expenses for the children which the father had not conceded to and there is no evidence that he has the continuous means to undertake the liability for payment of the school expenses.
41. I do not find that there was a clear finding that the father had knowledge of the amount that he had to pay and that he was liable to do so and had means to pay the same. The father did uplift the monies from his Fiji National Provident Fund but that amount was exhausted when the contempt proceedings was heard. He had given evidence that he had spent the monies on his farm.
42. Given that evidence I find that there had to be an examination as to his means to pay the same failing which the required act of "wilful disobedience" could not be made.
43. I do not find that the finding of guilt was properly made. As a result I set aside the orders making a finding of guilt and the sentence imposed on the father. The appeal is allowed. The

parties are at liberty to resolve the issue setting aside or clarify in the order in the Magistrates' Court if they so wish.

44. I now turn to the next issue.

B. Application for An Account of the Sale Proceeds and Payment of the Same

45. Before I deal with the substantive issue arising in this case, I must deal with Ms. Prem Narayan's concerns on service and jurisdiction. She raised that the application was supposed to be served on the mother or on her personally. She submitted that the application was served at her office and not on her personally. If it was not served on her client or her as the counsel personally, the service is defective.

46. Secondly Ms. Narayan asserts that there is no order by the Family Court for the sale of the property and how the sale proceeds were to be distributed. The Family Court thus does not have the jurisdiction in the application to decide how the proceeds are now to be distributed. It is a matter for the civil court.

47. I find Ms. Narayan's interpretation of serving her personally as the counsel absurd. Service to a law firm representing a party is service proper. Ms. Narayan was always on record for the mother and service was effected on her firm. Her agents received the service of the application. This is deemed service on her.

48. Further, if she was not properly served, she should not have made an application for transfer of the proceedings to the High Court. She should have first insisted on the documents being served on her personally and the court would have decided whether she needed to be given a copy to expeditiously resolve the issue and avoid any prejudice resulting.

49. Ms. Narayan has full knowledge of the proceedings and for her to raise the issue of inadequate service is neither meritorious nor a genuine act on her part to address the issue of any prejudice that her client has suffered. I dismiss the concerns on service.

50. On the question of Family Court's jurisdiction, it is very much a matter for the Family Court. The wife had made an application for an equal distribution of the property of the parties to the marriage. The application was made on 08 February 2013.
51. The property that was sought to be divided in the application of 08 February 2013 was Leasehold property. In respect of that application, the court had made an order by consent on 8 December 2014 that the father was to pay a sum of \$47,500 to the mother. In addition to that the father had to also pay a sum of \$100 to the mother for the valuation report. The amount was to be paid by 30 January 2015.
52. Although there was no order for sale and how the funds were to be distributed, the dispute is about the distribution of the sale proceeds of the same property that was subject of the wife's application for distribution and in respect of which the consent order of 8 December 2014 was made.
53. Ms. Narayan cannot separate the sale proceeds and say that now it falls under the jurisdiction of the Civil Court and that the Family Court has lost the jurisdiction.
54. The issue is whether the parties have realized the division of the property as per the order of the court and whether any party has been unfairly dealt with. The Family Court cannot ignore that the issue is about proper distribution of the proceeds of the sale of the property of the parties to the marriage. The property has now been converted to cash and the dispute remains regarding the distribution.
55. I must say at this stage that the order for payment of the wife's share under the 8 December 2014 was never changed or set aside by the Court. When the husband could not pay the monies within the time frame as ordered, the parties had started discussing the issue of the sale of the property and how the distribution should take place.
56. Before the Registrar of the Family Court, they had into an agreement which was never formalized or approved by the court and as such the agreement was not valid. Any changes to the order of the court had to be made formally and this was not done. I cannot find any

changes made to that order. The copy pleadings do not contain any such order of change. What therefore remains was the order of 8 December 2014 for the parties to follow.

57. I find it very alarming that Ms. Narayan wishes to exercise lien on the funds as she makes the case out to be. She says that she is the custodian of the funds and she could deduct the monies for the benefit of her client in the manner she deemed fit.
58. The property of the parties to the marriage being was sold in the sum of \$130,000. From that amount, Ms. Narayan only paid the husband a sum of \$3,467.80 by a cheque dated 6 October 2016. The rest of the monies has been deducted by her for various matters.
59. As per the order of 8 December 2014, the sale proceeds ought to have been given to the husband or his counsel so that he could pay the wife his share under the order. Ms. Narayan had no mandate to undertake the task of settlement and deduction of the monies. The agreement which she may have thought gave her the powers to handle the funds was not an order based on which she could act. This may have perhaps been the reason why the court below had ordered the wife and her counsel to hand over the settlement cheque to the husband and his counsel.
60. Be that as it may, I have to now see ascertain what has been done to the funds received by Ms. Narayan. Ms. Narayan has produced the accounts in the copy pleadings as follows:

<i>25 April 16</i>	<i>Deposit</i>		<i>\$ 5,000</i>
<i>05 Aug 16</i>	<i>Settlement Sum</i>		<i>\$121,232.50</i>
			<i>\$126,232.50</i>
<i>Less</i>			
<i>09 Aug 16</i>	<i>Conveyancing Costs</i>	<i>\$19,757.16</i>	
<i>09 Aug 16</i>	<i>Real Estate Agency</i>	<i>\$ 5,000</i>	
			<i>\$ 24,757.16</i>
			<i>\$101,475.34</i>
<i>Share of Tevita</i>			<i>\$ 50,737.67</i>

Less

<i>11 Aug 16</i>	<i>WAF & FEA Arrears</i>	<i>\$150.27</i>	
<i>11 Aug 16</i>	<i>Costs Awarded</i>	<i>\$2,163.00</i>	
<i>11 Aug 16</i>	<i>HA Land Rent</i>	<i>\$439.20</i>	
<i>11 Aug 16</i>	<i>School Fees</i>		
	<i>(as per judgment dated 9 May 2014)</i>	<i>\$26,775.00</i>	
<i>08 Sep 16</i>	<i>Suva City Council Rates</i>	<i>\$3,767.50</i>	
<i>08 Sep 16</i>	<i>Salele Law</i>	<i>\$2,100</i>	
<i>08 Sep 16</i>	<i>JDS Dated 8 Sep 2016</i>	<i>\$7,324.90</i>	
			<i>\$ 2,719.87</i>
			<i>\$8,017.80</i>

Less

Future Maintenance for Child C from 9/9/2016 to 11 Feb 2019

<i>127 week by \$50.00</i>	<i>\$6,350.00</i>	
<i>Less payment received in trust</i>	<i>\$1,800</i>	
<i>Nett Future maintenance for Child C</i>	<i>\$4,550</i>	
		<i>\$4,550</i>
<i>Enclosed Cheque</i>		<i>\$3,467.80</i>

61. Generally speaking, if the wife and her counsel, after having received the settlement cheque wanted the other deductions to be made, then they should have sought the courts order. It is the duty of the court to see whether the distribution is just and equitable. The court may not have sanctioned the distribution if it was of the view that the same would result in an inequitable distribution.

62. The case of *Harris v. Caladine* (1991) 172 C.L.R. 84 at 96, 103-104,124,133 makes it clear that the court must always exercise its own discretion on what order should be made under an application for distribution of the property of the parties to the marriage. This is so even if the parties seek a property order by consent. The court cannot ignore the requirement to assess that the orders which are proposed by the parties are just and equitable.
63. Ms. Narayan had no mandate to make any deductions without an order of the court. The father had also not given her any explicit authority or consent to deduct the monies from the trust account. She therefore is under no authority to dispose of the funds in the manner she likes.
64. It was Ms. Narayan who kept raising that the court has not said how the money should be distributed. Is she ignoring the order of 8 December 2014? Is that not an order that indicates how much the wife is entitled to? Does that not mean that that is all the obligation that the husband had under an order for property distribution?
65. Be that as it may, the deductions are now under scrutiny pursuant to the application filed by the husband. I therefore need to examine what could be classified as proper deductions. I can call this a posthumous exercise but very necessary for the husband to realize his share of the proceeds.
66. The first is the amount of the sale price. The property was sold in \$130,000. The accounts provided by Ms. Narayan only shows that she received \$126, 232.50. Where has the balance of \$3767.50 gone to? Her client explains that this sum was deducted for unpaid rates to Suva City Council without which the settlement could not take place. If that is so then why does Ms. Narayan again deduct the same amount for rates on 8 Sept 2016? There is double deduction for one transaction which is not proper.
67. I would have given concession for this if the wife was to be given equal shares in the property. There is no order for equal distribution. The order that is intact is for the wife to be given \$47,600 including the valuation costs. The court will therefore use the figure of \$130,000 to work with and not \$126,232.50.

68. A sum of \$19,757.16 was deducted for conveyancing costs. This means that Ms. Narayan has charged both the parties such an exorbitant sum for a \$130,000 transaction. I have never heard of any such conveyancing charges on that sale price nor do I find that it can be justified on any basis. What appears to me is that Ms. Narayan has taken indemnity costs from the sale proceeds for acting for the wife on her property distribution application.
69. The husband is not responsible for any legal costs that the wife has incurred in seeking representations for her litigation proceedings. In respect of the conveyancing costs, she should have either sought an order from the court for deduction of the same or the parties consent to deduct a particular amount. I do not find that any amount beyond \$1,500 is justified for conveyancing. I will therefore only make an allowance for \$1,500.
70. The next deduction is in the sum of \$5,000 which was paid to Real Estate Agent. I will allow the costs paid to the Real Estate Agents because the parties had agreed by consent on 22 July 2015 to engage Real Estate Agent to sell the property. The invoice produced by the Real Estate agent shows the fees as \$5,200 VIP. There may have been some discount offered. Since the amount is less than the invoice amount I will allow the same.
71. I am also of the view that the disbursements on the property such as the Housing Authority land rent, the water and electricity bills and the Suva City Rates shall be deducted from the husband's share as he had the property to his disposal and it was his duty to pay these dues on time. I am therefore of the view that from the husband's share a sum of \$4, 356.97 should be deducted. There is enough evidence in the copy pleadings that these amounts had been paid by Ms. Narayan.
72. The deduction of school fees in the sum of \$26,775.00 is improper. The amount was deducted because the husband was found in contempt of court. Ms. Narayan was of the view that since he was found guilty, he needs to purge his contempt.
73. The contempt judgment was appealed. I have allowed the appeal and set aside the findings of the court below. Part of my findings have explicitly stated that the consent orders were not brought to the knowledge of the husband, are inchoate and incapable of being enforced. I

therefore find that the deduction of the school fees is not justified pursuant to the findings on appeal.

74. Ms. Narayan also deducted a sum of \$2,163.00 being costs awarded against the husband in the proceedings. I find that this amount is not properly deducted. First, I am not shown how the costs order is made up of. The copy pleadings only contains one order which indicates that the husband had to pay a sum of \$750 in costs to the wife. I should have been convinced that there are other orders that have not be realized. Secondly, I am minded to award the costs on appeal and costs for this application for accounts in favour of the husband. Any costs orders can be offset against each other and the remaining balance can be enforced separately.
75. I reluctantly allow the sum of \$2, 100 paid to the husband's counsel as her fee. This is a matter that the husband ought to have been allowed to sort it out by himself. Ms. Narayan had no mandate to attend to a matter that is between the husband and his counsel. I am allowing this because Ms. Salele had appeared in court and argued the matter after which she passed away. She had not taken any objections that such an amount was paid to her. Even the husband did not seriously raise any such issues in regards this payment. Since the counsel for the husband is not around anymore, it is better that an allowance of this amount is made as proper instead of disallowing the same.
76. On the question of the maintenance arrears, the amount of \$7,324.90 has been paid in court by Ms. Narayan on behalf of the husband. This amount will be credited in respect of the maintenance arrears. Since this is an amount that has been paid in court, I will allow the same. The husband will be benefiting from this payment as he will decrease his maintenance liability.
77. As to future maintenance, Ms. Narayan could not presume that there will be default and that she has the right to use the proceeds of the sale. She neither had the permission of the court nor the permission of the husband to deduct future maintenance which is a contingent liability from the proceeds of the sale. Anything can happen and diminish this liability.

78. I find that the following deductions are proper from the sale price, that is,

- (i) *Wife's share as per order of Court - \$47,600*
- (ii) *Conveyancing costs - \$1,500*
- (iii) *Real Estate Agent Costs - \$5,000*

79. After the above costs are deducted from the sale proceeds, an amount of \$75,900 is left for the husband. From those monies I have permitted the following deductions:

- (i) *WAF & FEA Arrears - \$150.27*
- (ii) *Housing Authority Land Rent - \$439.20*
- (iii) *Suva City Council Rates - \$3767.50*
- (iv) *Payment to Salele Law - \$2,100*
- (v) *Maintenance arrears - \$7,324.90*

80. The above deductions from the husband's entitlements amounts to \$13,781.87. He is therefore entitled to a sum of \$62,118.13. This sum should be paid to the husband by Ms. Narayan without any further delay.

81. On the question of costs, I find that this application for accounts would not have been necessary if Ms. Narayan had acted diligently in handling the monies and not making deductions unilaterally in the manner she thought it was fit.

82. She could have avoided all this by seeking proper orders of the court for deduction or having proper discussions with the parties. The application was made by the husband for which he had to hire counsel to justify his cause. He is entitled to costs of the proceedings which could have been sorted out amicably between the parties.

Final Orders

83. In the final analysis I make the following orders:

- a. *The appeal is allowed. The orders of the Magistrates Court on the contempt proceedings in which a finding of guilt was made and the sentence imposed on the*

appellant father is set aside. The parties are at liberty to apply in the Magistrates' Court to either set aside the order or to clarify the extent of the husband's liability.

- b. In respect of the application by the father, I order Ms. Narayan to pay to the appellant father a sum of \$62,118.13 within 14 days and to provide evidence of payment of the said monies to me within the same time frame by filing the appropriate documents in the file. In absence of compliance of the orders, I will issue proper directives.*
- c. I set aside the order requiring the wife and her counsel to deliver the settlement cheque to the husband and his counsel on the basis of my calculation of his proper entitlement.*
- d. The appellant shall have costs of the proceedings in the sum of \$3,500 to be paid within 14 days.*
- e. I will appoint a date for review of the orders for payment by Ms. Narayan.*
- f. The parties are at general liberty to apply to this court to correct the calculations if there are any errors.*

.....
Hon. Madam Justice Anjala Wati

Judge

20.02.2020

To:

- 1. Appellant.*
- 2. Prem Narayan Lawyers.*
- 3. File: Appeal Case Number: 14/Suv/0004.*