

IN THE HIGH COURT OF FIJI
FAMILY DIVISION

AT LAUTOKA

ORIGINAL JURISDICTION
PRINCIPAL RELIEF

Case No: 57/2008
HBM 10/08L

R S AND A S

[Application for Nullity]

Appearances:

Applicant in Person
Respondent in Person

Date of Hearing: 28/04/08
Date of Judgment: 08/05/08

JUDGMENT

1. Formalities of Marriage & Application

The marriage between the Applicant, Mr R S, and the Respondent, Ms A S, took place on 6 July 2007 at the Lautoka Registry of the Office of Births, Deaths and Marriages. The Certificate of Marriage states that on that date Mr S was 24 years of age, his date of birth being 8 December 1982. His occupation was listed as school teacher, his conjugal status as 'bachelor'. Ms S's date of birth is 19 February 1983, hence at the date of the marriage she too was 24 years of age, and her occupation, too, is that of school teacher. Her conjugal status was that of 'spinster'. 'Lautoka' is listed as 'usual place of residence' for each.

1.1 The application for annulment was filed by Mr Sh at the Family Court, Lautoka, on 6 February 2008. 'No real consent given' is the category ticked on the application form.

2. Response & Reply

Ms S responded to the application by an Affidavit (Affidavit in Response), to which Mr Sh in turn replied. As there are some complexities in this matter, I set out in full Ms S's response intersected with Mr Sh's reply, sometimes by direct quotation (as indicated) and sometimes by paraphrase.

2.1 In response to the ground of 'no real consent', Ms S states that she is 'confused as to whose real consent was not given':

... as far as I am concerned, real consent [was] given by both parties inclusive of both parties' parents' consent for the parties ... to marry: Affidavit in Response, para 3

2.2 *Mr Sh says Ms S 'was under pressure of her mother, Roshni, that she should not undergo a civil marriage with [Mr Sh]. Therefore [Mr Sh was] lured into this marriage: Reply, para 3*

2.3 Ms S observes that she and Mr Sh 'had been courting each other for one and a half years'. Then, in August 2006 Mr Sh and his parents came to our [Ms S's] home and proposed to my parents and I that [Mr Sh] and I should marry each other'. After 'much consideration and careful thought' and taking into account that Ms S and Mr Sh 'had been courting each other for one and a half years', Ms S and her parents accepted the proposal. Preparations then began for the 'Shekani' ceremony and Mr Sh's father made arrangements with the Office of the Registrar of Marriages, Lautoka, for the civil marriage. The civil marriage was scheduled to occur a day after the Shekani ceremony: Affidavit in Response, para 4

2.4 *Mr Sh says:*

It is not true that we had a courting relationship for 1 ½ years. In fact this relationship between [Mr Sh] and [Ms S] commenced as a girl and boy friend relationship after the school opened in 2007. It is also not [Mr Sh's] parents approached [Ms S's] parents as alleged: Reply, para 4

2.5 The Shekani ceremony was held at Ms S's home on 5 December 2006, attended by members and relatives of both Ms S and Mr Sh – approximately fifteen persons attending in addition to the parties: Affidavit in Response, para 5

2.6 *Mr Sh admits this paragraph: Reply, para 5*

2.7 Ms S attaches photographs of the Shekani ceremony, and from my observation those photographed – which include Mr Sh and Ms S – appear to be pleased, proud and happy in their demeanour and expressions. The photographs include Mr Sh and Ms S sitting beside one another on upright chairs, Ms S and Mr Sh again sitting beside one another on a low couch with draperies, then again on the straight-backed chairs – in one with Ms S's parents and in another with Mr Sh's parents standing on either side. There are various other constellations of family members and relatives with Ms S and Mr Sh outside the home, and presentations to Mr Sh and Ms S: Affidavit in Response, para 5

2.8 *Mr Sh makes no comment as to the photographs, however, he does comment on the DVD of the marriage (engagement) ceremony referred to later in Ms S's Affidavit in Response (see later).*

2.9 In the event, the legal marriage ceremony did not take place immediately after the Shekani, but was formalized on 6 July 2007. Ms S's father signed as first witness to the marriage, and Mr Sh's mother signed as second witness. Ms S's mother and Mr Sh's father were also present. On this day, consistent with tradition and cultural expectations of the parties, their parents and community, Ms S and Mr Sh held their 'engagement ceremony', attended by relatives, family members and friends: Affidavit in Response, paras 6, 7

2.10 *Mr Sh agrees with Ms S's recitation of the ceremony except that he says Ms S's father 'witnessed the civil marriage under protest since [Ms S's] mother was not agreeable to this marriage': Reply, para*

2.11 Preparations and planning for the (traditional) wedding then began, with the initial plan being that this would take place from 6-8 December 2007. Events intervened, however: Ms S and her mother travelled to India as Mrs S required medical treatment. Consent was obtained from Mr Sh and his parents for the wedding to be postponed. Mr Sh drove Ms S to Nadi Airport and Ms S's observation was that it was 'hard for [Mr Sh] to see [her] depart from him temporarily': Affidavit in Response, para 8

2.12 *Mr Sh says he admits 'the former part': Reply, para 8*

2.13 Upon Ms S and her mother's return from India, they contacted Mr Sh and his parents 'immediately' to set an alternative (traditional/customary) wedding date. The dates chosen and agreed to were 15-18 February 2008. Planning recommenced, organisation and preparations beginning at once. However:

Despite our planning, organizing and preparations for our customary wedding, [Mr Sh] called [Ms S] on 22nd January 2008 to say that the wedding is officially canceled without giving any reason. [Ms S] was so shocked and could not believe what [she] was told by [Mr Sh]. [Her] world crumbled and [her] heart fell to pieces: Affidavit in Response, paras 9, 10

2.14 *Of paragraph 9, Mr Sh says that upon Ms S's return from medical treatment he again approached' Ms S's father asking Ms S 'to undergo Hindu marriage ceremony she agreed but somewhat seemed pressure raised': Reply, para 9*

2.15 *Of paragraph 10, Mr Sh says:*

I deny paragraph (1) and substantive with some evident recorded in my mobile. [Ms S] contacted [me] by her mobile phone stating the marriage was over recorded version of the conversation will be exhibited in court': Reply, para 10

2.16 Ms S says that she then insisted on our marriage to proceed but [her] pleas fell on deaf ears'. She made 'vigorous attempts' to persuade Mr Sh the wedding should proceed, however, this 'met with surprising conditions' set by Mr Sh:

- a. That I should not go to my parents after marriage.
- b. That in going to and returning from work, I will be picked up by [Mr Sh] and further that I would not go anywhere between school hours.
- c. That I must do whatever [Mr Sh] says.
- d. That wherever I go [Mr Sh] must accompany me: Affidavit in Response, para 11

2.17 Ms S says she 'totally declined the conditions', however heard later from friends that Mr Sh 'is accusing me of bring up the ... conditions which strongly deny': Affidavit in Response, para 11

2.18 *Of paragraph 11, Mr Sh says:*

I categorically deny this is an absolute lie: Reply, para 11

2.19 Mr Sh, says Ms S, requested her to meet him on 24 January 2008 'at Hotsnacks in Lautoka City. We met and [Mr Sh] insisted that I should accept the conditions. I refused': Affidavit in Response, para 12

2.20 *Mr Sh denies paragraph 12: Reply, para 12*

2.21 Then, on 28 January 2008 Mr Sh and Ms S 'met again and it was then ... [Mr Sh] disclosed to [Ms S] that his father has been pressuring him to put forward the conditions'. Ms S continues:

I was further told by [Mr Sh] that his family is not willing to accept me and [Mr Sh] was given a choice of whether to choose me as his wife or his parents, and I am surprised that [Mr Sh] chose the latter: Affidavit in Response, para 13

2.22 *This is 'an utter-lie' says Mr Sh: 'I deny the fact': Reply para 13.*

2.23 Ms S goes on to say:

In all honesty I do want to proceed with the wedding for I want to marry [Mr Sh] but I can't do much because of [Mr Sh's] decision to stay with his parents rather than marrying me: Affidavit in Response, para 14

2.24 *In reply, Mr Sh says Ms S is trying to play a drama and cover things up: Reply, para 14*

2.25 Ms S visited the Social Welfare Office, Lautoka where she spoke with Mr Jone Meliki about the matter, seeking counselling. She arranged for counselling for the couple with a Social Welfare Counsellor. The counselling session was rescheduled due to Hurricane Gene, taking place two days after the originally appointed day, at the end of January 2008: Affidavit in Response, para 15

2.26 *Replying, Mr Sh says he admits paragraph 15, 'but things did not workout': Reply, para 15*

2.27 Next, Ms S says that on the day of the rescheduled counselling session, Mr Sh arrived with his father and 'before the counselling could commence, [Mr Sh's] father stopped [him] from attending counselling'. Ms S says she 'attempted to speak to [Mr Sh] but was denied access' by his father. Since then, she says, 'there has been no communication between' Mr Sh and herself: Affidavit in Response, para 16

2.28 *'This is totally untrue,' replies Mr Sh, 'since no attempt was made by' Ms S: Reply, para 16*

2.29 Ms S says she believed that if she 'gave time' to Mr Sh to 'think over' his decision to cancel the (traditional/cultural) wedding, then he 'may be able to come to his senses and proceed with our wedding':

But my belief proved wrong when I got served with [Mr Sh's] application for an Order of Nullity dated 6th February 2008, on the grounds that no real consent was given. I was shocked and stunned that [Mr Sh] now claims that no real consent was given. I could not believe that [Mr Sh] has filed the application when all had been going so well and I was looking forward to the big day of my life. I believe that it was [Mr Sh's] parent's strong and undue influence that has forced [Mr Sh] to make such a draconian decision not to marry me and/or proceed with the wedding: para 17

2.30 *Mr Sh replies:*

I deny [,] [T]he fact that it was the ... stubbornness of [Ms S] that this marriage could not work out and whatever had happened [Ms S] is to be blamed: Reply, para 17

2.31 Ms S says her 'world finally fell to pieces and shame, embarrassment, physical, social and mental distress greatly affected' her:

I could not concentrate on my work and my parents got worried about me. I felt used by [Mr Sh] for my status, integrity and credibility in our community is severely affected. My colleagues began to humiliate, ridicule and irritate me because of the failed marriage and rumours have now surfaced that [Mr Sh] is blaming me for the failed marriage.

[Mr Sh's] actions together with the strong and undue influence of his parents have caused me great discomfort. My status in society has been destroyed and it will take time for me to rebuild my shattered life. My parents have spent and sacrificed so much with the planning, organising and preparation for my full customary wedding notwithstanding their involvement in preparing all I need for my 'Shekani' ceremony, and engagement ceremony: Affidavit in Response, paras 18, 19

2.32 *Mr Sh says paragraphs 18 and 19 of Ms S's Affidavit in Response are 'not true'. Respectively as to paragraph 18 and paragraph 19, he states:*

This is not true; again [Ms S] is playing a drama and [concocting] a story. A story asking the court to believe her: Reply, para 18

This is not true. Since [Ms S] had not consummated the marriage with [Mr Sh]. No damage or distress has been caused to [Ms S]. In fact [Ms S] caused [Mr Sh] distress, discomfort and mental stress and a school teacher [Mr Sh's] performance was affected in school and as a result the school students suffered: Reply, para 19

2.33 A DVD of the 'engagement ceremony' (the legal wedding) was made, and Ms S is ready to provide a copy provided the Court rules it is able to be accepted into evidence. Ms S states that the DVD will show that real consent was given 'for [Mr Sh] and I to marry each other': Affidavit in Response, para 20

2.34 *The DVD, says Mr Sh:*

...will only prove the parties underwent an engagement ceremony and from the pictures it will prove that [Ms S's] facial expression is somewhat serious amounting to actually no real consent is assigned by [her]. In fact [Ms S] only played a drama: Reply, para 20

2.35 Ms S concludes with her 'realisation' that her insistence to marry [Mr Sh] will prove futile and therefore, because [she has] suffered so much loss and damages, [she requests] compensation in the sum of \$25,000 that will reflect the gravity of [Mr Sh's] action in damaging [her] reputation, integrity and credibility in society and to losses [she and her] parents have incurred over the past year with the preparation, planning and organising the 'Shekani' ceremony, engagement [legal wedding] ceremony, and for the failed wedding inclusive of purchases of wedding dresses etc: Affidavit in Response, para 21

2.36 *Mr Sh concludes by stating that paragraph 21:*

Proves that [Ms S's] intention was to be gainful. Her reputation, integrity and credibility in society is still intact since it was her refusal that she thought fit to cancel the marriage with [Mr Sh]. This is not a civil case whereby compensation can be pleaded: Reply, para 21

2.37 *He states that he seeks:*

... an order for conditional final orders and the time period for issuance of final order is to be abridged to one day. Further I wish to state the marriage has broken down and there is no way both parties can come together to any agreement: Reply, final para

3. Evidence in Person

Both Mr Sh and Ms S appeared unrepresented, in person. At the commencement of the hearing, Ms S asked that the matter be heard in the absence of Mr Sh's father who was present in Court. Mr Sh wished his father to be present.

3.1 As Family Court hearings are generally covered by privacy principles which allow for a closed court, it appeared to me proper to hear from Mr Sh and Ms S in the absence of any other persons. Mr Sh's father and a male companion therefore absented themselves from the hearing.

3.2 As Mr Sh was the applicant, he gave his evidence first, with the opportunity for Ms S to put questions to him at the conclusion of that evidence, and the same provision was applied to Ms S who gave her evidence after Mr Sh: the opportunity was provided to Mr Sh to question Ms S.

3.3 (a) **Mr Sh:** Mr Sh stated he is a school teacher and the relationship with Ms S commenced in 2007. He said that the relationship was 'not happy' however he had believed it was necessary to 'give it a chance'. It had 'not worked out'. He said:

I thought as time went on it would change. It did not. There is a limit to everything.

3.4 He said that Ms S had 'not asked anything about me', the import being that Ms S, insofar as Mr Sh knew it, was not interested in his wellbeing or concerns, but in herself and hers alone. He said that the (religious/cultural) marriage had been 'fixed' for February 2008.

3.5 On 17 January 2008 he asked Ms S to 'give me a call. She didn't. I called and she was very upset'. Mr Sh said that in that call Ms S 'said a lot of conditions' and that he would have to comply with those conditions. He said Ms S said that if she 'can't adjust to me and my parents, then she would pack up and go'. She said she should be able 'to go to her family any time she wants'. He said Ms S told him that she 'wants me to leave my parents and if not, she will leave me'.

3.6 Mr Sh said further that Ms S 'hardly meets me – once every two weeks. She ignores my calls. She gets irritated very quickly, if I discuss marriage'.

3.7 Mr Sh said he is a civil servant and has passed his degree, and that Ms S is 'jealous of my success'. He said she will 'not accept gifts from my parents and family. Her caste system is higher than mine – and she has said this a number of times'.

3.8 Mr Sh said that after the ceremony on 7 July 2007, he and his family had a wedding card printed for the religious/cultural marriage ceremony. (Note the Marriage Certificate sets the date as 6 July 2007.) He handed up one of the cards.

3.9 Mr Sh said that it has caused great humiliation that the cultural/religious marriage was set and planned and invitations had been printed and the ceremony is not going ahead. The traditional marriage is 'of the highest order'. However, Mr Sh said that he and Ms S 'can't stay together. I am not willing to accept this [relationship] at any cost'.

3.10 Mr Sh said that the way he met Ms S was that he saw her and contacted her friends, who gave her contact details for him. They met and Ms S approached Mr Sh again, inviting him to 'bring my parents to her home'. He said that they met once, then talked about marriage. 'I think it

'happened a bit too fast,' he said. 'I think her mother was against it [the marriage] as the day of the legal marriage her father signed as witness not her mother, although her mother was there.'

3.11 Asked by the Court as to what was meant by 'no real consent' (ticked as the reason for or ground of annulment), Mr Sh said 'she has not been true to me. Her mother did not agree. She did not want to meet me'. He said he has 'done a lot for her [Ms S]. She is a part-time student and I am giving her assignments [to help her]. I drove her to the airport when she went to India. I gave a letter to the Indian Ministry [so that she could go to India]. I have contacts in the Indian High Commission'.

3.12 Mr Sh said:

I was a caring husband but my heart just broke because of her conditions, so I put conditions – that we should stay with my family, and I said she should never leave me and not to fight with me. But it is all just futile.

3.13 As Mr Sh had concluded the evidence he wished to have before the Court, at this stage I asked Ms S whether she had questions she would like to ask of Mr Sh. It became clear that she wished to give her own evidence rather than formulating questions, so it seemed preferable to allow her to do this, and should it become clear that at a later state there were questions to be asked by her of Mr Sh, then that would be done and similarly vis-à-vis Mr Sh's questioning of Ms S.

3.14 (b) *Ms S:* Ms S said she 'agreed that [Mr Sh] has done a lot for me and was very caring' when she and her mother had to go to India because of her mother's illness. She agreed that he had written a letter to the Indian Ministry and 'made daily calls and was caring at that particular time when my mother was ill'.

3.15 She said that as to Mr Sh's assumption that her mother was opposed to the marriage, 'he is totally wrong'. She said:

I have bought all my wedding gowns and jewelry.

3.16 She said that the Shekani ceremony was 'held at my house'. She said further that her mother 'is a cancer patient' and 'she wanted me to get married'. Ms S said that because her mother was ill, this made her wish for her daughter to be married. She said also that her 'father is not against the marriage'.

3.17 Ms S said that contrary to what Mr Sh had said, she 'did not make any conditions. He gave conditions to me'. There were four conditions that Mr Sh set for her, she said:

1. That she not go to her parents home after marriage. But, said Ms S, this was impossible. She said that she is 'age 25 and I became a teacher because of them'(her parents).

2. That she would have to go to school and be dropped off and picked up from school by Mr Sh. She said she did not have any problem with that condition, but the part of that condition with which she did have a problem was the requirement that she not leave the school without him during school hours (that is, between drop-off and pick-up). She said that if a child is ill or has some problem that means she must go off the premises to do her duty vis-à-vis the child and her teaching responsibilities, then it was unrealistic to expect her to contact or endeavour to contact Mr Sh and to wait (with the child) until

he was able to come to take her from the school to wherever she and the child/pupil had to go. She said: 'I can't ring to ask for permission from him to leave school.'

3. Ms S would always 'have to do what Mr Sh says' and 'do whatever he does' and 'for any decision I would have no say'.

4. Mr Sh would have to accompany Ms S at all times and be 'all the time with me'. He would 'have to accompany me wherever I go'.

3.18 Ms S said that she and Mr Sh had a relationship where he proposed marriage after a 2 week holiday in 2006. She said that Mr Sh 'checked me' and 'after checking me' the legal marriage took place. Then the religious/cultural marriage was originally scheduled for December 2007. However, she had to go to India with her mother at that time, as her mother was ill.

3.19 She said that it was after the return from India that Mr Sh 'for the first time told me I should accept the conditions' he set.

3.20 Ms S said that she then went to Church Welfare and made a complaint to Social Welfare. She said: 'I complained that my husband was putting four conditions on me.' Mr Sh, said Ms S, told her that it was his father who had 'laid the conditions'. Ms S said she told Mr Sh he would have to 'choose between his father and me'. She was extremely surprised that he chose his father over her.

3.21 She said that Mr Sh 'forced' her to buy a wedding gown because he wanted to have a 'matching' outfit. She said Mr Sh should have been more thoughtful 'as I have spent a lot on the wedding costume'.

3.22 As to the legal ceremony, Ms S said:

Yes, I was 100% [for it]. No one forced me. It's a lie. I thought he [Mr Sh] really wanted to get married.

3.23 Returning to the setting of conditions, Ms S said:

He made a phone call that particular night and gave me the conditions. I told him I would not accept the conditions. We went to counselling but the boy's family would not allow me inside. I thought by talking maybe it would work out but it doesn't seem to – that was why I went to Social Welfare.

3.24 Ms S said she did not believe 'the boy was pressured by his parents' at the ceremony but she does believe the 'boy is being suppressed by his parents'.

3.25 The legal ceremony – 'engagement' – took place on 8 July 2007, said Ms S. She believes that it was on that day, whereas Mr Sh believes it was 7 July (and as noted the Marriage Certificate notes it as 6 July 2007).

3.26 (c) *Interaction Between Mr Sh and Ms S:* At this stage I asked Mr Sh if he had questions to ask Ms S. It became clear in the exchanges that now occurred that there is a strongly emotionally charged relationship between Mr Sh and Ms S. The parties engaged in what might be described as a 'marital dispute' or argument between parties who have been or are married or at least are in a close relationship of a personal nature or an 'intimate' nature (here the implication is not as to any sexual relationship but a close relationship were the parties are or have been bound together in a way that is, or equates to, marriage or at least commitment).

3.27 In these exchanges, Mr Sh said that he holds a Bachelor of Arts (BA) and is a teacher. He said that he had 'not laid conditions'. He said: 'I am not a dictator. I can't dictate someone's life'. He said that since July 2007 matters with Ms S have 'gone beyond the limit. It is futile. I have been counselled and it is no good. There is a limit'.

3.28 Ms S replied that all had been well 'until January 2008'. Mr Sh said that his family had cursed me and called me a coward'. He said that Ms S wanted the traditional ceremony to be in August whereas he wanted July 2008. He said he has suffered humiliation because of the distribution of the wedding card, but as Ms S had 'set so much conditions' he could not go ahead with the wedding. 'Why did she set these conditions,' he asked. However, Ms S responded by saying that it was not she who set any conditions, but Mr Sh who set conditions on her. 'Why should he set these conditions?' she asked.

3.29 (d) *Additional Matter:* The evidence in this case, and particularly the exchanges between the parties in the giving of oral evidence, indicates clearly that there is a relationship between Ms S and Mr Sh which holds a strong level of emotional intensity and engagement. This is not a case where two parties have 'just met' then been precipitated into marriage at the behest of their parents and by arrangement without prior knowledge of the parties involved. I accept Ms S's evidence that there was a lengthy acquaintanceship between the two, and observe that although Mr Sh's evidence was that the prior relationship between him and Ms S was shorter than she said, his evidence and demeanour throughout the hearing indicated that whatever the length of the relationship, it was a relationship of some considerable feeling and depth. In his reply to Ms S's Affidavit in Response, Mr Sh also acknowledged a 'boyfriend-girlfriend' relationship.

3.30 As earlier observed, the exchanges between the parties during the hearing tended to equate with marital disagreements or arguments, or arguments or disagreements between engaged or courting couples. Whether this is a matter of what is sometimes described as 'pre-marriage jitters' or 'pre-marriage anxiety' – developing in this case as the religious ceremony drew closer – is impossible to gauge.

3.31 What is possible to say, however, is that the evidence does not support the proposition that for either party there was 'no real consent' to the legal marriage ceremony.

4. Law of Nullity

The application for annulment cited as the ground 'no real consent given'. The general basis upon which this is put is that Mr Sh believes Ms S's mother did not want the marriage to go ahead and that her not signing as a witness at the legal ceremony, leaving Ms S's father to do so, was evidence of this. Mr Sh also says that when the proposal for a Hindu marriage ceremony arose Ms S 'seemed somewhat pressured'. This was, of course, after the legal marriage had taken place. As it is, Ms S denies she was under any 'pressure' from her parents vis-à-vis the marriage, says she was a fully consenting party, and denies that her mother was in any way opposed or 'against' the marriage.

4.1 There is no evidence of Mr Sh's being 'pressured' into the marriage or that his consent at the legal ceremony was unreal or impeded in any way. I do not understand this to be the case or the contention. As outlined below in reference to section 32 of the *Family Law Act* 2003:

- there is no evidence of duress or coercion, and no evidence of fraud;
- there is no evidence that the parties did not know the nature of the ceremony, or that one or other of them did not;

- nor is there any evidence of a mental incapacity on the part of either of them in terms of knowing what the ceremony was, or of giving their consent in that full knowledge.

4.2 As noted, the relevant provision is section 32 of the Family Law Act, which says that an application for an order of nullity must be upon the ground that the marriage is void (s. 32(1)). Section 32(2) lists the various bases upon which the Court has power to determine a marriage is void:

Nullity of marriage

32.-(1) An application under this Act for an order of nullity of marriage must be based on the ground that the marriage is void.

(2) A marriage that takes place after the commencement of this Act is void if-

(a) either of the parties is, at the time of the marriage, lawfully married to some other person;

(b) the parties are within a prohibited relationship;

(c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages;

(d) the consent thereto of either of the parties is not a real consent because-

(i) it was obtained by duress or fraud;

(ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or

(iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony; or

(e) either of the parties is not of marriageable age,

and not otherwise.

4.3 For 'no real consent', therefore, the application must be brought within section 32(1)(d)(i), (ii) or (iii).

4.4 There is no suggestion by the parties, and no evidence before the Court, that Ms S was mistaken as to Mr Sh's identity, or that Mr Sh was mistaken as to hers. They clearly knew one another and were acquainted before the marriage ceremony. There is a dispute between them as to the length of time they had known one another or whether they were in a relationship of any length prior to the marriage ceremony, however, I have no doubt from the evidence and the parties demeanour and exchanges during the course of the hearing that they knew each other as friends and as 'boyfriend' and 'girlfriend' prior to the marriage. Hence section 32(2)(d)(ii) does not apply.

4.5 There was no proposition by the parties or either of them that one or other or both lacked the capacity to understand the nature and effect of the ceremony in which they participated. Although there was reference to the marriage ceremony as being an 'engagement ceremony', again there is no doubt that the parties each knew, when they attended at the marriage ceremony, the nature of the ceremony: that is, that it was a legal marriage ceremony. The evidence before the Court supports this and there is no dispute by the parties or either of them as to the nature of

the ceremony and their knowledge at the time of the ceremony they were attending and in which they were participating. This means that section 32(2)(d)(iii) does not apply.

4.6 This then leaves section 32(2)(d)(i) as the only possible provision to cover the contention that the marriage between Ms S and Mr Sh is void by reason of 'no real consent given'. To grant an annulment on this basis, the Court must be satisfied on the balance of probabilities that the consent to the marriage, given at the legal marriage ceremony, was 'obtained by duress or fraud'.

4.7 There has been no suggestion of 'fraud' and I am unable to see any material which supports this proposition. In *KN and EG* (Fam. Court Case No. 0029/2008) the authorities on fraud have been fully canvassed. The analysis of fraud in its application to nullity does not have any application to the present case. Hence, no nullity can be granted here on the basis of 'no real consent given' by reference to 'fraud'. That leaves the question of 'duress'.

4.8 'Duress' or 'coercion' most often arises in respect of 'arranged' marriages where it is said that one or other or both parties were 'pressured' into the marriage, or 'pressured' into participating in the ceremony by parents or a parent.

4.9 There could in a sense be said to be an 'arranged marriage' in that Ms S said that upon Mr Sh's raising the matter of marriage with her, she advised that her parents should be approached by his parents. Mr Sh denies his parents approached Ms S's parents. Whatever the case on this point – which does not provide any basis for the grant of a nullity application in any event, it appears from the evidence that the parties' parents 'got together' in respect of the marriage and there were discussions between them. On the other hand, it is clear, too, that this was no 'arranged marriage' in the traditional sense of parents initiating the arrangement, engineering meetings or a meeting between the parties, and making decisions without regard to whether or not their children truly wish to enter into the arrangement. After all the parents needed to discuss the arrangements for the legal ceremony and the traditional, religious or cultural ceremonies which were to be a part of the joinder of Ms S and Mr Sh in matrimony.

4.10 Apart from Mr Sh's proposition that there was 'no real consent given' to the marriage, all the evidence goes to and fully supports the proposition that when these parties married, they went through the ceremony fully knowing that it was a legal marriage ceremony and each wishing to do so. The issue of 'duress' or 'coercion' and what they mean in the context of nullity applications has been addressed in a number of cases, including *AD and KST* (Case No. 0798/SUV/2007, 27 March 2008); *NM and DR* (Case 0008/LTK/2008, 14 April 2008); *AD and KST* (Case No. 0798/SUV/2007, 27 March 2008).

4.11 Nothing given in evidence before the Court in the present matter can be said to equate with any of the matters accepted in the authorities as being 'coercion' or 'duress' so as to support a grant of nullity. Neither Mr Sh nor Ms S was, in my opinion, under any 'pressure' which vitiated or could be considered to vitiate, that consent. Thus, section 32(2)(d)(i) does not apply.

4.12 This means that there is no basis upon which an annulment can be granted. The ground of 'no real consent' is not made out. The Court has no option but to apply the law as it is written in the Family Law Act and as it is interpreted through the authorities, and is therefore bound to refuse the application.

5. Outcome & Determination

There is evidently a problematic relationship between Ms S and Mr Sh. Mr Sh states that he does not wish to remain married to Ms S. Ms S accepts that Mr Sh expresses this view, albeit she is concerned about a number of matters going to parental influences upon Mr Sh and also preparations undertaken in respect of the marriage ceremonies and expenditure in this regard. Mr

Sh has expressed a view that parental influences have had a place in Ms S's disposition vis-à-vis the marriage.

5.1 Under the law nullity cannot, as noted, be granted. The question then is what is to be done?

5.2 As the Court is unable to grant an annulment, if the parties are serious about wishing to end their relationship, then the only alternative is to make an application for dissolution. To qualify for dissolution of marriage, the marriage has to have been broken down for 12 months. Here, the marriage took place on 6 July 2007. Hence, the earliest a dissolution could be granted is after July 2008. I note also that both Mr Sh and Ms S appear to agree that their relationship was a positive, happy and caring one in or up to December 2007, when Ms S and her mother traveled to India in relation to her mother's illness. Can the marriage relationship be said to have broken down before then? This would be a matter for consideration in any application for dissolution in relation to the 'break down' period required.

5.3 The Family Law Act emphasises the importance of marriage, observing that the courts exercising jurisdiction under the Act have a mandatory obligation to have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while the family is responsible for the care and education of dependent children;
- (c) the need to protect the rights of children and to promote their welfare;
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage;
- (e) the Convention of the Rights of the Child (1989) and the Convention on the Elimination of all Forms of Discrimination Against Women (1979): s. 26

5.3 There are no children involved in the relationship between Mr Sh and Ms S. However, as earlier observed, during the course of the hearing, it was apparent that there is a high level of emotional engagement between these two parties, that they have intense feelings in relation to one another reminiscent of disputes between parties who have at least at one time cared deeply for one another. That there is pain and upset at what has occurred between them is evident, along with (perhaps) anger and frustration, and a lack of understanding of where the other person stands or as to their motivation and disposition. In addition, each has apprehensions as to the parental involvement or influence of the other's family.

5.4 Ms S endeavoured to effect some engagement between the parties in marital counselling. The parties did attend but no marital counselling between the two took place. Ms S says that the attendance of Mr Sh's father together with Mr Sh meant the counselling with her and Mr Sh did not take place.

5.5 Whether or not this is so, it appears to me that this is a case where marital counselling should be ordered by the Court, in accordance with section 9 of the Family Law Act. This is not done for the purpose of prejudging any outcome or endeavouring to effect any outcome. It is

ordered because there appear to be unresolved issues between Ms S and Mr Sh which could be assisted by professional marital counselling.

5.6 The Family Court has qualified counsellors and a Counselling Division. The provision of counselling which is independent and specifically competent in matrimonial matters may enable the parties to come to a better agreement as to how to proceed than is currently the case. Even if they decide upon dissolution of the marriage, counselling will at least give them a possible avenue for resolving some of the matters that are currently in dispute.

5.7 As they are adults and must take responsibility for their own relationships, it is appropriate that the counselling occur between Mr Sh and Ms S in the absence of their parents. The counselling should take place in circumstances where neither party is concerned about parental influence or involvement. So that the counselling can be independent, I will advise the Head of Counselling in Suva so that he can make the necessary arrangements.

Declaration and Orders

1. The application for annulment of the marriage of R S and A S taking place at the Lautoka Registry at the Office of Births, Deaths and Marriages in the Republic of the Fiji Islands on 6 July 2007 under section 32 of the Family Law Act is refused.

2. The parties are ordered to attend Marriage Counselling in Lautoka as directed by the Head of Counselling in the High Court Family Court in Suva.

3. No order as to costs.

Jocelynn A. Scutt
Judge
8/05/08

