

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 303 OF 2020

**BETWEEN : BLUE DE LA MARE
PLAINTIFF**

**AND : RATU TEVITA NAVALUBALAVU aka DAVINA KUNALANGI
DEFENDANT**

**APPEARANCES : Ms. A. Swamy for the Plaintiff
: Mr. Turuva for the Defendant**

DATE OF HEARING : 21st April, 2022

DATE OF DECISION : 10th August, 2022.

J U D G M E N T

[On committal proceedings]

A. Introduction and overview:

1. This is an application for the committal of the defendant, namely, RATU TEVITA NAIVALUBALAVU aka DAVINA KUNALANGI, for the alleged offence of contempt of court.
2. The NOTICE OF MOTION was filed on 31st August 2021, pursuant to the leave granted by my predecessor Hon. Alan G. Stuart-J, on 30th August 2021 on an Ex-parte application preferred by the Plaintiff on 27th August 2021 seeking for leave to issue committal proceedings and supported on 30th August 2021. The said application for leave was backed by the Affidavit of EVETTE DE LA MARE, the Mother of the Plaintiff.
3. The allegation is that the defendant had committed contempt of court by violating the consent order that was entered on the 05th of March 2021, before the then Hon. Jude Nanayakkara –J in terms of prayers (a), (b), (c) and (d) of the Originating Summons filed on 11th December 2020 by Messrs. Patel & Sharma, Barristers & Solicitors on behalf of the Plaintiff, details of which are briefly narrated in the background history given bellow.
4. The defendant too, simultaneously, had on 27th August 2021 filed a SUMMONS, purportedly, pursuant to Order 2 Rule 1&2, Order 19 rule 9 and order 45 rule 10 of the High Court rules 1988 and under inherent jurisdiction of this Court, supported by his affidavit sworn on 13th July 2021, seeking to set aside the Order dated 5th March 2021 (consent order) and sealed on 13th April 2021. The defendant also moved for the stay of the execution of the said order pending the determination of the Summons.

5. A combined hearing being held before me on 21st April 2022 in relation to the Plaintiff's application for Committal and the defendant's Summons for setting aside the aforesaid consent order made on 5th March 2021, this court by my Decision dated 7th July 2022 dismissed the defendant's Summons for setting aside the said consent order.
6. Accordingly, what remains now for the adjudication is the application preferred by the plaintiff for the committal of the defendant on the contempt charges levelled against him for allegedly violating the consent order made on 5th March 2021.

B. Background facts in brief.

7. The Plaintiff, on 11th December 2020, caused to file the Originating Summons, along with her Affidavit in support sworn on 10th December 2020, against the defendant moving for the following reliefs;
 - a) *An order that the Defendant forthwith to remove or disable the Instagram post , dated 21st June 2019 and any other social media post made in relation to the Plaintiff by the Defendant or by his agents and servants.*
 - b) *An order that the Defendant publish an apology to the Plaintiff on all media platforms, including the local dailies, as may be directed by this Honorable Court.*
 - c) *An order that the Defendants or his agents and servants not to send similar communications to the Plaintiff or encourage any other person to send similar communication to the Plaintiff or to publish against the Plaintiff on any social media.*
 - d) *An order that the Defendant or his agents and servants not to engage in any conduct, which is the subject of the complaint.*
 - e) *Such other orders, including payment for monetary compensation or damages as the court deems just*
 - f) *Costs on client solicitor indemnity basis*
8. The Plaintiff also, simultaneously, filed an EX-PARTE SUMMONS seeking injunctive orders in terms of aforesaid paragraphs (a), (c) and (d) against the Defendant, his agents and servants pursuant to Section 17 and 21 of the Online Safety Act 2018 and Order 29, Rule 1 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
9. The above Summons for injunctive reliefs being supported Ex-parte on 11th December 2020, Orders in terms of summons were granted by the Hon. Jude Nanayakkara –J for same to be in force until the determination of the application made under section 17 of the said Act.
10. The above Order was, reportedly, served on the defendant, who in response to it appeared in person on 19th February 2021, when the learned Counsel for the Plaintiff informed the Court that as the defendant had complied with the restraining order, **apparently, the Order (a)**, the matter could be sorted out if compensation is paid to the

Plaintiff, in response to which the defendant informed the Court that as he is unemployed, he cannot pay compensation.

11. Accordingly, the Court made its Order as follows;

“The defendant gave an undertaking to be abided by the orders made by the court on 11/12/2020. The remaining issue is the monetary compensation. (Mrs) J. Raman of Legal Aid undertook to assist the Court as a duty Solicitor and to explore the possibilities of a settlement. Mention- 05/03/2021 to explore the possibility of a settlement”

12. Thereafter, when the matter was mentioned before the same judge on 05th March 2021, with the due representation of the defendant by Mrs. J. Raman, from the Legal Aid, who informed the Court that her client (the defendant) was willing to comply with orders (a), (b), (c) and (d) in the Originating Summons filed on 11th December 2020, but without paying any monetary compensation. In response to this, the learned Counsel for the Plaintiff has stated that they are willing to withdraw the claim for monetary compensation, but would seek costs of \$5,000.00, upon which the Hon. Jude Nanayakkara-j instantly made the following orders.

“Orders.

I grant order in terms of prayer (a), (b), (c) and (d) of the Originating Summons filed on 11/12/2020, by consent.

The defendant is ordered to pay a cost of \$ 1,000.00 (summarily assessed) to the plaintiff within 14 hereof.

Proceedings concluded”.

13. After the above order was sealed and, reportedly, served on the Defendant on 29th June 2021, the defendant on 27th August 2021 filed his purported SUMMONS supported by his Affidavit as stated in paragraph 4 above, seeking to set aside the consent Order. This summons now stands dismissed by my Decision dated 7th July 2022.
14. With regard to the Plaintiff’s application for committal, the defendant on 17th September 2021 filed his Affidavit in response to the Affidavit of plaintiff’s mother **Evette De la Mare**, upon which she filed her Affidavit in reply on 21st September 2021. This judgment is in relation to the Plaintiff’s application for the committal of the defendant for the alleged contempt of Court charges.

C. The Legal Framework:

Order 52 Rules 1, 2, 3 and 4 of the High Court Rules 1988, ‘HCR’) are relevant to Committal Proceedings and same are not reproduced here to avoid verbosity.

D. The Issue:

15. The issue is whether or not the defendant is guilty of contempt of court for breaching the consent orders made by Court on 05th March 2021 as alleged by the Plaintiff.

E. The Orders defendant consented to abide by.

16. The Orders made on 05th March 2021 requiring the defendant to abide by are as follows.

1. *That the Defendant forthwith remove or disable the Instagram post, dated 21st June 2019 and any other social media post made in relation to the Plaintiff by the Defendant or by his agents and servants.*
2. *That the Defendant publishes an apology to the Plaintiff on all media platforms, including the local dailies, as may be directed by this Honorable Court.*
3. *That the Defendants or his agents and servants not to send similar communications to the Plaintiff or encourage any other person to send similar communication to the Plaintiff or to publish against the Plaintiff on any social media.*
4. *That the Defendant or his agents and servants not to engage in any conduct, which is the subject of the complaint.*
5. *That the defendant to pay a cost of \$1,000.00 (summarily assessed) to the plaintiff within 14 days hereof.*

17. The Plaintiff complains that the defendant, who was aware of the above Orders made by the Court, by being present in Court and served with the sealed Orders, has failed and neglected to comply with the above orders 2, 3, 4 and 5, and thus those orders have been observed in breach.

F. Particulars of alleged breach:

18. That on 9th March 2021, the defendant instead of posting an apology as ordered by the court,(Order # 2) has posted a comment with word such as ***“I am raising my hand because I cheese to challenge the ugly”*** . The Plaintiff alleges that the said comments were not an apology as required by the Court; however, he used disparaging and insulting words against the plaintiff to degrade her in social media. Plaintiff refers to the contents of annexure “C” in this regard.

That despite the restraining order made on 11th December 2020 and the subsequent substantial order made on 05th March 2021, as per the prayer to the Originating summons, requiring the defendant to publish an apology for the initial posts, the defendant has acted in direct breach of the Orders of the Court, by not making such a publication.

That thereafter, the defendant had continued to post several comments and posts against the plaintiff and her family as per exhibit “D”, which contains the photos of the plaintiff and comments on her on the face book.

That the defendant continued to post Facebook comments on several occasions as per annexure “E” about the Plaintiff and her family.

That on 1st July 2021, the defendant made further comments on his Facebook platform insulting the Plaintiff and her family. He made these comments in relation to the Order dated 5th March, 2021 made by this Court for the payment of \$1,000.00 as costs. This comment is found in exhibit "F".

That the defendant has made other derogatory and insulting posts about the Plaintiff on his other social media platforms, by blocking the Plaintiff and her family members, so that he can post whatever he wants about the plaintiff and her family, which can be seen by everyone, except for the Plaintiff and her family members.

G. Evidence:

19. The Plaintiff relies on the affidavit in support sworn by her Mother, filed along with the Application for Committal proceedings and on the contents of the annexures thereto marked as "B" to "F" and her Affidavit in reply filed and the contents of the annexures thereto marked "B" to "E", while the defendant relies on his Affidavit in opposition and the contents of the annexures marked as "A" and "B".

H. Discussion:

20. Initially, on 11th December 2020, Justice Jude Nanayakkara-j, on the EX-PARTE SUMMONS filed by the Plaintiff, made injunctive orders in terms of paragraphs (a), (c) and (d) thereof against the Defendant, his agents and servants pursuant to Section 17 and 21 of the Online Safety Act 2018 and Order 29, Rule 1 of the High Court Rules 1988 and the inherent jurisdiction of this Court.
21. The defendant, who appeared in court on 19th February 2021 in response to the originating summons and the injunctive orders issued against him, undertook to abide by the injunctive Orders made and accordingly was directed to appear on 5th March 2021 with his decision on the claim of the Plaintiff for compensation for the matter to be sorted out, as he was not readily inclined to pay compensation.
22. Thereafter, when the matter was called on 05th March 2021, the Plaintiff's counsel, having relinquished the claim for compensation, moved for cost in a sum of \$5,000.00, for the matter to be fully and finally settled with the substantial reliefs in terms the Originating Summons being granted to the plaintiff, for which the defendant through his Solicitor agreed, sans the Order for cost, and the Court accordingly granted orders in terms of the prayers to the Originating Summons, however, with an Order for cost in a sum of \$1,000.00.
23. The substantial reliefs claimed in the Originating Summons and granted in favor of the Plaintiff, were not in the nature of imposing any heavy burden on the defendant, with any sort of liability or obligation, like in other Civil Actions, except for the order made for

the payment of cost in a sum of \$1,000.00, propriety of which is not to be gone into at these proceedings. The Orders that the defendant was to comply with are as follows.

- 1) *That the Defendant forthwith to remove or disable the Instagram post, dated 21st June 2019 and any other social media post made in relation to the Plaintiff by the Defendant or by his agents and servants.*
- 2) *An order that the Defendant publish an apology to the Plaintiff on all media platforms, including the local dailies, as may be directed by this Honorable Court.*
- 3) *An order that the Defendants or his agents and servants not to send similar communications to the Plaintiff or encourage any other person to send similar communication to the Plaintiff or to publish against the Plaintiff on any social media.*
- 4) *An order that the Defendant or his agents and servants not to engage in any conduct, which is the subject of the complaint.*
- 5) *That the defendant to pay a cost of \$1,000.00 (summarily assessed) to the plaintiff within 14 days hereof*

24. In fairness to the defendant, it is observed that the Order 1) above directing the defendant to remove the posts from Instagram and other platforms , has been promptly complied with by the defendant and this has been acknowledged by the learned Counsel for the Plaintiff in Court on 19th February 2021. The Plaintiff does not complain on this matter for the purpose of committal.
25. However, according to the available evidence before the Court, the allegation that the rest of the Orders 2) to 5) have been observed in breach by the defendant cannot be disregarded or taken lightly.
26. The contents of the exhibits marked by the plaintiff, along with the Affidavit in support and the Affidavit in reply, clearly demonstrate that the defendant has willfully and deliberately acted in violation of those Orders made by Court, particularly, the Orders 2), 3) and 4), which were made directing the defendant to publish an apology and for the defendant and his agents to desist from engaging in such activates in future respectively. The defendant has unconditionally undertook to abide by those Orders in order to resolve the dispute and terminate the proceedings.
27. Further, the Order made for the payment of Costs in a sum of \$1,000.00 too remains unfulfilled by the defendant. Instead, the defendant has chosen to make further unwarranted and unbecoming comments in his Facebook, which, along with other violations by way of commissions and omissions on the part of the defendant, would undoubtedly have caused further insult and suffering to the Plaintiff, while ridiculing the authority of this Court in the eyes of the public.
28. Remarkably, in paragraph 18 of his Affidavit in opposition sworn and filed on 17th September 2021, in response to paragraph 13 of the Plaintiff's Mother's Affidavit in support, the defendant, unreservedly, admits and acknowledges **that he did not comply with any orders as he has applied to have the amended orders set aside** and for a stay

of the execution pending the determination of the setting aside application. Relevant paragraph is reproduced below for easy reference.

“! 8. In reply to paragraph 13, I have not complied with any orders as I have applied to have the Amended Orders set aside and also for a stay of execution, pending the determination of the setting aside application by this Honorable Court”

29. The above admission by the defendant clearly absolves the prosecution of its burden of proving the charge against the Defendant, standard of which is beyond reasonable doubt. However, this court, instead of purely relying on the said admission of the defendant, has deeply delved into the evidence placed and found that the defendant has deliberately violated the orders 2 to 5 above given by this Court on 5th March 2021, and thereby stands liable to be convicted for the charge of contempt.
 30. The ground for the alleged contempt was that the defendant had breached the court orders delivered on 5th March 2021 following an agreement reached inside the Court (Consent Order) which was quite clear and specific. The defendant was in Court duly represented by his Counsel and the order was duly served on him. The Defendant in one of his post has admitted that he was aware of the Court Orders.
 31. The Orders 1 , 2 and 5 required the defendant to perform certain positive actions, Firstly to remove the posts already published, Secondly to publish an apology in the manner required and Thirdly to pay costs in sum of \$1,000.00. Order 1 has already been, admittedly, complied with.
 32. The Orders 3 and 4 granted in the nature of permanent orders, as further substantial reliefs, restraining the defendant from publishing or making any further posts and/or causing to be published and posted in future, have also been blatantly violated by the defendant. This has been proved not only on the evidence adduced, but on his own admission as observed above.
- I. **Locus.**
33. The said Orders were granted in favor of the Plaintiff, and as and when she is aggrieved by the continued act and/or omissions in violation of the Orders so made, she has the right to bring before the courts any matter, which she alleges amounts to contempt.
 34. It is quite clear, as a party aggrieved, the Plaintiff has locus to apply for committal of an alleged contemnor even if the contempt is civil and involves the breach of an order obtained. I wish to quote what Lord Reid said in ***Attorney general v Times Newspapers Ltd [1974] AC 273, 293:***

"I agree with your Lordship that the Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he considers should in the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amount to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had not right to act. But the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act".

35. In this case, the Plaintiff's locus to bring these committal proceedings against the defendant was not put in dispute.

J. Onus of Proof

36. The Plaintiff must prove her case beyond reasonable doubt and the standard of proof in contempt proceedings is proof beyond reasonable doubt. See, *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd [2005] FJCA 46; ABU0011 ABU0011A.2004L (22 April 2005); Shalini v Basanti [2003] FJHC; HPP0036j.1999s (27 August 2003)*.
37. The allegations of breach of an order obtained have to be willful. The breach has to be willful in the sense that it was deliberate and intentional: *Ali v Chaudhary [2004] FJHC 189; HBC0061J.2001L (29 March 2004)*.
38. The Plaintiff bears the duty to prove her case beyond reasonable doubt that the defendant had willfully breached the order obtained on her Originating Summons on 5th March 2021.
39. The onus of proof in such proceedings is on the mover of the motion. Proof is to be established to that standard applying in the criminal courts, namely proof beyond reasonable doubt: *Barclays de Zoete Wedd Securities Ltd and Others v Nadir [1992] TLR 141; Dean v Dean [1987] FLR 517 CA; Vijay Kumar v Shiu Ram & Anor. (unreported) Suva High Court Action No. HBM0026.00S, 19 September 2001, Shameem J.*
40. Where, as here, the contempt alleged is of disobedience to a court order, the accused contemnor must be shown to have willfully disobeyed the order. An unintentional act of disobedience is not enough: *Steiner Products Ltd & Anor v Willy Steiner Ltd [1966] 1 WLR 986* where Stamp J found breach of a consent order to have been willful. His lordship cited with approval observation of the Court of Appeal in *Fairclough v Manchester Ship Canal Co [1897] WN 7, CA* which had said:

In these cases, casual, or accidental and unintentional disobedience to an order of the court is not enough to justify either sequestration or committal; the court

must be satisfied that a contempt of court has been committed in other words, that its order has been contumaciously disregarded."

41. The defendant cannot find fault with the Order that has been made for him to comply with. He has to comply with and then complain. By just calling those Orders as wrong, he cannot escape from complying with it. The Order should have been complied with to its letter.
42. The defendant avers in his Affidavit in response that he had made an application to set aside the Order made on 5th March 2021. However, this cannot be a reason for the defendant not to honor the decision of the Court. Once a decision is given by a Court of Law it is valid and in force and must be obeyed by the parties concerned until it is set aside by a Court of competent jurisdiction.

In the case of ***Hadkinson v Hadkinson [1952] 2 All ER 567*** at page 569 where Romer LJ made the following observations;

"It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void".

In the same judgment the following observations of Lord Cottenham LC in ***Chuck v Cremer (1 Coop temp Cott 342)*** were cited by the Court of Appeal;

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order is null or valid—whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That a course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed".

However, in this case, the defendant has failed in his attempt to have the said order set aside by this Court.

43. In the instant case, the Accused contemnor, as he admitted in paragraph 18 of his affidavit in response, did not obey the Orders 2,3,4, and 5 made on 5th March 2021. This I see as deliberate on his part. His action and omissions were willful. "Willful" in this contempt means either deliberately doing an act knowing that there is some risk of the consequences, or doing an act not caring about the risks involved."


K. Conclusions:

44. I find that the Plaintiff has proved beyond reasonable doubt that the defendant has acted in breach and violation of the Orders 2,3,4 and 5 granted by this Court on 5th March 2021, as prayed for in the prayer to the Originating Summons and thereby has committed the offence of contempt of Court as alleged by the Plaintiff. Accordingly, the defendant cannot escape the contempt of Court Charges levelled against him.

L. Final Orders:

- a. The application of the Plaintiff for the committal of the defendant succeeds.
- b. The defendant is found guilty of contempt charges levelled against him by the plaintiff.
- c. Accordingly, the defendant is convicted of contempt charges.
- d. There shall be a sentencing hearing before the sentence is passed.
- e. Considering the circumstances , no costs ordered




A.M. Mohammed Mackie
Judge

At High Court Lautoka this 10th day of August, 2022.

SOLICITORS:

For the Plaintiff: Messrs Patel & Sharma
For the Defendant: Messrs Turuva Legal