

<b>IN THE FAMILY DIVISION OF THE HIGH COURT</b>	
<b>CASE NUMBER:</b>	08/LTK/0065
<b>BETWEEN:</b>	DEACON
<b>AND:</b>	MEREONI
<b>Appearances:</b>	Mr. Vuataki for the Original Applicant/Respondent. Mr. Sunil Sharma of Legal Aid Commission for the Original Respondent/ Applicant. Ms. Prasad of AG's Chambers for the Child. Ms. Colavanua for Amicus Curiae
<b>Date/Place of judgment:</b>	Thursday, 20th January, 2011 at Lautoka
<b>Judgment of:</b>	The Hon. Justice Anjala Wati.
<b>CORAM:</b>	
<b>Category:</b>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymised Case Citation:	DEACON v MEREONI- Fiji Family High Court Case Number: 08/LTK/0065.
<b>JUDGMENT OF THE COURT</b>	
<b>Catchwords</b>	
LEAVE TO APPEAL - delay in filing appeal due to events of April, 2009 which terminated the judges appointments-proposed appeal against an order of the High Court where the court had dismissed the application to tri/ contempt proceedings against the father of the child in his absence- High Court also ruled that the applicable rules in respect of institution and prosecution of contempt proceedings is the High Court Rules 1988 instead of the Family Law Rules which specifically covers the subject- question of general importance of law-no prejudice to the father of child as substantive application has been discontinued-application for leave to appeal out of time allowed.	
<b>Legislation</b>	
<i>Family Law Act No. 18 of 2003.</i>	
<i>Family Law Rules 2005.</i>	
<i>Family Law Regulations 2005.</i>	
<i>High Court Rules, 1988.</i>	
<b>Cases/Texts</b>	
<i>AFS v. FEF- [unreported] Fiji Family High Court Case Number: 07/NAN/0250</i>	

### The Application

1. This is an application by the applicant mother for leave to be granted out of time to appeal Judgment No. 3 of the High Court the decision of Scutt, J.J., where her ladyship in dealing with contempt proceedings had dismissed the applicants application to deal with contempt in absence of the father of

the child who is the original applicant in the proceedings for an order for return of the child under the Convention on the Civil Aspects of International Child Abduction (The Convention).

2. After the current application for leave to appeal out of time was heard, the father filed a notice to discontinue the substantive proceeding under the Convention. The matter has not been ordered to be discontinued as yet, as there are costs implications in respect of which the parties need to be heard together with the application for discontinuance.
3. Any application to discontinue the substantive proceedings will not affect the applicants' right to a verdict on her application for leave to appeal out of time.

#### The Grounds

4. The grounds on which the application is made are as follows:-
  - a. On the 30<sup>th</sup> day of March, 2009, the High Court delivered a decision in respect of Contempt proceedings being judgment No. 3.
  - b. Due to the confusion, an application was prepared to be filed by the applicant to seek clarification and directions from the court on the judgment.
  - c. Unfortunately the events of April 2009 came about and the courts were closed. Hence the application was not accepted by the Registry as there was no presiding judge in the country.
  - d. Finally on 21<sup>st</sup> July, 2009 the High Court Registry accepted the application.
  - e. Since the Courts were not functioning, the applicant went to Lautoka to stay with her relatives. She therefore was unable to contact her lawyer because the place at which she stays does not have telephone contact and no mobile reception.
  - f. The applicants' lawyer was trying to contact her but he could not. Mr S. Sharma had written to her on the 15<sup>th</sup> day of September, 2009 and also on the 21<sup>st</sup> day of October, 2009 but the applicant only received the latter letter.
  - g. On 8<sup>th</sup> September, 2009 the substantive application was called in court and a hearing date was

assigned as 4<sup>th</sup> December, 2009.

- h. The applicant is keen to appeal the decision of Scutt, J.J since an important question of law is involved.
- i. The circumstances were beyond the applicants control and hence the delay.

#### The Applicants Submission

- 5. Counsel for the applicant, Mr. S. Sharma submitted that when Judgment No. 3 was given, there was confusion and he sought instructions to file an application to get clarification on the judgment. The events of April, 2009 made it impossible to file the application to seek clarification because the judges' appointments were terminated and there was no judge available to hear the case. The judge who heard the matter has left the country. Her ladyship could have clarified the judgment and now that she has gone, it is important that an appeal be heard in respect of an important issue of law which is whether the specific provisions of the Family Law Act and the Rules which relates to contempt proceedings in Family Law is overridden by the High Court Rules 1988. It is in the interest of the lower courts to be aware of the correct procedure and thus a ruling is necessary from the Higher Court.
- 6. There will not be any prejudice to the father as the substantive proceedings can continue without waiting for verdict of the appeal court as the two proceedings are quite separate from each other.

#### Respondents Submissions

- 7. Respondents counsel Mr. Vuataki stated that reasons for delay is a matter for the court to consider. He also said that her ladyship was correct in dealing with the contempt proceedings with reference to the Constitution and the High Court Rules. She was entitled to look at the issue beyond the Family Law Act. Her ladyships' decision is correct. His client will suffer prejudice as he will have to wait for the ruling from Court of Appeal to have his substantive proceedings tried. Leave thus shall not be granted.
- 8. There were no submissions from counsel for the child and counsel for the Amicus Curiae.The Law and

### the Determination

9. Rule 11.01 (a) of the Family Law Rules states that "an appeal under the Act shall be instituted by filing a notice of appeal in accordance with Form 26 in the court appealed from within one month after the day on which the order appealed from was made".
10. Rule 11.02 of the Rules states that the court whose decision is appealed from can grant such further time within which an appeal must be filed.
11. I have read Judgment No. 3 of Justice Scutt, J .J. and with all due respect, I faced the same difficulty in comprehending the judgment as the applicant and his counsel did. I therefore agree that the applicant needed some clarification on the judgment and when she filed an application, the events of April 2009 came about and since then she was in difficulty. When she managed to appear in court with her counsel, the indication was that an appeal was desirable. The potential appeal was out of time and so the counsel was asked to file an application for leave to appeal out of time for this court to consider the same. An application was thus filed. I do not think that the delay is the making of the applicant and the length of delay will not affect the father of the child or any other party. The substantive application is unrelated to this matter and the court of appeal can independently deal with the issue. Moreover, there is an application to discontinue the proceedings indicating that the father does not wish to continue with his application under the convention.
12. I agree with Mr. Sharma that her ladyships' decision has dealt with an important question of law where she has indicated that the applicable Rules are the High Court Rules 1988 and not the Family Law Rules which contains specific procedures for instituting and trying contempt proceedings. This issue needs to be clarified. I have recently delivered a ruling in the matter of AFS v. FEF- Fiji Family High Court Case Number: 07/NAN/0250, where I have disagreed with Scutt, J.J .particularly on the aspect that there is requirement for leave to institute proceedings for contempt and that the applicable rules to be followed in the Family Court is the High Court Rules 1998. There are now 2 different positions through two different judges. It is thus important that the Court of Appeal gives clear direction on the matter at hand.

13. The application must be granted.

### Final Orders

14. The application to file appeal out of time is granted.
15. The appeal papers must be filed in this court within 14 days.

16. The Notice of Discontinuance on the substantive application is listed for the 21<sup>st</sup> day of January, 2011 for the parties to address the issue of costs, if any.
17. For this application, each party shall bear its own cost.

**ANJALA WATI**

**JUDGE**

**20.01.2011**

To:

1. *Mr. Vuataki for Original Applicant.*
2. *Mr. S. Shanna for Original Respondent.*
3. *Ms. Prasad of AG's Chambers, counsel for child.*
4. *Ms Colavanta of Human Rights Commission as counsel for Amicus Curiae.*
5. *File Number 0S/LTK/0065.*