

<b>IN THE FAMILY DIVISION OF THE HIGH COURT</b>	
<b>CASE NUMBER:</b>	07/SUV/0776
<b>BETWEEN:</b>	TUKITAI
<b>AND:</b>	SULIANA
<b>Appearances:</b>	Ms. S. Shah for the Appellant. Mr. S. Komaisave the Respondent.
<b>Date/Place of judgment:</b>	Tuesday, 25th January, 2011 at Suva.
<b>Judgment of:</b>	The Hon. Justice Anjala Wati.
<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>
<b>Anonymised Case Citation:</b>	TUKITAI V SULIANA - Fiji Family High Court Case Number: 07/SUV/0776

## **JUDGMENT OF THE COURT**

### *Catchwords*

*APPEAL -SPOUSAL MAINTENANCE - MODIFICATION - Statutory ground on which maintenance must be modified-the factors to be taken into account-whether the lower court had taken the appropriate grounds into consideration- error of law and fact shown-appeal allowed-no order as to costs.*

### *Legislation*

*Family Law Act No. 18 of 2003.*

*Family Law Rules 2005.*

*Family Law Regulations 2005.*

## Appeal

1. On the 21<sup>st</sup> day of November, 2008, the appellant filed a notice of appeal against the orders of the Magistrate made in 2008.
2. The order of the Magistrate was particularly in respect of variation of a spousal maintenance order from \$500.00 to \$300.00 a week.
3. The variation was made upon an application of the husband to decrease maintenance to \$50.00 a week and upon the wife's cross application to increase the maintenance to \$800.00 a week.

### The Grounds of Appeal

4. Ms. Shah raised 5 grounds of Appeal and they are as follows:-

#### Ground 1

The Learned Trial Magistrate erred in law and in fact when he ordered spousal maintenance in the sum of \$300.00 without considering that the respondent is working and capable of earning her own means.

#### Ground 2

The Learned Trial Magistrate erred in law and in fact when he did not consider the respondents' witness giving evidence that the applicant only earned those monies which he mentioned when the applicant's son was working for him and not after the recent economic instability.

#### Ground 3

The Learned Trial Magistrate erred in law and in fact when he did not consider the amount of income earned by the Applicant per week is \$350.00 and the maintenance of \$300.00 per week was unreasonable and unjust because the Applicant also needed to survive and meet his financial expenses with his weekly income.

#### Ground 4

The Learned Trial Magistrate erred in law and in fact when he ordered an exorbitant sum of \$300.00 per week to the respondent without considering that the respondent is living in the applicant's house in Suva.

#### Ground 5

That the Learned Magistrate erred in law and in fact when he did not properly assess the means of the Respondent from Welfare department's Report and during her evidence in trial.

#### Orders Sought

5. The Appellant has sought an order for stay of the maintenance order made by his worship and for maintenance to be paid at \$120.00 per week.

#### The Appellants Submissions

6. The Appellants counsel submitted as follows:-
  - There was doubt in the Magistrates mind as to whether the respondent was working or not but without confirmation, he proceeded to award maintenance to her. His worship had noted the wife's dishonesty and yet he awarded her the maintenance in the sum of \$300 per week. The husband has provided her a house to live and he does not earn that income any more to provide the wife with \$300.00 per week maintenance.
  - The court relied on the evidence of the son who was staying with the mother and he was not a credible witness at all. He also testified on the income pertaining to year 2006. After 2006, there was economical crisis and the appellant does not earn that amount of money any more.
  - The provision on spousal maintenance, that is, s. 157 of the Act was not taken into consideration. The appellant's age was not considered. His worship also failed to analyse the commitment of the appellant. He failed to take into account that the appellant had a family to support as well. He also failed to take into account the fact

that in Fiji most orders are in the range of \$20 -\$50 per week and ordering \$300.00 per week was exorbitant. The court failed to consider that at his age and with the political crisis, the appellants earning capacity had decreased. The court also did not take into account the fact that the appellant had provided for the wife and children all the years. He also did not consider that the respondent wife did not need to support her children anymore but vice versa.

- The appellants' evidence was that he was earning \$350.00 a week and there was nothing on record to suggest otherwise.
- His worship also did not give a copy of the means report to the parties to comment on.

### The Respondents Submissions

7. The respondents counsel submitted that the respondent had invested more than 35 years of her life to the marriage and it is fair that she is paid the maintenance. She gave evidence that she does not operate business anymore. The parties were invited by the court to peruse the means report.
8. It was submitted further that the order must not depend on orders made in other cases and that it must be assessed on the facts of each case. The appellant had fleet of cars, 3 cars, earning \$2000 per week, was withdrawing about \$400.00 per week from ATM, had fixed deposit in Holding company and had build a home for his young de- facto partner worth \$35,000. The particular business of the appellant had survived civil unrest and had strengthened.

### The Law and Determination

9. Both the counsels have made their submissions taking into consideration the statutory provision for ordering fresh orders for spousal maintenance, that is, they had considered ss. 155, 156 and 157 of the Family Law Act. This case was about modification of maintenance orders and so the appropriate provision was s. 167 of the Act.
10. Both counsels' submissions are also not intelligible. They seem to submit on the wrong section of the Act and stretch the point. His worship also considered the application as if it was a fresh application for spousal maintenance. He also cited the wrong section. In his

judgment under the heading, "The Law", he ended up citing s. 155 and s. 157 of the Act.

11. Both parties had applied for an increase and decrease respectively of the spousal maintenance. They had to meet the statutory ground to be able to qualify for an increase or decrease. One of the grounds was change in circumstances of either party.
12. It is relevant to deal with all the grounds together.
13. The court had before it evidence from the husband that he only earns \$350.00 from the market stalls which he has rented out. The court then took evidence of the son who testified on the father's income in 2006. There was no other evidence of the husband's income for the current year except for the husband's testimony. The husband's bank statements show cash deposit and withdrawals. No evidence was adduced in respect of the deposits and where it came from. The court decided that it was income from the market stalls.
14. There was no reason why the income of 2006 would be taken into consideration as that was the income that was used to grant initial spousal maintenance. This was a factual error on his wife's part.
15. The court also did not believe both parties but allowed the wife's expenses in the sum of \$250.00. In this expense were some unreasonable and exorbitant expenses like \$5.00 for grandchildren when she is not obliged to look after them and their parents are there to provide for them, phone recharge expenses of \$30.00 per week, fuel of \$60.00 per week which she could minimize, and food expenses of \$100.00 per week which she could also minimize. What in essence is obvious is that the wife had not justified a change in her circumstances to ask for the sum of \$800.00 and when her expenses amounted to \$250.00 there was no need to order maintenance for an amount more than her expenses of \$250.00. There is also error of law and fact in analysing the proper needs of the wife.
16. In my judgment, if there were any expenses to be allowed, it would be exclusive of unnecessary and exorbitant expenses.
17. The husband had testified on change of his circumstances and his wife did not believe him. It is his prerogative to accept or reject any evidence but the application for variation should not have been considered in light of income earned in 2006. That again was an error of fact.
18. The judgment is also short of making allowance for the husband's expenses to be catered from his income. The Court must also have looked at the husband's expenses and determine whether he would be able to adequately meet his expenses from the given income as the husband had also pleaded a change in the circumstances.

19. His worship also failed when he stated that by reasons of her age, the wife could not find a gainful employment. The husband had said that she was operating a market stall. His worship said that he had doubts about that issue but he left it to god to judge. These are factual matters for his worship to make a finding on and he failed to make a finding of fact of whether the wife was in gainful employment and thus a change in her financial circumstances.
20. The Social Welfare Officers report also stated that the wife used to sell Fijian artefacts in the Flea Market and that the wife had stated that she does not work anymore. The report also stated that some artefacts were found in one of the rooms where the wife lived. All this evidence was not analysed to find out whether the wife was in gainful employment.
21. Age in itself does not indicate that one cannot work. The husband is also above 60 years but he is expected to support the wife. There should have been a finding as to why the wife could not maintain herself and whether there was change in her circumstances or whether her circumstances had improved by virtue of her working or able to work and not working for reasons of justifying spousal maintenance.
22. The order to pay \$300.00 a week cannot stand in light of the fact there is no need for such exorbitant payment, and also in light of the fact that there is no definite evidence that such money is available for payment. There has to be a fresh hearing on the party's actual income and needs but in the interim the husband can afford to pay \$120.00 a week which will not be an amount more than the wife's expenses. He should continue to pay that amount from the date of the judgment until such time a fresh trial is conducted in respect of the change in circumstances of the parties.
23. I therefore allow the appeal on grounds 1, 2, 3,4 and 5. They all are interrelated.

#### Final Orders

24. The appeal is allowed.
25. The order of the Magistrate is set aside.
26. The husband is to pay \$120.00 a week pending fresh hearing on variation application. The payment is to be with effect from the date of the judgment of the Magistrates' Court.
27. Each party must bear their own costs.
28. Orders accordingly.

**ANJALA WATI**

**JUDGE**

**25.01.2011**

**To:**

1. *Ms. Shall for the Appellant.*
2. *Mr. Komaisavefor the Respondent.*
3. *File Number. 07/SUV/0776.*