IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

ORIGINAL JURISDICTION

ACTION NUMBER:	**13/LTK/0390**
BETWEEN:	**AVI**
	APPLICANT
AND:	**SHOM**
	RESPONDENT
Appearances:	*Applicant in Person.*
	Respondent in Person.
Date/Place of Written Judgment:	*Friday, 31 January 2014 at Lautoka.*
Coram:	*The Hon. Justice Anjala Wati.*
Category:	*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.*
Anonymised Case Citation:	*Avi v. Shom - Family Case number 390 Ltk of 2013*

JUDGMENT

MARITAL STATUS PROCEEDINGS – APPLICATION FOR AN ORDER FOR NULLITY – application by husband on the ground that his consent to marry was not a real consent as it was obtained by duress - the ground for nullity not established- application for an order for nullity dismissed-no order as to costs.

Legislation:

Family Law Act No. 18 of 2003.

Marriage Act Cap. 50.

Cases/Texts Referred To:

Brodie v. Brodie [1917] P. 27.

H. v. H. [1954] P. 258.

Silver (orse. Kraft) v. Silver [1955] 1 W. L. R. 728.

Morgan v. Morgan (orse. Ransom) [1959] P. 92.

Scott v. Scott (orse. Fone) [1959] P. 103.

Szechter (orse. Karsov) v. Szechter [1971] P. 286.

In the Marriage of Suria (1977) 29 F. L.R. 308.

In the Marriage of Otway [1987] F.L.C. 91-087.

Vervaeke (formerly Messina) v. Smith [1983] 1 A. C. 145.

In the Marriage of Hosking (1994) 121 F.L.R. 196.

Griffith v. Griffith [1994] I.R. 35.

Leonards v. Leonards (1961) 2. F.L.R. 111.

Parojcic (orse. Ivetic) v. Parojcic [1958] 1 W. L. R. 1280.

Scott (falsely called Sebright) v. Sebright (1886) 12 P.D. 21.

Cooper (falsely called Crane) v. Crane [1891] p. 369.

Re Meyer [1971] P. 298.

Singh v. Singh [1971] p. 226.

Singh v. Kaur (1981) 11 Fam. Law 152.

Hirani v. Hirani (1982) 4 Fam. L.R (Eng.) 232.

In the Marriage of S (1980) 42 F.L.R. 94.

In the Marriage of Teves and Campomayor (1994) 122 F.L.R. 172.

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co; Sydney.

Case Background

1. On 07 August 2013 the husband filed an application for an order that their marriage which was solemnised at Lautoka Registry on July 2013 be nullified on the ground that he did not provide his real consent to the marriage as the same was obtained by duress.

The Law

2. *Under s. 32 of the Family Law Act, a party can apply to have the marriage nullified on the grounds that the marriage is void.*

3. *The first limb of section 32 (2 (d) (i) of the Family Law Act states that a marriage is void if the consent of either party to the marriage is not a real consent because it was obtained by duress.*

4. *It is fundamental to marriage that both parties consent to being joined together as husband and wife. A marriage is a "voluntary union". The concept of voluntariness is an essential ingredient in the definition of marriage under the laws of Fiji Islands: s. 15: Marriage Act:*
   "Marriage in Fiji shall be the voluntary union of a man and a woman to the exclusion of all others".

5. What is it that each party to the marriage must give real consent to? There are two possibilities here. Either the parties are required to consent simply to entering into formal marriage relationship or they are required to consent to living with the other party in the way normally expected of a husband and wife.

6. Australian and English Courts have always refused to take notice of any understanding by parties to a marriage concerning the future course of their marriage: Brodie v. Brodie [1917] P. 271; H. v. H. [1954] P. 258 at 267-269; Silver (orse. Kraft) v. Silver [1955] 1 W. L. R. 728; Morgan v. Morgan (orse. Ransom) [1959] P. 92; Scott v. Scott (orse. Fone) [1959] P. 103; Szechter (orse. Karsov) v. Szechter [1971] P. 286 at 296; In the Marriage of Suria (1977) 29 F. L.R. 308 at 314; In the Marriage of Otway [1987] F.L.C. 91-087.

7. There is accordingly no doubt that the consent is simply consent to enter into a formal marriage relationship, and nothing more. As Lord Hailsham said in Vervaeke (formerly Messina) v. Smith [1983] 1 A. C. 145 at 152, concerning the corresponding law in England:
   " The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties" personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities".

8. Lindenmayer J put it in the more recent Australian case of In the Marriage of Hosking (1994) 121 F.L.R. 196 at 207:-
   "Should a court ever be entitled to say that a party's reasons for marriage are so improper that it will declare their marriage void? The answer, in my view, must be a resounding 'no'".

9. Lindenmayer J put it in the more recent Australian case of In the Marriage of Hosking (1994) 121 F.L.R. 196 at 207:-

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10. The courts have consequently had to determine at what point constraint upon a person to marry is so severe as to nullify that person's consent to the marriage.

11. In considering this problem, courts have consistently distinguished duress from lesser forms of pressure. So in Leonards v. Leonards (1961) 2. F.L.R. 111 a reluctant bridegroom claimed to have marred simply because he had wanted to placate his father and mother, who desired the marriage, and that he was a tormented person whose heart was not in what he was doing, and that he was under a considerable emotional stress. The court held that pressure of this kind did not constitute duress.

12. *On the other hand, in Parojcic (orse. Ivetic) v. Parojcic [1958] 1 W. L. R. 1280, a father, a Yugoslav refugee, ordered his daughter to marry a man chosen by him, who was another Yugoslav refugee, and he threatened to send her back to Yugoslavia against her wishes if she refused. He even hit his daughter in an argument over her refusal to marry the man in question. The court found that the girl had terrified into obedience to her father and that the ensuing marriage accordingly void on account of duress.*

13. *In England, the degree of oppression that constitutes duress for the law of nullity has changed over the years. Until 1970, the two leading cases on this matter were Scott (falsely called Sebright) v. Sebright (1886) 12 P.D. 21 and Cooper (falsely called Crane) v. Crane [1891] p. 369.*

14. *In Scott's case, a wealthy young lady was induced by her suitor to put her name to a number of bills of exchange to meet some of his accommodation expenses. The young lady was subsequently pressed by discounters to pay these bills, with writs being issued against her and bankruptcy proceedings threatened. As a result of all this, she became both mentally and physically ill. The suitor, a true Victorian bounder, then told the young*

lady that if she married him he would make appropriate arrangements with the discounters, but if she refused he would not. Moreover, he said that if she refused to marry him he would falsely accuse her to her mother "and in every drawing-room in London" of having been seduced by him. He forcibly took her to a registry office and told her that he would shoot her if she did anything to show that she was not acting of her own free will.

15. *The marriage at the registry office was held to be a nullity as the young lady had been reduced by mentally and bodily suffering to a state in which she was incapable of offering resistance to the respondent's coercion and threats. In particular, the judge held that there can be no consent to marry if a party is in such a mental state of incompetence, whether through natural weakness of intellect or from fear (whether reasonably held or not), that he or she is unable to resist the pressure improperly brought to bear.*

16. *The facts of Cooper were as Victorian as the previous case. There a man took a young lady to a church, where he had arranged by stealth for marriage to take place. Outside the building he said to her "you must come into this church and marry me, or I will blow out my brains, and you will be responsible". The young lady was so alarmed at this, for she knew he was in the habit of carrying a revolver, that she complied with his demand. The judge held that for the wife to avoid the marriage on the ground of duress, she had to show that her mind was so perturbed by terror that she did not understand what she was doing, or alternatively that although she understood what she was doing, her powers of volition had been so paralyzed that she had succumbed to another's will. On the facts of the case, this was not established.*

17. *From 1970 until 1982, the English courts substantially restricted the nature of the duress that could invalidate a marriage. The leading case in this regard was Szechter (orse. Karsov) v. Szechter (supra). The facts of this case involved both actual imprisonment and a threat of immediate danger to the petitioner's life. The petitioner was a woman in poor health who had been imprisoned in appalling conditions under communist rule in Poland for 'anti-state activities". Her subsequent marriage was a device, to which the respondent was a willing party, to enable her to leave Poland. There Sir Jocelyn Simon P. held that for the purposes of the law on nullity, the cause of the duress had to be a threat of immediate danger to life, limb or liberty. In particular he said:*

"It is, in my view, insufficient to invalidate an otherwise good marriage that a party has entered into it in order to escape from a disagreeable situation, such as penury or social degradation. In order for the impediment of duress to vitiate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible) to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock".

18. It may accordingly have been because of the special facts in that case, which the judge described as involving "a situation of hardship brought about by heroism in the teeth of cruelty and oppression", that Sir Jocelyn Simon referred to the need for a threat of immediate danger of life, limb or liberty. However, be that as it may, the formulation of the law was consistently followed in England until 1982.

19. Only two qualifications were judicially suggested to the law as stated in Szechter (orse. Karsov) v. Szechter. The first was that a present likelihood of future danger, rather than a threat of immediate danger, to life, limb, or liberty would suffice and the second was that 'danger to limb" includes any serious danger to physical or mental health": Re Meyer [1971] P. 298 at 306-307.

20. During the 12 years from 1970 to 1982, the test of duress in Szechter (orse. Karsov) v. Szechter proved to be very restrictive in many circumstances involving the overbearing of a party's will. Prominent among these were situations involving arranged marriages. In England, as in Australia, immigrants often wish to continue to practice the social traditions and customs of their children. The question has thus arisen in both countries in recent years of what degree of parental or communal pressure will vitiate an arranged marriage to which a child is an unwilling party.

21. In two English cases concerning arranged marriages, Singh v. Singh [1971] p. 226 and Singh v. Kaur (1981) 11 Fam. Law 152 the Court of Appeal approved the test laid down in Szechter and held that duress would nullify an arranged marriage, like any other, only if the mind of the party was so overborne by fear caused by a threat of immediate danger to life, limb or liberty that the constraint destroyed the reality of the consent to marriage. In neither case was such duress established.

22. In the subsequent case of Hirani v. Hirani (1982) 4 Fam. L.R (Eng.) 232, however, the Court of Appeal expressly declined to follow the law as stated in Szechter. Without referring to Singh v. Singh or Singh v. Kaur, the Court of Appeal held that the crucial question was simply "whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual". The court expressly held that there was no requirement of any threat to life, limb or liberty in order for there to be duress for the purposes of the law of nullity. In the light of the facts of the case, the Court of Appeal found that the will of a 9 year old Indian woman had been sufficiently overborne by her parents, who had arranged her marriage in order to prevent her marrying a member of another religion, to vitiate her consent and thus invalidate the marriage.

23. The Australian Courts have followed the English definition of duress until in the case of In the Marriage of S (1980) 42 F.L.R. 94. There Watson J. not only declined to follow the strict test in Szechter but went so far as to relax the more liberal principles in Scott and Cooper. The facts of the case were that a girl aged 16 succumbed to parental pressure and went through an arranged marriage in a Coptic Orthodox Church in Australia. The girl had been born in Egypt and had come to Australia with her family when she was eight. The marriage had been arranged in accordance with Egyptian Coptic traditions. The girl said in evidence that she had not wanted to go through with the marriage but that her parents had insisted and she could not stand up against them. The judge found that "she was caught in a psychological prison of family loyalty, parental pressure, sibling responsibility, religious commitment and a culture that demanded filial obedience… if she had „ no consenting will‟ it was because these matters were operating-not threats, violence, imprisonment or physical constraint".

24. In the Marriage of Teves and Campomayor (1994) 122 F.L.R. 172, Lindenmayer J. had no hesitation in following the decision in the Marriage of S. He said:

    " It can be said that duress does not necessarily need to involve a direct threat of physical violence so long as there is sufficient oppression, from whatever source, acting upon a party to vitiate the reality of their consent".

    The judge in this case also emphasized that it is duress at the time of marriage ceremony with which the law of nullity is concerned, and not duress at some time earlier unless the effect of this continues to overbear the will of a party to a marriage ceremony at the time of the ceremony itself.

The Evidence

25. The husband testified that prior to his marriage, he knew the wife for a month. She was his girlfriend. He was in love but there was not so much love between them.

26. He said that when he met her, he treated her like a friend. She was then staying at her friends place. He went to her place and one lady staying there said that the respondent could get killed like this. He could not fathom what she meant. He told the respondent to go back to her home and stay with her parents but the respondent told him that she is staying away from them because her mother was forcing her to get married to a cane cutter.

27. He then took the respondent to her place. The respondent told her mother that they wanted to get married. He did not want to get married so he lied to them that he was going to New Zealand but someone told them that he was in Fiji. When they found that out, they called him. They said that they were in front of a police station and they were going to report that he was deserting the respondent and running away from her. They said that he would be put in prison. He got scared.

28. The respondent's mother told him to come to their place otherwise she would report the matter. He went to their place and they asked him to get married to the respondent on 29 July. On 29 July, he was sleeping and he received a number of calls from the respondent's family when they asked him to go to the marriage registry and get married at 12.00pm. He did not want to go but he went.

29. He did not tell his mother because she is a sickly person. He hardly talks to his father because he is a very strict person. He went and got married.

30. The respondent's mother asked him after the marriage to accompany them to their place. He went to his place. They found out his father's number and called him. They told his father about the marriage. They asked his father whether they should take any legal steps.

31. He lost his thinking power and drank burnt engine oil. His parents asked him whether he loved her and he said no he was forced to get married. His father then told him to take some action otherwise his life would be spoilt. He then decided to file an application for nullity of marriage.

32. After the marriage, he had reported the matter to the police. He told the police how he was being disturbed by the respondent and her family. He told the police that due to the disturbance, he was being suspended from work for 3 days and subsequently fired from work.
33. He has one sister who works at a University. He does not talk to her much. He does not share any problems with her.

34. He also told the Court that he is educated up till Form 6 after which he attended the FNU to get automotive engineering.

35. He said that he did not know that no one could force him to get married.

36. Under cross examination the wife asked him whether he was dragged out of his house and forced to get married and even if he was he could have reported the matter to the marriage officer to which the applicant replied that he was so scared that he would be reported to the police so he did not mention to anyone about the force aspect. There were other matters raised in cross examination which were not relevant to the proceedings and I do not consider it vital to state such matters in this proceedings.

37. The applicant's mother also testified on his behalf. She said that she has no idea that the son had a girlfriend. On 3 August 2013, the respondent's father called her husband on his mobile phone and informed him about the legal marriage. They were so surprised to hear that. The son was forced. If he was involved with the respondent, their parents should have informed them first. When they received the message, their son was at the neighbours place. They called him home and told him about the information they had received on phone. They relayed this to him very nicely. They told him that they were interested in knowing the true facts of what had happened. He got very furious. He could not explain himself but told them about the hassle he was put through by the respondent and her family. They asked him to tell them the entire story. He then ran and drank the burnt transmission oil. They took him to the Ba Mission

Hospital when the police intervened. He told the police that he wanted to stay with them and not the respondent and his family.

38. The applicant's mother also testified that the respondent's parents should have first discussed with them an important matter like marriage before getting the children married. She said that the respondent's family did this because they are rich and they want their wealth.

39. The respondent also gave evidence. She stated that she had got out of her parent's place because her mother was forcing her to get married to a cane cutter and she did not want to so she moved out of the house and started living with her friend. Her friend is a gay. She met the applicant there. He had come around to have fun with her gay friend. It was there when the applicant had told her that he likes her. At that time she told him that if he indeed liked him, he has to go to her parents place and tell them that he wanted to get married to her. He agreed. Next day he went to where she was working and told her that they should go to her place to discuss marriage. They both went. He told her parents not to tell his parents anything because her mother has migraine and the father is a very bad person. Her mother then said that she will organise the marriage and she booked 29 July to be the date. The respondent came on that date to get married.

40. The respondent stated that his parents could not be informed because the applicant had begged them not to and he had told her parents that after 2 to 3 years, he himself will tell his parents about the marriage.

The Determination

41. Before me are two different versions of how the marriage took place. I have to accept one evidence and reject the other because the two cannot stand together.

42. I have numerous reasons to accept the evidence of the wife. It is very difficult for me to fathom how the applicant could be terrified by the fact that he was being told that he would be reported to the police for being involved with the respondent and that the matter will only solve with marriage.

43. The respondent was of a marriageable age. She was not a minor when the two started a relationship and so there was nothing to be reported on and to fear that a legal wrong had been committed.

44. The applicant further could have sought assistance from his parents if he was being terrified by the respondent's family or the assistance of the police officers. His parents are very supportive people as they have encouraged him to live his life and file a nullity if he so wished.

45. Further, the applicant could have informed the marriage officer of his status and asked for assistance. He could have asked for assistance from anyone for that matter and he would have been told that he need not get married to hide the fact that he had a relationship with the respondent.

46. The applicant took no action when he had the powers of volition which were not paralysed to refuse to succumb to the wishes of the respondent's parents if there was any.

47. I accept the evidence of the respondent that the applicant willingly got married to the respondent and he did not want his parents to discover that as he wanted it to be a secret. When he got found out, he wanted to avoid the interrogation and embarrassment at home so he drank the burnt transmission oil. He wanted to have things his way and keep his parents in the dark.

48. His evidence on duress is unacceptable. I find that his powers of volition were not paralysed and he could have refused to get married and he did not, he cannot now get out of this marriage after having it imposed on him voluntarily.

The Final Orders.

49. I therefore dismiss the application for an order for nullity. There shall be no order as to costs.

50. The applicant shall have a month within which he can appeal against the decision dismissing his application for an order for nullity:

ANJALA WATI
Judge
31.01.2014

To:
1. Applicant in Person.
2. Respondent in Person.
3. File Number: 13/LTK/0390.