

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACT ION NUMBER: 14/Ltk/ 0015
(Original Case Number: 06/Nan/o^87)

BETWEEN: -MUNIR
APPELLANT

AND: -MEHER
RESPONDENT

Appearances: Mr. V. Sharma for the Appellant,
Mr. K. Tunidau for the Respondent.

Date/Place of Judgment: Wednesday 21 October 2015 at Lautoka.

Coram: Hon. Madam 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: MUNIR v MEHER- Fiji Family High Court Appeal Case Number: 14/Ltk/0015.

JUDGMENT

Catchwords:

FAMILY LAW - CHILD AND SPOUSAL MAINTENANCE - MODIFICATION - APPEAL - Assessing proper quantum after change of
circumstances established.

Cause/Background

1. The mother and the two children of the marriage were beneficiaries of spousal and child maintenance orders of 12 September 2007.
2. The children are -Child 1 male, born in 2000 and –Child 2 female, born -in 2005.
3. The order, in particular, was for the father to pay \$20 per week for each child being \$40 per week for two children in child maintenance and \$10 per week in spousal maintenance. The total to be paid was \$50 per week.
4. An application was filed -in 2012 for modification of the maintenance for the children. The application was heard on a defended basis and orders were made -in 2014 for the father to pay increased maintenance to one child of the marriage namely -Child 2 to the extent of \$70 per week with effect from February 2014 as the other child -namely Child 1 was indisputably living with his paternal grandparents. The father was ordered to maintain this child as well although no specific order for monetary payment was made. The spousal maintenance was ordered to be continued.
5. The husbands appeals against the orders on the grounds that the Court erred in law and in fact:
 - (i) *By ordering maintenance variation in the sum of \$70 per week for one child without giving regard to the father's financial commitments.*
 - (ii) *When it ordered spousal maintenance to continue.*
 - (iii) *By not giving adequate weight to the fact that the father was solely responsible for maintaining the elder child without any contributions from the mother.*
6. The husband asks for the order for spousal maintenance and the increased child maintenance to be set aside.

Findings of the Court

7. The factual findings made to justify an order for modification were:
 - (i) From the date of the final orders in 2007, the cost of living had changed to justify a variation.
 - (ii) There was changes in circumstances of the mother in that:
 - (a) . *one child of the marriage was not provided for by the mother anymore as he was living with the paternal grandparents; and*
 - (b) . *she was incurring more expenses after having moved out of her residence which was her usual place of abode;*
 - (iii) There was a change in the circumstances of the father as well in that he was remarried and had a child out of that marriage to be maintained by him.
 - (iv) The circumstances of the female child changed in that she was not living in the same residential facilities due to the mother moving out of the same with the child.
8. The factual finding on the liability of the parent to pay the increase and the quantum of increase was that the father had the financial ability to pay an increased amount of \$50 for the younger child and to cater for full expenses of the elder child who was living with his paternal grandparents.
9. The father's evidence that he did not have means to pay the same was rejected on three basis.
10. One on credibility when the Court found that he failed to make disclosures regarding his "rental business" until he was confronted in cross-examination.

11. The second on the basis of his living style in that he had two vehicles worth of \$50, 500 with no evidence provided by him on how he maintained the same and that he had recently purchased a 32 inch LCD TV on hire-purchase and was making payments for the same.
12. The third basis was contradiction in his evidence that he earned \$132 less than his expenses but there being no evidence that he missed any of his loan repayments.

Submissions

13. In respect of ground 1, counsel for the appellant argued that the reason why the mother asked for variation was specifically stated in her evidence to be that she could not cater for the expenses of the two children. The expenses for food, clothing, medical, travelling and education were so high.
14. It was contended that the mother only had responsibility to care for one younger child. The elder child was no longer residing with her and to order an increase of \$50 was not reasonable.
15. In respect of ground 2, it was argued that the evidence given by the mother was that she was working and earning \$182 per week. With her income she is only required to look after herself and one child whereas the father is maintaining four people from his income being his wife, their child and the elder child from the parties to the proceeding.
16. The commitments financially are more for the husband than for the wife and these pertinent facts were ignored.
17. In respect of ground 3, it was submitted that the father is looking after the elder child of the marriage without any support from the mother. The mother is working and she should be responsible for the maintenance of the elder child as well. It is unfair to require the respondent to pay maintenance for the wife and the younger child and also look after the welfare of the elder child and to maintain him financially with no assistance from the mother.
18. It was submitted that maintenance for the younger child to be paid by the father should be as it

was originally ordered and that the spousal maintenance be cancelled. Considerable time has elapsed since the parties' separation and the mother must learn to maintain herself instead of depending on the husband who has a new family to look after and maintain in law.

19. Mr. Tunidau, counsel for the respondent submitted that the basis upon which the quantum was ordered was justified. The Court used its discretion to make the award and on the facts arising from the evidence there cannot be any other justifiable order.
20. On the issue of spousal maintenance, Mr. Tunidau submitted that it lasts for the joint lives of the parties and if the husband did not want to continue with the payment he should have asked for a variation of the said amount.

Issues/ Law/ Analysis

21. From the grounds of appeal I find that the Court has to determine the following issues:

1. *Was the variation in child maintenance by an increase of \$50.00 necessary and justified?*
2. *Was an order for continued payment of spousal maintenance supported by the facts and in law?*
3. **What are the appropriate orders to justify the financial needs of the parties and the children?**

22. I will first deal with the issue of increase in maintenance for one child to the extent of \$70 per week. Was this justified? Since there is no appeal against the finding that expenses of the child had increased in the last 7 years and the costs of living has increased, I find that there was legal and factual basis to consider variation.

23. In determining the amount to be increased, the expenses of child, the income and expenses of the parties were pertinent considerations.

24. The mother's application reveals that **one child's** weekly expenses would amount to \$39.50 being made up as follows:

<i>Food:</i>	\$25
<i>Education Expenses:</i>	<i>\$2.00 per week: Average (\$90 per year)</i>
<i>Emergency Medical Expenses:</i>	<i>\$2.50</i>
<i>School Expenses:</i>	\$10.00

25. Although not claimed as child expenses, I do not think it is improper to allocate expenses for electricity, water, clothing and shoes for the child as well. In absence of any evidence on the appropriate amount, I allocate an extra \$20.00 per week for these expenses for one child making the total expenses to \$59.50 per week.

26. The mother's expenses per week are \$76.00 per week and made up as follows:

<i>Food:</i>	\$25
<i>Electricity:</i>	\$10
<i>Water:</i>	\$3
<i>Telephone:</i>	\$3
<i>Hire Purchase:</i>	\$10
<i>Travelling Expenses:</i>	\$25

27. When the mother gave evidence she was asked whether what she stated in her application were her expenses. She agreed that it were except that she has travelling costs when she goes to work from Lautoka to Nadi and return.
28. The application however claims \$25 per week for travelling expenses per week to work to be \$25 so I find that there are no changes in her expenses from that outlined in her application.
29. Although the mother is now not living in the same residence as she used to, there is no evidence that she is incurring extra expenses as she lives with her sister in Lautoka.
30. The wife earns a net income of \$132 per week. If I allow her full expenses of \$76 per week, she is still left with \$56.00 per week. This excludes the spousal maintenance that she receives from the husband as for reasons that will appear later in my judgment, I find that the order for spousal maintenance must cease.
31. I now have to analyse the expenses of the father. His response did not contain the breakdown of the expenses but he stated in his application that he had listed those expenses in Form 19.1 did not find any Form 19 in the court records. If counsel wanted to rely on expenses disclosed in property proceedings they ought to have made proper applications to me to rely on supplementary record and in absence of any application, I rely on the available evidence given at the trial.
32. At the trial the father stated that his expenses were \$432.00 per week. He said that the expenses are for food, electricity, water, telephone, clothing, motor vehicle expenses and hire purchase. He stated that he was living beyond his means and that he has been assisted by family from overseas. They sent him money from offshore and he tendered one money order dated 18 June 2012 to substantiate that. The money order was for F\$6000.
33. I am not able to find from the evidence, the exact expenses of the husband but I do find as a matter of fact that he has the obligation to support four people including himself. He supports his wife and child and also a child from the marriage of the parties' to the proceedings. The child is a grown up child and his expenses are many together with the younger child of 3 1/2 years.

34. Although the child who lives with the mother has increased expenses, I find that the order for increase to be paid by the father unjustified. The change in the mother's financial circumstances in that she now earns and after giving full allowance for her expenses, saves \$56.00 per week will leave her with enough finance for her to utilize the same towards the maintenance of the younger child. To add to that would be \$20.00 in child maintenance that she receives from the father as per the original order. She therefore has \$76.00 per week from which she can maintain the child. The child's expenses on my above calculation come to approximately \$60 per week. At the end of the day, the mother will save little money but on the facts the father cannot save any after fulfilling his statutory duty to maintain 4 people.
35. After paying \$20 per week in child maintenance, the father is left to support four people in the family. I find that the expenses of the father for four people would exhaust his \$280.00 per week and it is not justifiable that an increase be awarded from his commitments. I accept his evidence that his income is not even enough to sustain four people and that is why he looks for family support. Large amount of cash money was sent to him from New Zealand. In absence of any contradictory evidence I find that this money was given to him to support him due to lack of finance. The Court failed to give proper weight to this evidence and concluded that there was contradiction in the evidence that he was living beyond his means when his loan payments were not established under the evidence to be in arrears. The payments were not in arrears because the father lived on borrowed money. The evidence was used adversely when it ought not to have been when viewed holistically.
36. The increase by \$50.00 was not justified on the current income and commitment of the father. The Court found that the father had not disclosed about the rental business but there was no evidence that it belonged to him or that he derived any income from the same.
37. I therefore find that the initial order for the husband to pay \$20 per week for the child cannot be varied on the facts of the case.
38. I now come to the question of spousal maintenance. There is now no need to make any orders for spousal maintenance in light of the fact that the wife is working and she earns enough to support

herself and partially one child of the marriage. It would have been difficult for her if she was asked to maintain two children but as it is her income and expenses do not support an order for continued spousal maintenance.

39. I will however wish to make one matter very clear. The father had once made an application for cancellation of spousal maintenance which application was adjourned sine die on his own agreement to continue the payments as ordered. It was therefore fair that since his application was not determined on merits, it be considered holistically in light of the application for modification by the mother.

40. The application for modification of the maintenance of children had an impact on the father's income and ability to pay and it was prejudicial not to consider his application albeit adjourned sine die.

41. I find that since the Court was aware that the application lay in abeyance, it needed to be disposed of at some point in time and factually I find that the opportune time to consider that was when the current application was heard.

Final Orders

42. In the final analysis, I allow the appeal and set aside the orders of the Court on the variation application.

43. The fresh orders of the Court are that there shall be maintenance for one child name-ly Child 2 born in 2005 in the sum of \$20.00 per week to be paid by the father. This order is effective from the date it was made and continues to be in operation without any increase. In essence the order for increase is set aside retrospectively from the date of its making.

44. The father is further ordered to maintain the elder child fully irrespective of where he stays. For now, it is not essential that a quantum be fixed for his maintenance as the child is staying with his paternal grandparents but if the child moves out to live with his mother, an application can be made for the

quantum to be fixed.

45. The order for spousal maintenance is set aside with effect from --2013 being the date of the trial. It was apparent on the date of the trial that the elder child had recently moved to live with the paternal grandparents so even if the wife received some form of spousal maintenance, although she was working, her uplifting and using the same cannot be said to be unjustified as she was looking after two children of the marriage.
46. If as a result of the making of these orders retrospectively, there is any excess payment by the father, then the same to be applied towards deduction of future maintenance without there being a need to refund any monies.
47. The existing Judgment Debtor Summons (if there is any pending for determination) or any to be issued in future must be recalculated based on the orders of this Court.
48. The Registrar to ensure that the new orders are correctly and accurately reflected in the maintenance card and any other data or system which is used to record the orders of the Court.
49. Each party shall bear their own costs of the appeal proceeding.

Anjala Wati

Judge

21.10.2015

1. *Vijay Naldu & Associates for the Appellant.*
2. *Kevueli Tunidau Lawyers for the Respondent.*
3. *File: 14/Ltk/0015.*