IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTIQN

ACTION NUMBER:	**14/Suv/0003** **(Original Case Number: 13/Nav/0044)**
BETWEEN:	**ANTONIO** **APPELLANT**
AND:	**VENINA** **RESPONDENT**
Appearances:	*Mr. P. Tawake for the Appellant.* *Ms. T. Leweni for the Respondent.*
Date/Place of Judgment:	*Wednesday 13 January 2016 at Suva.*
Coram:	*Wednesday 13 January 2016 at Suva*
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:	*ANTONIO v VENINA- Fiji Family High Court Appeal Case Number: 14/Suv/0003.*

JUDGMENT

Catchwords:

FAMILY LAW - PRACTICE AND PROCEDURE - proper practice before committing a person to prison for default in payment of child maintenance- Judgment Debtor Summons must be served personally on the person - it must be established under the MCR and the Constitution that the debtor had the means to pay but had willfully refused to- committal warrant cannot be issued without means of the debtor having being examined at the time of the committal.

Legislation:

1. The Constitution of the Republic of Fiji Islands: s. 9(2).

2. Magistrates' Courts Act Cap. 14 ("MCA"): s. 16 (1) (h).

3. The Magistrates' Courts Rules Cap. 14 ("MCR"): Order XXXVI Rule-9-(1) .

4. The Family Law Act No. 18 of 2003 ("FLA"): s. 22(2).

5. The Family Law Rules 2005 ("FLR"): Rule ZJJ(2).

Cause

1. Antonio was committed to prison for ninety (90) days on 6 March 2014 for failure to pay child maintenance.

2. He served his term and has appealed against the decision of the Resident Magistrate Ms. Piyumini Weeratunga .

3. He is aggrieved that he was never served with the Judgment debtor Summons ("JDS") pursuant to which a committal warrant was issued against him, that he was never examined as to his means before committing him to prison and for committing him for 90 days when the law does not permit committal for such a long term.

Appellant's Submissions

4. The counsel for the appellant submitted that the JDS was initially listed for 8 January 2014 and adjourned to 23 January 2014 on which day he appeared with his client. On this date the counsel had informed the Court that he did not have a copy of the JDS. The Court then directed that a copy would be furnished to him on the same date. The matter was adjourned to 6 March 2014 on which date a committal warrant was issued committing the appellant for 90 days.

5. Mr. Tawake contended that since the FLR is silent on the procedure to be invoked upon issuance of the JDS, the MCR ought to be followed: s. 22(2) of the FLA and Rule 1.02(3) of the FLR.

6. Order XXXVI Rule 9 (1) of the MCR stipulates that no order of commitment under paragraph (g) of sect ion 16 of the Act shall be made unless a summons to appear and be examined on oath has been personally served upon the judgment debtor.

7. There was no affidavit of service to confirm that service was conducted on the appellant and this was even informed to the Court. On that basis the Committal Warrant could not have followed.

8. The appellant's counsel also argued that the appellant was never examined on oath. After the Court directed that a copy of the JDS be furnished from Court File, the matter was adjourned. On the next date, without examining the appellant as to his means, he was committed to prison.

9. Examination on oath is a requirement under Order XXXVI Rule 9 ((1) of the MCR and s.16 (1) (h) of the MCA which states that a Magistrate has jurisdiction to commit a person to prison if he or she makes default in payment of any debt or instalment but that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making the default has either has or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay the same.

10. For the Court to be satisfied that the appellant has the means to pay and has refused, he should have been examined on oath which procedure was not carried out. Again on this basis the Committal Warrant could not and should not have been issued.

11. It was also argued that the RM does not have jurisdiction to commit a debtor for refusal to pay despite having the means for a term exceeding 6 weeks. This is provided for in s. 16(1) (h) as well. 90 days imprisonment is more than 60 days and is in breach of the powers that the Court has.

12. The order for commitment was therefore wrongly issued and must be set aside.

Respondent's Submissions

13. The respondent's counsel argued that on 24 January 2014 1 when the appellant and his counsel appeared in Court, the counsel advised that he did not have a copy of the JDS. They did not advise that the JDS was not served on the appellant. One reason why it may not have been raised could be that the appellant had the benefit of the service. Although there is no affidavit of service to the effect, the appellant should have raised the issue of personal service. He failed, and having participated in the proceedings, he now cannot make a complaint.

14. Ms. Leweni further submitted that the Committal Warrant has an endorsement on it to the effect that the Means Test was conducted. The RM then signed off at the bottom. This shows that there was compliance of the law in that the means test was conducted.

15. When the order for payment was made, the RM would also have examined the appellant as to his means. On the committal warrant there was an also an examination done.

16. The RM had the powers to commit the appellant to prison because when the matter was called in Court on 6 March 2014, he informed the Court that he did not pay any money and did not offer any reason why he did not pay. On that basis he ought to have been and was properly committed to prison.

Law and Analysis

17. Both the counsel are correct in submitting that for enforcement proceedings, the MCR will apply. This is by virtue of s. 22(2) of the FLA and Rule 7.11(2) of the FLR.

18. The enforcement procedure was begun by a JDS. Therefore the Standard Rules on JDS will apply to this case.

19. Order XXXVI Rule 9(1) of the MCR provides that "no order of commitment under paragraph (g) of section 16 of the Act shall be made unless a summons to appear and be examined on oath (hereafter in this Order called a judgment summons) has been personally served upon the judgment debtor".

20. There are two mandatory requirements of the above legal provision. The first is that the judgment summons be personally served on the debtor. In this case there is no evidence of service. No affidavit of service has been filed. It is therefore safe to conclude that service was no effected on the debtor personally.

21. I do not know how the debtor ended up in Court and if he did and was not served, he ought to have informed the Court about non-service. The Court normally does not check for affidavit of service when there is appearance by the person on whom service ought to have been effected.

22. The only issue that was raised by the counsel for the appellant was that he did not have a copy of the judgment summons. That was swiftly resolved by the Court in ordering that a copy be provided to the counsel.

23. If the issue of non-service was raised, the Court would have definitely addressed it. By appearing without putting a conditional appearance that service be properly effected on the appellant and participating in the proceedings, the appellant waived his right to be personally served. If he did not appear in Court, his concerns in the appellate court would be upheld but since he did appear and participate in the proceedings below, he not being served now is a non-issue.

24. The second requirement arising from **Order XXXVI Rule 9 (1)** is that the debtor be examined on oath as to his means. This requirement is substantiated by s. 16 1(h) of the **MCA** which reads as follows:

" 16.-(1) A resident magistrate shalt, in addition to any jurisdiction which he may have under any other Act for the time being in force, have and exercise jurisdiction in civil causes-

(h) to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him, in pursuance of any order or judgment of the court or any other competent court:

Provided that such jurisdiction shall only be exercised where it is proved, to the satisfaction of the Court, that the person making the default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same…. "

25. S. 9(2) of the Constitution of the Republic of Fiji Islands also states that a person must not be deprived of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax, unless the court considers that the person has willfully refused to pay despite having the means to do so.

26. The Committal Warrant notes that the Means Test was conducted but there is nothing in the records of 6 March 2014 that the debtor was examined on oath and that he was questioned on his means and why he did not pay the maintenance debt.

27. Any Court examining the debtor will ask the debtor about his income, his expenses, and if there is means then why were the monies not paid. No such examination was done and the notation that the Means Test was conducted is not correct and supported by the Court Minutes.

28. It is the duty of the Resident Magistrate commit ting a person to prison and depriving him of his liberty to keep transparent records and not make notations in the Committal Warrant which is suspicious and not supported by the records.

29. The notes of 6 March 2014 only reads:

"Applicant Lady:	Present
Respondent Man:	Present
Court:	Respondent says he hasn't paid anything to the Applicant at all and doesn't give any reasons either.
	Committal Warrant issued"

30. There is no indication that the appellant was put on oath and asked any questions on his means and asked under oath why he did not pay. It is noted that the appellant did not give any reasons why he did not pay the monies but that is not equivalent to the statutory and constitutional requirements to ascertain the means and reasons for failure to pay. This exercise ought to be undertaken when the person is being committed to prison and not at the time the orders for payment are being made as the orders for payment may be made well before the default. There may be a good reason why the debtor did not pay the money and so this all has to be ascertained at the time of the committal.

31. I find that the Court failed in its statutory duty to examine the appellant under oath and finding the reasons for the failure to pay. On that basis the committal warrant issued is erroneous and bad in law.

32. Further, under s. 16(1) (h), the RM did not have powers to commit the appellant to prison for a term beyond six weeks and by ordering committal for 90 days, the RM acted in excess of her jurisdiction.

33. The orders for committal are therefore bad in law and must be set aside.

Final Orders

34. The appeal is allowed on the basis that the Committal Warrant was not properly issued in that the appellant was not examined on oath as to his means and that it was not established on oath that he had willfully refused to make the payments despite having the means to do so.

35. The appeal is further allowed on the basis that the RM did not have jurisdiction to commit the appellant to prison for more than 6 weeks.

36. The Committal Warrant is bad in law and I thus cancel the same although it has been executed.

37. The Registrar of the Court to furnish a copy of this judgment to the respective Court so that in future such discrepancies in procedure are omitted.

38. Each party is to bear their own cost of the proceedings.

Anjala Wati

Judge

13.01.2016

To:

1. Mr. P. Tawake for the Appellant .

2. Ms. T. Leweni for the Respondent .

3. File: 14/Suv /0003 .