

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:

0014/2017

Nadi MC- FD File Number: 16/Nan/ 0519

BETWEEN:

SALESH

APPELLANT

AND:

MARAIA

RESPONDENT

Appearances:

Ms. S. Sharma (LAC) for the Appellant.

Respondent in Person.

Date/Place of Judgment:

Friday 21 February 2020 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

Category:

Anonymised.

JUDGMENT

A. Catchwords:

FAMILY LAW – SPOUSAL MAINTENANCE – *The Court must first make a finding that the person claiming spousal maintenance has established a right under the law for an order for spousal maintenance and that the person who is to pay the maintenance is financially able to provide the same.*

B. Legislation:

- 1. Family Law Act (“FLA”): ss. 155 and 157.***
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1. The husband has brought an appeal against the decision of the Family Division of the Magistrates' granting spousal maintenance to his wife in the sum of \$50 per fortnight with effect from 17 October 2017.
2. The parties were married on 20 January 2014. They separated sometimes in November 2016. They have one child of the marriage under the age of 18. The child lives with his father.
3. The basis on which the court granted the order for maintenance was that it was the responsibility of the husband to provide for the wife since he had been doing so when they were living together.
4. The husband appealed the decision on the ground that the court erred when it did not follow the provisions of the law in making a determining on whether the wife was entitled to spousal maintenance in the first place and also in determining the correct amount upon assessing the needs of both the parties and the financial capacity of the husband to pay the same. It is also appealed that the duration of the payment should have been identified as well.
5. It is very clear from the courts findings that despite setting down the law which governs the grant of spousal maintenance, the court did not follow the same. It just based the order on the fact that it was the responsibility of the husband to provide for the wife and since he had been providing the same when they were living together, he should do it continuously. This finding is flawed in law and in fact.
6. By basing the finding on the above ground, the court seems to be of the view that it is the duty of the husband's to provide for their wives upon separation and that separation is to be a punishment for them.
7. There was an era in this country, before the enactment of the current legislation that spousal maintenance was as of right. We have long moved away from such views. The law has changed over a decade ago.
8. It is now clear from s. 155 of the FLA that a spouse is not entitled to maintenance as of right. He or she has to prove that that the party from whom maintenance is sought is able to

maintain the party seeking the same. The party who is seeking the maintenance must show that he or she meets one of the criterion listed below:

(a) that he or she is having the care and control of a child of the marriage who has not attained the age of 18 years;

(b) that by reason of age or physical or mental incapacity, he or she is unable to find employment; or

(c) that there is any other adequate reason for which he or she is entitled to spousal maintenance.

In determining each criteria, the court must have regard to matters outlined in s. 157 of the FLA. I do not think that repeating those factors at this stage is necessary.

9. The Court did not identify any factor based on which the wife was entitled to spousal maintenance. It was mandatory for the court to identify the reason why the wife was entitled to spousal maintenance.
10. In her evidence, the wife said that she was working and earning \$130 per week. She stated that she paid \$350 per month in rent, \$70 per month for hire purchase, \$15 per month for electricity, \$7 to \$8 per month for water, and \$3.00 per day for transportation costs.
11. The wife did not prove her main expenses such as rent and hire purchase. These are matters which can be easily proved. There are other matters for which I would not insist for documentary evidence such as food bills. Since the expenses were not proved, it could not be established as necessary expenses. The remaining matters are food, water, electricity, clothes and transport. I find that with her earning of \$130.00 per week, the wife should be able to sustain herself.

12. I am also concerned that the court did not even consider whether the husband's income was sufficient to cater for the child and him. No evidence was extracted and analysed in that regard. The husband's financial ability was ignored.
13. I therefore find that the basis on which the order was made cannot be supported in law and on the facts of the case. With the scarcity of evidence, this court is not in a position to make the finding that the husband is in a position to maintain the wife.
14. He is looking after the child of the marriage with his income. Despite earning, the wife is not providing any financial or other support to her child. In fact, under the law, she is obliged to maintain the child but she is not fulfilling that responsibility and is using all her income for her expenses.
15. I do not find that the order for spousal maintenance was justified in law and on the facts of the case. I therefore set aside the order of the Magistrates' Court. I order each party to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

21.02.2020

To:

- 1. *Legal Aid Commission for the Appellant.***
- 2. *Respondent.***
- 3. *File: Appeal Case Number: 0014 of 2017 (Original File Number: 16/Nan/0519).***