

**IN THE FAMILY DIVISION OF THE HIGH COURT
APPELLATE JURISDICTION**

CASE NUMBER:	18/Lab/ 0003
BETWEEN:	NOEL
AND:	STELLA
Appearances:	Mr. A. Sen for the Appellant. Mr. S. Singh for the Respondent
Date/Place of judgment:	Monday 04 May 2020 at Suva.
Coram:	Hon. Madam Justice Anjala Wati.
Category:	<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>
Anonymised Case Citation:	NOEL v. STELLA, Fiji Family High court Appeal Case Number: 18/Lab/0003.

JUDGMENT OF THE COURT

Catchwords

FAMILY LAW – APPEAL – stop departure and injunction orders issued ex-parte – affected party must be heard within a reasonable period of time which is between 7 to 14 days on the application, in absence of which the affected party will be deprived of natural justice and the initial orders unjustified if it were to continue – circumstances of the particular case required a determination of the applications by the husband for removal of the stop departure and the injunction in part on its merits and not dismissed on perceived grounds of abuse of process of the court.

Cause

1. The husband appeals against the decision of the Family Division of the Magistrates' Court of October 2018. On this day, the Court made the following orders:
 - a. *The application for removal of stop departure and dissolution of injunction in relation to monies kept in overseas be heard in Court A.*
 - b. *The application for removal of the stop departure filed by the husband be dismissed and the same to be heard in Court B on 23 November 2018.*
 - c. *The application for dissolution of injunction in relation to the monies in overseas be dismissed.*

Background

2. It is essential that I outline the backdrop of the proceedings so far as it is relevant to the appeal before me.
3. The parties reside in suburb B. They are now separated. They have proceedings between them pending in Magistrates Court B.
4. On 14 March 2018, an interim injunction was granted in Court B restraining the husband from dealing with certain properties as follows:

“An order for injunction is granted in the interim to restrain the respondent man or his agents or servants or solicitors or legal representatives or beneficiaries from any form of access or from transferring, consolidating, closing or restructuring the accounts pending the determination of the proceedings. The accounts are as follows:

- (i) *Bank Vault Number. XXXX and any other Vaults registered under the name or names or alias of the Respondent;*

(ii) *Foreign Currency Account Number XXX1;*

(iii) *Overseas Bank Account Number XXX2;*

(iv) *Overseas Bank Account Number XXX3;*

(v) *Overseas Bank Account No. being XXX4;*

(vi) *Bank Accounts in overseas under the name of the Respondent or a named Charitable foundation.”*

5. A stop departure order was also granted against the husband on 13 September 2018. The order was granted ex-parte.
6. On 19 September 2018, the husband filed an application in the Court B wherein amongst other reliefs, he sought an order for removal of the stop departure and also for the dissolution of the injunction in respect of the monies in overseas banks and for the same to be divided equally between the parties.
7. Subsequently, on 25 October 2018, the husband filed in the Court B an urgent application for transfer of the proceedings in Court A for urgent hearing of two specified applications which was for removal of the stop departure orders and for an order that the monies frozen in overseas bank accounts by the respondent's solicitor WRMK Lawyers be released and equally divided between the parties.
8. The Court granted an order for hearing of both the applications in Court A but dismissed both on the basis that the matters were pending in Court B. The applications were not dealt with on its merits.
9. Specifically, in dismissing the application for removal of the stop departure, the Court A found that there was an application pending before the Court B in respect of which the husband was ordered to file a supplementary affidavit within 14 days and to identify the

details of his travel and the medical institution in which the treatment was proposed. The wife was given 14 days to respond to the affidavits.

10. After having gone through the Court records, the Court found that the application for stop departure was pending for hearing in Court B and as such, the filing of another application is an abuse of the process of the Court.

11. I am not able to gather from the ruling why the application for dissolution of injunction in relation to the monies in the Bank Vault No. XXXX was dismissed. It definitely was not dealt with on its merits and I therefore presume that the reason for dismissing the same was the perceived basis of abuse of process of the Court.

Appeal

12. The grounds of appeal essentially complains that:

1. *The Court erred in failing to determine the application for stop departure on its merits.*
2. *The Court erred in holding that the application for stop departure would be heard on 23 November 2018 in Court B when it was informed that the same was to be withdrawn and that the matter was set for only a mention in Court B and not for hearing.*
3. *The Court erred in failing to consider/hear and determine the application for dissolution of the injunction on its merits.*
4. *The Court erred in making the orders for stop departure and injunction final in nature after hearing the same only on an ex-parte basis thereby breaching the rules of natural justice to hear both the parties.*
5. *The application for removal of the stop departure was based on medical grounds and should have been treated with urgency when the application was supported by proper documentations from qualified medical practitioners.*

Issues/Law/Analysis

13. The complaint on the appeal is in respect of two distinct issues. I will deal with each separately.

A. Removal Of Stop Departure Order

14. On the day of the hearing, I was informed by the Counsel for the wife that the Court had removed the stop departure on the day the appeal matter was set for hearing. Counsel for the Applicant did not dispute that but he did raise his concerns about the manner in which his application was dismissed and then granted when the appeal was on foot. Although the stop departure order has been removed, I still need to make my observations regarding the matter.

15. The stop departure application was dismissed on the basis that an application was pending in Court B and was fixed for hearing on November 2018.

16. I understand that the nature of the stop departure applications are always urgent and so normally heard on an urgent basis. If the orders are granted ex-parte, it is the duty of the Court to then grant the affected party a right to be heard on the application after which the Court should determine whether the orders should continue.

17. It is in the interest of justice that the order affecting the rights of a party and the applications pursuant to which an order is granted is served on the affected party. Together with that, the court should grant an urgent returnable date in the application so that the affected party does not suffer harm or prejudice. The returnable date should be set within a reasonable period of time which is often 7 to 14 days from the date of issuing ex-parte orders.

18. In this case, my concern is that when the stop departure order was made against the husband, the returnable date was granted after a month which is 11 October 2018. This was not in the interest of the husband and so he ended up filing an application for removal of the same in Court B on 19 September 2018.

19. The matter was adjourned to 23 November 2018. The Court records do not say clearly that it was set for hearing on 23 November 2018. I do not know how the Court stated that it was for hearing on 23 November 2018. Be that as it may, what is more unjustified is the long time period given for the husband to file the supplementary affidavit and further long time for the wife to file her response papers.
20. I understand from the Court records that the Court had been informed about the medical treatment of the husband. That is why the Court gave time to file supplementary affidavit with details in it regarding the travel and the medical institution.
21. If medical urgency had been informed to the Court, short periods ought to have been assigned to ensure that there was no prejudice to the husband. Such long time frames for filing of the relevant papers was not justified. The Court erred in not giving the husband's application the desired early consideration.
22. The way the Court operated and conducted the procedures, it put the burden on the husband to file an application for dissolution of the stop departure order. In fact he should have been given time immediately to respond to the application on which the order was made. The application on which the order was made should not be treated as having been made final as it happened in this case. The Court should be aware of the rules of natural justice that final orders cannot be made behind the back of the parties and without hearing the parties.
23. Let me now come to the order dismissing the application on the grounds that it was an abuse of the process of the Court. The application that the Court found to be an abuse of the process of the Court was not even a second application. It was the same application filed earlier and sought to be transferred to be heard in Court A. The applications were filed in Court B and not in Court A.
24. The reason why the so called second application specified the particular applications sought to be heard in Court A was to merely clarify what applications were urgent and needed hearing in Court A. The applications were not duplicate in nature. Even if it was, the Court

ought to have treated the applications filed on two different dates as having being amalgamated instead of dismissing the same.

25. The Court ought to have been concerned about what was essential in the larger interest of justice. Since the husband had proffered medical reasons why he was asking for a removal of the stop departure order, the same ought to have been heard on its merits. Otherwise what was the reason for the transfer of the applications to Court A for hearing if it was to be dismissed on the basis that the applications are filed in Court B? The Court contradicted itself in first allowing the transfer of the applications to be heard in Court A and then dismissing the same on the grounds it did.
26. The Court ought to have considered the merits of the application and if the medical urgency was not established as professed, the application could have been dismissed. That is another matter.

B. Injunction – Monies in Overseas.

27. In respect of the monies sitting in Bank Vault No. XXXX, the parties have agreed that the injunction be uplifted and that the monies be shared equally between the parties. The concerns that Counsel for Respondent however had was that there be stringent procedures put in place so that the entitlement of his client is protected.
28. Both counsel had suggested to me that the Vault be opened in presence of both the parties and that the counting and the distribution of the same be supervised and recorded.
29. I am aware of the desire for the parties to be there when the Vault is opened, monies counted and distributed equally between the parties. I am also aware of the travel restrictions that the parties are under due to the Covid – 19 pandemic. I will make orders bearing in mind the concerns and the difficulties raised by the parties.
30. I however still need to make my comments regarding the orders of the Court. The injunctive orders were granted on 14 March 2018. Once again, the Court erred in not making an order for service of the orders and the applications on the affected party. There was once again

failure to assign a returnable date in the application for the husband to be heard. Although the order was issued on an interim basis, it had the effect of being final in nature as the husband was not given an opportunity to address the application. He was deprived of access to justice and the right to be heard.

31. He had to create ways to be heard on the application which was to file an application for dissolution of the injunction. Why should he be burdened to move the Court when it is his right to be heard on an application which affects his rights, if not at the initial stage then definitely at a later stage within a reasonable timeframe. In this case, the reasonable timeframe would be within 7 to 14 days. This right was taken away from him and I find that the Court erred in this regard.
32. Secondly, the order dismissing the application does not identify the reasons why it was so done. Perhaps the Court had in mind that the application of the same nature was filed in Court B. I however repeat what I have said before and that is that those applications are the ones which were sought to be transferred to be heard in Court A. The reason why the transfer application mentions removal of the stop departure and the dissolution of the injunction of the monies held in in the Vault is to specify the applications that were sought to be transferred. The applications were filed in the suburb B case. A separate case number was not allocated in Court B. In that regard, there was no duplicity of the process.
33. Even if there was duplicity, the applications, when ordered to be heard in Court A, should have been properly treated as having been amalgamated.

Final Orders

34. In the final analysis, I find that the application for removal of the stop departure order against the husband was not properly dealt with in that :
 - a. *When the application for stop departure was issued ex-parte, the Court ought to have ordered that the order and the applications pursuant to which the orders were granted to be served on the husband in a very short span of time.*

- b. *The Court ought to have granted a returnable date within 7 to 14 days on the application pursuant to which the order for stop departure was granted to enable the husband a right to be heard.*
- c. *By adjourning the matter for one month and not making any orders for service of the orders and the application papers, the court treated the application and the orders as final which impedes the husband's constitutional right to be heard and to a swift access to justice.*
- d. *The application for removal of stop departure ought to have been heard on merits and not dismissed on the grounds that an application of similar nature was pending in Court B as there was no abuse of the process of the court.*

35. Since the stop departure order was uplifted by the Court below on the date the appeal was set for hearing, I do not find that there is a need to endorse the same or comment upon it.

36. In respect of the application for dissolution of the injunction in relation to the monies in overseas, I find that:

- a. *The Court erred in not providing a reason why it dismissed the application after hearing the same in Court A.*
- b. *The Court also erred in not hearing the application on its merits and treating it as an application which has been amalgamated with the application filed earlier in Court B.*
- c. *The Court also erred in treating the interim injunction orders as final when it did not make any orders for service of the interim orders and all the application papers on the husband and hearing him within 7 to 14 days.*

37. I order by consent that:

- a. *The order restraining the husband, his servants and agents or howsoever from dealing with the monies kept in Vault be dissolved to allow both the parties to deal with the monies in the Vault together.*
- b. *The parties are at liberty to deal with the monies kept in the Vault together. They are at liberty to open the Vault when they are both together. If the parties are not able to be present at the Bank, they can appoint their nominees in writing and exchange the details of the nominees who shall be present to open the Vault. The information of the nominees are to be provided to all parties and their counsel within a reasonable time frame. The parties are to count the monies in the Vault together when they are in overseas or when their nominees are present.*
- c. *The monies in the Vault shall be shared equally between the parties in presence of the parties and an independent person being either a bank officer, a senior court officer in that country or any other person holding public office.*
- d. *The wife is at liberty to take along with her, a counsel of her choice to open the Vault, count the monies and to distribute the same equally.*
- e. *Upon receiving the monies, the parties are to sign the respective discharges required of them by the independent person and/or any other person or institution to relieve them of the responsibility of distributing the funds.*
- f. *The relevant order in the part that affects the Vault monies shall be registered in the Court where Vault is to enable the discharge of the injunction obtained in that Court. The wife should make necessary arrangements in this respect.*
- g. *The key to the Vault shall be provided to the Court Officer in the Country in the matter between the parties. When the parties or their nominees intend to open the Vault, they can together collect the key from the Court Officer on a date and time suitable to all.*

h. The date and time of opening of the Vault and distribution of the monies has to be appointed by the parties in consultation with their counsel.

38. The parties are at liberty to enter into any other consent arrangement in respect of the Vault monies in order to give effect or better effect to the orders of this Court.

39. The parties are also at liberty to enter into consent arrangement in lieu of the orders that I have issued to ensure an equal distribution of the monies in the Vault. If it is necessary for other consent orders to be issued in this regard, the parties are at liberty to apply generally in the manner which is expeditious and inexpensive.

40. I order each party to bear their own costs of the legal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

04.05.2020

To:

- 1. Maqbool & Company for the Appellant.***
- 2. Shelvin Singh Lawyers for the Respondent.***
- 3. File: Appeal Case Number: 18/Lab/0003.***