

IN THE FAMILY DIVISION OF THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

ACTION NUMBER:	FAMILY APPEAL NO. 0014 OF 2022
BETWEEN:	JACK APPELLANT
AND:	LILY RESPONDENT
APPEARANCES:	<i>Mr. Ravuniwa) for Appellant</i> <i>Mr. Waqanivalagi for Respondent</i>
DATE OF HEARING:	<i>Tuesday 1 August 2023</i>
DATE OF JUDGMENT:	<i>Tuesday 26 September 2023</i>
CORAM:	<i>Hon. Madam Justice Senileba Levaci</i>
CATEGORY:	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>

JUDGMENT
(APPEAL FROM FAMILY DIVISION OF MAGISTRATES COURT)

Cause and Background

1. The Appellant has made an application to Appeal against the decision of the Learned Magistrate awarding child maintenance to the Respondent lady.
2. The Learned Magistrate ordered for the payment of \$65 per week to be paid as spousal Maintenance to the Respondent lady (who was the Applicant in the lower court).

Grounds of Appeal

3. The Appellant relied upon only one ground of appeal as follows –
 - a. *That the Learned Magistrate erred in law and in fact in incorrectly holding that the Appellant is obligated to support the Respondent financially without due consideration to his means.*

Law on Appeal

4. Section 19 of the Family Law Act 2003 empowers the Family Division of the High Court to hear and determine Appeals from the Family Division of the Magistrates Court. It states –

'Appeals from the Family Division

19.-(1) An appeal from the Family Division of the Magistrates' Court lies as of right to the Family Division of the High Court'.

5. However although there is a right of every applicant to appeal a decision of the Family Division of the Magistrates Court, the Appellate Court will not overturn a decision of the Magistrates Court unless and until the Learned Magistrates Decision is of error in fact or law.
6. The Court is cautioned when considering an appeal from the court below. As was held in Roberts –v- Chute [2009] FJCA 4; ABU0040.2007 (17 March 2009) Scutt JA, Lloyd JA and Bruce JA stated –

'85] Appeal courts should always take care in overturning or interfering with the decision of a court below, where the trial court has had the opportunity of hearing witnesses and gauging their credibility, and especially where the trial court has a broad discretion in respect of its decision-making. This latter is particularly so in matrimonial causes or family law: **MAK and KN** (FamMagCt Appeal No.

06/SUV/0021, 25 July 2008) As the High Court of Australia emphasized in **CDJ and VAJ** (1998) 197 CLR 172, [1998] HCA 76, appellate courts need to exercise 'much caution in a case where an error of principle cannot be clearly identified':

Such reasons for appellate restraint ... have particular relevance to appeals within, and from, the Family Court of Australia. This is because of the functions and purposes of that Court and the difficult and evaluative decisions which it often has to make. The peculiar nature of decisions relating to the intensely personal questions of the division of the property of parties to a failed marriage and the welfare of their children makes it essential that those who decide appeals respect the onerous responsibilities of those whose decisions they review. They need to recognize that it is of the very nature of such decisions, including those relating to the residence of children, that any two decision-makers may, with complete integrity and upon the same material, often come to differing conclusions.'

Law and Analysis of ground of Appeal

7. The provisions in section 155 of the Family Law Act 2003 empowers the Court to grant spousal maintenance on three grounds:
 - (i) whether the Applicant is looking after a child below 18 years;
 - (ii) whether the Applicant suffers, because of age or physical or mental incapacity and is unable to find gainful employment or
 - (iii) for any other reason.

8. The learned Magistrate correctly referred to the provisions of the law and correctly determined that the Respondent was entitled to spousal maintenance. This also has not been contested by the Appellant and evidences submitted by the Respondent indicated her medical conditions suffering from sepsis and diabetes with the amputation of her 3rd right toe and multiple right and left hand debridement's. Her evidences which was accepted by the Court was that she was never employed and since their marriage from 2014 until their separation in 2021 the Appellant provided for her. She started getting sick in 2018 and was looked after by the Respondent and the father. She was admitted and discharge from hospital on numerous occasions.

9. Section 157 of the Family Law Act 2003 stipulates the factors to be taken into consideration when determining the appropriate award for spousal maintenance to be given to an Applicant. They are as follows –

'157. (1) In exercising jurisdiction under section 155, the court may take into account only the following matters-

(a) the age and state of health of each of the parties;

(b) the income, property and financial resources (including any interest in leasehold or real estate which is inalienable) of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment

(c) where either party has the care or control of a child of the marriage who had not attained the age of 18 years;

(d) commitments of each of the parties that are necessary to enable the party to support -

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

(e) the responsibilities of either party to support any other person;

(f) the eligibility of either party for a pension, allowance or benefit under-

(i) any law of the Fiji Islands or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside of the Fiji Islands;

(g) the rate of any such pension, allowance or benefit being paid to either party;

(h) a standard of living that in all the circumstances is reasonable;

(i) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earnings capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration

(l) if either party is cohabitating with another person - the financial circumstances relating to the cohabitation;

(m) the terms of any order made or proposed to be made under section 161 in relation to the property of the parties.'

10. The Learned Magistrate had correctly referred to the law on the factors to be considered. He then went on and stated –

'This Court has considered all the factors under Section 157 of the Family Law Act. This Court has been informed by the Applicant that she will receive \$90 per month has Social Welfare Assistance. This comes to \$22.50 per week. She is seeking \$90/week from the Respondent based on her needs and expenses. From the evidence of the Respondent in Court the Court finds that the Respondent cuts cane and has benefits from a 4 acre cane farm. Full details of this was not provided into court. He is also seeking the Probate for the said land. He paid \$1100 for the probate. The Respondent has means to pay the maintenance and provide support to the Applicant.'

Having assessed everything this Court finds that the Respondent should pay the Applicant \$65/week as spousal maintenance. This should start next week until further orders of the Court.'

11. Based on the evidences before the Court, the Learned Magistrate had arrived at the decision and awarded the said monetary value. However in arriving at its decision, the Court found that the Learned Magistrate had failed to canvass reasons from the factors outlined for awarding the said sums of monies.
12. The Learned Magistrate had also referred to further information regarding the cane farm and required counsel to find out details of the cane farm and proceeds earned. A few weeks later, the Learned Magistrate then went on to deliver a decision.
13. In the principle of 'audi alteram partem' rule, both parties must be heard prior to the Court arriving at a decision. The parties are obliged to submit all their evidences available into court. Parties that are not able to prepare and submit evidences relevant to their case cannot expect the Court to then rule favorably.
14. The Appellant has not asked to submit fresh evidence on appeal. He has however appealed the decision on the basis that further evidence was not tendered at Trial on the enquiry of the Magistrate. The Appellant was relying on a number of factors to solidify his quantum of earnings. He failed to provide documentations regarding his cane payment. This information was available prior to trial yet was not submitted into the lower court.
15. The Court finds that the Learned Magistrate had exercised his discretion accordingly. He had considered that there was no evidence forthcoming regarding the cane payments although he had enquired Counsel to obtain the same. It is clear from the

Learned Magistrates Ruling, that he had allowed Counsel time which the Counsel failed to do.

16. This Court finds that the Learned Magistrate did not err in law and fact when he disallowed for further evidence when the evidence was not submitted during trial. The lower Court was correct to determine the quantum based only on information available at trial and no other.
17. The Court hence finds that despite the lower Court not properly canvassing the factors, his arrival at the determination on the quantum to be paid by the Respondent was based on his correct analysis of the law and facts

Orders

39. The Court will therefore:

- (i) The Appeal is dismissed;
- (ii) The Decision is upheld;
- (iii) Costs against the Appellant at \$300.

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Mrs SLTTW Levaci
A/Judge