

IN THE FAMILY DIVISION OF THE HIGH COURT

AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>FAMILY APPEAL # 20 OF 2020 (Magistrate's Court File # 17/LTK/0393)</i>
BETWEEN:	<i>SABITHA</i> <i>APPELLANT</i>
AND:	<i>FNPF</i> <i>RESPONDENT</i>
APPEARANCES:	<u><i>Appellant</i></u> - Ms. S. Singh (Legal Aid). <u><i>Respondent</i></u> - - Ms. L. Bula
DATE/PLACE OF JUDGMENT:	<i>Wednesday 25 October 2023</i>
DATE OF HEARING:	<i>Monday 28 August 2023</i>
CORAM:	<i>Hon. Mr. Justice Chaitanya Lakshman</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

A. Introduction

- [1] The Appellant on 17th May 2019 filed an amended application for contempt (Form 7) against the Respondent in the Magistrate Court. In that application she alleged that the Respondent in 2016 released money from the FNPF account of her late former husband (U.P) in breach of the

restraining order on the FNPF account made on 14th December 2012. On 21st May 2020 the Learned Magistrate dealt with the Form 7 application and found that the Respondent discharged its statutory duty and its actions did not amount to wilful disobedience of the court order of 14th December 2012. The appellant is aggrieved with this decision. Hence this appeal.

- [2] The Learned Magistrate granted leave to appeal to the Appellant as the appeal was out of time. The leave was granted on 10th September 2020. On 7th October 2020 the notice of appeal against the Ruling of the Learned Magistrate was filed.

B. The Grounds of Appeal

- [3] There are three grounds of appeal as follows:

(i) The **first ground** is that “*that the Learned Magistrate erred in law and in fact when she found that the Respondent did not wilfully disobey the Court Orders dated 14th December 2012.*”

(ii) The **second ground** of appeal is that “*the Learned Magistrate erred in law and in fact when she failed to consider that the Respondent had to make an application to uplift the restraining order dated 14th of December 2012 before releasing the monies to the FNPF nominee.*”

(iii) The **third ground** of appeal is that “*that the Learned Magistrate erred in law and in fact when she failed to consider that after the death of the Original Respondent in the matrimonial proceedings, FNPF was aware and hence an application was to be made to uplift the restraining Order.*”

- [4] The submissions for the Appellant were that the Respondent in their affidavit had stated that they received the court orders and they were duty bound to have the injunction on the FNPF account. By releasing the money, FNPF breached and did not follow the court orders. FNPF needs to follow its own regulations and should have come to court to discharge the injunction. It was also submitted for the Appellant that in **AP v. NOH Family High Court Appeal Case Number 13/Suv/0001** the court in looking at Section 136 of the FNPF Act found that the FNPF monies could be used to pay off a person’s entitlement in a property or maintenance claim. The court has powers to make those orders and that ought to have been considered by the Magistrate. There was real threat which was the reason for the injunction. FNPF was to do due diligence

and that FNPF was duty bound to the deceased. Proceedings were on foot and FNPF did not take steps to uplift the injunction.

- [5] In response it was submitted that FNPF did not wilfully disobey the court orders. From 2012 until 2016 when the FNPF member passed away, FNPF did not release any funds in that period. FNPF only released funds after the death of the member. FNPF received nominee's claim from the spouse of the member and FNPF was duty bound under the FNPF Act to release the monies to the members nominee. According to FNPF the restraining order was conditional on maintenance and matrimonial application. From 2012 when restraining order was served on FNPF no determination of matrimonial or maintenance until members death in 2016. FNPF sought that the Court consider action of FNPF prior to 2016. It respected the Court. Only upon the death of the member, FNPF released the funds. It had responsibilities under the law and its actions did not amount to wilful disobedience.
- [6] The relevant portion of the court orders of 14th December 2012 is as follows “***2. That a restraining order is made for Fiji National Provident Fund (FNPF) not to release any monies from the Respondent [U P] [FNPF Account No. NW...] until determination of the property and maintenance application.***” (my underlining) The FNPF member passed away on 15th October 2016. The nominee/spouse of the member notified FNPF on 10th November 2016 and also filed an application seeking the release of the funds. FNPF paid the nominee on 14th November 2016. The Appellant on 13th November 2017 served FNPF with a court order seeking the release from FNPF for certain funds to pay for their daughter's fees at FNU. She was advised by FNPF that they could not comply as the funds had been paid out to the nominee in 2016.
- [5] The FNPF admitted that they had knowledge of the court orders of 14th December 2012. It was in place from that time until after the death of the member. Following the members death on 15th October 2016, his nominee lodged a claim with the FNPF. Acting in accordance with Section 57 (1) of the Fiji National Provident Fund Act 2011, FNPF paid out the FNPF members preserved and general entitlements on his death to the nominee of the member. Section 57 (1) of the FNPF Act is a mandatory provision. FNPF is statute bound to act and comply with the law. The issue here is on one hand is compliance with the law and the other the court order. FNPF followed the law. This is not willful disobedience of the court order.
- [6] For the sake of completeness it is important that we look at the basis of the court order of 14th December 2012. It was based on property and

maintenance applications. We need to know what property application was before the court that granted the restraining orders. On 27th July 2011 the Appellant had filed a Form 9 seeking half shares in the FNPF of her former spouse [U.P] for herself and her children. There were no other shares in any other property that was being sought by the Appellant. This information was before the Learned Magistrate who granted the restraining orders of the FNPF funds. The time the Learned Magistrate granted the restraining orders (14th December 2011) effective from 25th November 2011 consequential amendments through Section 141 (2) of the Fiji National Provident Fund Decree 52 of 2011, the definition of “property” in the Family Law Act 2003 was amended to exclude FNPF Funds of a member from matrimonial property distribution.

- [7] The Court order of 14th December 2012 injuncting FNPF funds of the member was not a proper order of the Court as the FNPF funds was excluded from being part of the pool of assets of a party. On 14th December 2012 the Learned Magistrate should not have made the orders injuncting the FNPF funds in consideration of the property proceedings (which was in relation to shares in the FNPF). Had the former spouse had other property which would be part of property distribution Section 136 of the FNPF Act would have been applicable and the restraining order would have been appropriate. A number of cases have already determined this issue. A restraining order protecting the FNPF funds and considering it as property of the parties was improper.
- [8] Following a hearing on Maintenance (Form 5) the Learned Magistrate on 10th August 2010 had ordered the Man to pay maintenance for the children in the sum of \$80.00 per fortnight. On 9th November 2011 a maintenance variation application was filed. On 4th December 2012 the Court through consent of the parties entered into consent orders that the Man pay \$60 per week as child maintenance. There was no pending maintenance application when the court made orders of 14th December 2012. The basis on which the Court granted the restraining order against the FNPF Funds of the Man in relation to maintenance is unclear.
- [9] This Court also has concerns over the Court Order of 17th August 2017 where the Court ordered the Man to pay the child’s fees following his demise. The Court files show that Court was aware that the Man had passed away and despite that knowledge went ahead and ordered the payment of the fees through his FNPF funds. Section 98 (1) (b) of the Family Law Act 2003 provides that child maintenance order stops being in force on the death of the person liable to make payments under the order. Despite the law expressing that maintenance ceases upon the demise of a person. The Court went ahead and made orders for payment

of fees (maintenance order) for the child from the FNPF account of the Man. Having perused the materials before me, I am concerned with the manner in which the application was canvassed and the orders granted.

[10] It is clear from the material before me that the property application which was filed by the Appellant was one where she was seeking half share in the FNPF funds of the Man. The law excluded FNPF funds of members from being included in the pool of assets. She had no other claim against the Man with respect to matrimonial property. The Form 9 application was frivolous. It is unreasonable for the Appellant to rely on the property application. It was doomed to fail. As for maintenance there was no maintenance application pending in court. Based on these the restraint on FNPF from releasing the funds was unreasonable. Given these situations FNPF did not need to move the court to uplift the restraining order. This Court finds that the Learned Magistrate properly dealt with the matter.

[11] For the reasons given the appeal is dismissed. There will be no orders as to costs.

C. Court Orders

(a) The Appeal is dismissed.

(b) No orders as to costs.

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Chaitanya Lakshman

Acting Puisne Judge