

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

ACTION NUMBER:	<i>Family Appeal Case Number 19 NAN 0242</i>
BETWEEN:	<i>ADHAN</i> <i>APPELLANT</i>
AND:	<i>UDITA</i> <i>RESPONDENT</i>
APPEARANCES:	<i>Ms. J. Singh for the Appellant.</i> <i>Ms. B. Reddy for the Respondent.</i>
DATE/PLACE OF JUDGMENT:	<i>Friday 3 November 2023 at Suva.</i>
CORAM:	<i>Hon. Madam Justice Anjala Wati</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. Catchwords:

FAMILY LAW – SPOUSAL MAINTENANCE – *The party applying for spousal maintenance must establish both: that he or she qualifies to get maintenance under s.155 of the Family Law Act and the other party has the income or earning ability to pay the maintenance.*

B. Legislation:

- 1. The Family Law Act 2003 (“FLA”): s. 155.**

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Cause

1. The husband appeals against the spousal maintenance order made against him. The court had ordered that he pays a sum of \$25.00 per week to his wife for a period of 1 year from the date of making the order. The period of 1 year was for the wife to find work for herself.

2. The wife had made an application for spousal maintenance. On 7 June 2019 the court made an interim order for the husband to pay \$25.00 per week until the hearing and determination of the substantive application. After the trial, the order remained except that the time period for payment was limited to a year only.
3. The parties have been married for 29 years until their separation. There are two children from the marriage and they are both over the 18 years.

The Appeal and Determination

4. The husband has raised 4 grounds of appeal asserting that the court has erred in law and in fact in:
 - (i) *Failing to consider that the husband has no income or earning capacity due to his age and sickness.*
 - (ii) *Not properly evaluating the evidence of the wife during the trial.*
 - (iii) *Failing to consider that the husband is supported by his nephew and the wife is being supported by the daughter hence they do not have the capacity to maintain themselves.*
 - (iv) *Failing to properly consider s.154 of the Family Law Act 2003.*
5. The wife asserted in her evidence that she was unable to support herself due to the physical incapacity caused by her husband. She testified that her husband had assaulted her.
6. Her allegation was that her husband had pushed her and when she fell she twisted her knee. As a result of that she has a torn ligament which gave rise to arthritis. She says that she has difficulty standing or walking for too long.
7. Under s.155 of the FLA, the wife had to establish that she could not support herself due to the physical incapacity as that is the only ground that she had raised. No other grounds outlined in s. 155 of the FLA was relied on. She also had to establish that the husband had the income or the earning capacity to provide for her.

8. There was no medical evidence or any other equivalent evidence produced by the wife which established that her knee pain precluded her from carrying out any form of work to earn a living. The evidence indicates that the treatment prescribed to the wife for her knee pain was heat therapy and exercise. In one of the medical reports of 19 March 2019, it was noted that she could resume duties from 24 March 2019.
9. The wife could not establish that given her medical condition she could not work. She was almost 60 years of age at the time of the judgment but that age factor alone does not mean that she cannot support herself. She had in her savings account a sum of \$1,800.00. She lived with her daughter and mother. The daughter was working and her mother was on social welfare benefit. She testified that her daughter supported her.
10. Given the support from her daughter and that she had some money in her savings, she could do some light work to provide for herself. She had been working in a garment factory for a long time even after her marriage. There is no reason why she could not undertake sewing work for her welfare. This could earn her a lot of money. Many people survive on sewing income alone. She could use her savings to invest in her sewing business. I do not find that the wife had established that she was unable to support herself given her knee injury.
11. The wife also had to establish that the husband was able to maintain her. He was 60 years old at the time of the judgment. He was unemployed. There was no evidence to refute that. The wife testified that some people have told her that he still works as a mechanic. However, no one testified that they saw him working. Even if he is working, no one testified on his income.
12. If he is working in some places, the question is whether he is earning enough to support another person. There was no evidence of that. I therefore find that there was no reliable evidence that the husband was working and earning a regular income to be able to maintain himself and his wife.

13. I gather from the submissions of the husband’s counsel that he had tendered to the trial court a letter from the Ministry of Health which stated that he was unfit to work due to multiple medical comorbidities. That letter was not in the court records. I could not locate the same.

14. I therefore do not find from the records that there was any such evidence which indicated that he had medical conditions which precluded him from finding work for his living. Even if he has the earning capacity, there is no evidence to establish that it is to an extent to maintain another person living in a different household. He may have been working and supporting the wife when they lived together but one must not forget that maintaining one household has less expenses than maintaining two. There is no evidence to support that he has an income or earning capacity to now support two different household expenses.

15. I find that trial court had not analyzed the evidence properly to establish entitlement and liability under s.155 of the Family Law Act. The orders for spousal maintenance is not justified.

Final Orders

16. In the final analysis I find merits in the grounds of appeal and I set aside the order for spousal maintenance. The orders are discharged to take effect from the date the payments are not being made.

17. Each party shall pay their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

03.11.2023

To:

1. Legal Aid Commission, Lautoka for the Appellant.
2. Legal Aid Commission, Nadi for the Respondent.
3. File: Nadi Family Court Case Number: 19/NAN/0242.