

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	16/LTK/0011
[ORIGINAL DVRO CASE NUMBER]:	01 of 2016
BETWEEN:	ADITYA
AND:	ALIA
Appearances:	<i>Ms. Baleilevuka for the Appellant.</i> <i>Ms. J. Singh (LAC) for the Respondent.</i>
Date/Place of Judgment:	<i>Thursday 3 October 2024 at Suva.</i>
Judgment of:	<i>Hon. Madam Justice Anjala Wati</i>
Category:	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymized Case Citation:	ADITYA v ALIA – Fiji Family High Court Case number: 16LTK0011

JUDGMENT

A. **Catchwords:**

FAMILY LAW - DOMESTIC VIOLENCE RESTRAINING ORDER – APPEAL - *whether the evidence established that the requirements of s. 23 of the DVA were met to issue the domestic violence restraining order.*

B. **Legislation:**

1. **Domestic Violence Act 2009 (“DVA”): s. 23.**

Cause and Background

1. The husband appeals against the domestic violence restraining orders granted against him.
2. The parties to the proceedings are parties to the marriage. At the time of the alleged incidence of violence, the parties were separated and living apart. There are two children of the marriage. They live with their mother since the separation of the parties.
3. The allegation of violence by the wife was that she had contacted the husband over the phone to enquire about her passport. He then started fighting with her. She alleged that he was also swearing over the phone. It was also alleged that there had been violence during the marriage due to the husband's relationship with another woman.

Court's Findings

4. The court found that the husband had been abusive towards the wife after he started having an extra-marital affair. It said that it was obvious from the evidence that the parties had unresolved domestic issues from the past which led to their unfortunate separation. The court referred to the husband's admission of slapping the wife in the past and his admission of having an extra-marital affair.
5. The court said that in its findings, having an extra-marital affair whilst being legally married was actually committing provocative or offensive conduct. The court then found that the slapping and the extra-marital affair established domestic violence.
6. Focusing on the incident of the fighting and swearing over the phone, the court stated that it believed the evidence of the wife that the husband had been violent to her after the separation. The reason for accepting the wife's evidence was consistency and firmness in her evidence.

The Appeal

7. The husband raised 3 grounds of appeal. They are that the court erred in law:

[1] in holding that there was domestic violence when the alleged incident of domestic violence was not the subject matter of the proceedings leading up to the urgent relief for domestic violence and further that the alleged domestic violence had been resolved between the parties and they started living together.

[2] *in the interpretation of the meaning of domestic violence when it held that extra martial affairs by the appellant amounted to domestic violence.*

[3] *in not considering all the elements for ordering an interim domestic violence order to become final, in particular, when there was no evidence of any alleged domestic violence repeating itself.*

Law and Analysis

8. The allegation before the court was that the wife had called the husband to enquire about the passport when he started arguing and swearing over the phone. The husband denied this.
9. The court accepted the evidence of the wife over that of the husband. The issue of whether or not the husband had fought with the wife and sworn at her over the phone was resolved on the issue of credibility. It was open to the court to do so and I cannot interfere with that evidence. There is no evidentiary basis for me to impeach the court's finding that the wife was not telling the truth about the alleged incident.
10. The reference to past violence was important to decide whether the requirements of s. 23 of the DVA was met to issue the final orders. S.23 of the DVA reads:-

“23 ***Grounds for making a domestic violence restraining order***

- (1) *A court may make a domestic violence restraining order for the safety and wellbeing of a person if satisfied that the person is, or has been, in a family or domestic relationship with the respondent and –*
 - (a) *The respondent has committed, is committing, or is likely to commit domestic violence against that person or against another person relevant to the application; and*
 - (b) *The making of the order is necessary for the safety and wellbeing of the person or another person relevant to the application, or both.*
- (2) *In determining whether a domestic violence restraining order should be made for the safety and wellbeing of a person, the court must consider –*
 - (a) *whether there is reason for concern that the respondent's behaviour or other behaviour that would be domestic violence may be repeated by the respondent;*
 - (b) *the perception of the applicant and of a person who would be protected by the order, about the nature and seriousness of the respondent's behaviour in respect of which the application is made; and*
 - (c) *the effect of the respondent's behaviour on each person who would be protected by the order including the effect of the respondent's behaviour on their ability to go about their normal life and normal routines.”*

11. As. 23 outlines, past violence is not an irrelevant consideration. It is important to decide whether there has been violence before and whether coupled with the current alleged incidents, the violence could repeat.
12. When the parties lived together, there was violence in the marriage. The husband admitted to this. The parties have now separated. That does not mean that violence will stop due to that. The husband has the tendency to be violent. That was established. That tendency did not stop as it was established that the violence continued after separation. The past and the current violence therefore gave rise to a high possibility that the incident could be repeated in future.
13. The parties have two children of the marriage. As parents, they will need to be in contact with each other for their children. If there is no harmony in the relationship, matters regarding the welfare and development of the children cannot be promoted by them as parents.
14. It is important that the appellant fulfills his role as a father and if contacted remains calm and composed and not affect the wife mentally by swearing at her. It will be expected that he will be contacted by the wife for the children's matters. He needs to be restrained from being abusive.
15. There is acrimony in the relationship and the wife who has the residence of the children does not need any future lashing out by the husband. She needed protection and so a domestic violence restraining order was justified.
16. The act of having an extra marital affair is not violence in itself but if a party to the marriage becomes mentally and physically abusive given the other relationship then that conduct comes under the definition of domestic violence. I do not find any basis to disturb the order of the court.

Final Orders

17. I do not find any merits in the appeal. I dismiss the same and uphold the orders of the court below. There shall be no order as to costs.

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Hon. Madam Justice Anjala Wati

3.10.2024

To:

1. ***Messrs Baleilevuka & Associates for the Appellant.***
2. ***Legal Aid Commission for the Respondent.***
3. ***File: Family Appeal Case Number: 11 of 2016.***