

IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	13/NAN/0357
BETWEEN:	WALKER
AND:	KYLIE
Appearances:	<i>Ms. R. Lal and Ms. K. R. Lal for the Appellant Ms. Veitaitai 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:	WALKER v KYLIE – Fiji Family High Court Case number: 13NAN0357

JUDGMENT

A. Catchwords:

FAMILY LAW – JUDGMENT DEBTOR SUMMONS – COMMITTAL ORDER - APPEAL – *If the amount in the JDS is disputed, it is only proper that the proper amount be determined before examination of the means of the debtor- an order for payment can be made only to the extent that the debtor can meet the order – default orders are necessary which includes committal orders – before committal, it has to be examined that the person had the means to pay and had wilfully disobeyed the order.*

B. Legislation:

1. *Constitution of Fiji: s. 9(2).*

Cause and Background

1. The appellant appeals against the order of the Family Division of the Magistrates' Court committing him to prison for 4 weeks until the arrears of maintenance stated in the Judgment Debtor Summons ("**JDS**") was fully paid.
2. The amount in the JDS was \$12,828.90. It accumulated upon an order for maintenance for 2 children of the parties. There was consent order for payment of \$350.00 per fortnight for the 2 children.
3. The appellant made payments until end of 2014. He then paid maintenance in kind by buying groceries for various amounts at various times. His position was that the respondent accepted the groceries until 6 December 2016 when she issued a JDS against him.
4. When the JDS was first called in court, the appellant was present. The matter was adjourned for the amount in the JDS to be re-calculated. On the second mention date, the matter was called in court and stood down for re-calculation of the JDS. The re-calculation was done and the matter was re-called.
5. The appellant then made an application to the court that the amount in the JDS be discounted by the amount of the value of the groceries provided to the respondent. The respondent did not want the amount to be discounted.
6. The court directed that since the respondent did not agree to the discounting, it will examine the appellant's means to pay the amount in the JDS.
7. The appellant's counsel then advised the court that she was not in a position to proceed to the hearing as her client did not have all the evidence of his expenses on him.
8. The respondent's counsel then informed the court that they will accept all the expenses of the appellant if given under oath. On that basis the appellant's counsel agreed to proceed to the hearing on the means.
9. After the hearing the court made orders in the following terms:

"(a) JD either has or has had, since the date of order of this court, the means to pay the sum in respect of which he has made default and;

(b) He is therefore committed for prison for four (4) weeks until fully paid."

Grounds of Appeal

10. The appellant has raised 7 grounds of appeal. He says that the court erred in law:

[1] *as to the purpose of the means test;*

[2] *in committing the appellant to prison for 4 (four) weeks;*

[3] *in the process for JDS and Committal;*

[4] *in deciding to proceed with the means test without any evidence being produced by the appellant;*

[6] *and in fact when he it heard the matter for means test when the matter was listed for mention only; and*

[7] *in not considering the payment in kind and cash made to the respondent.*

Law and Analysis

11. I will first deal with the issue of hearing the appellant on his means when the matter was fixed for mention. The records very clearly indicate that the appellant had accepted to proceed for hearing on the means of the appellant when the respondent's counsel informed the court that she will accept the expenses of the appellant if given on oath. On that premise, there was no need to produce documentary evidence to substantiate his expenses. I do not find any prejudice arising out of the decision to hear the matter.

12. On a JDS, if the parties are ready to run a short hearing on examination as to the means of the debtor, the matter should proceed. The case does not involve complex issues that a trial date is needed for the parties to prepare themselves. The matter can proceed to hearing on a mention date as well.

13. I now turn to the ground which complains about the value of the groceries provided to the respondent and not being deducted from the JDS amount. It was clear to the court that the amount in the JDS was disputed on that basis. Groceries of substantial value was provided to the respondent in lieu of cash. The value of the groceries over the period exceeded \$10,000.

14. The respondent did not dispute that. All she indicated was that she did not want the value of the groceries to be deducted from the JDS amount.
15. Even at the appeal hearing, the respondent's counsel did not dispute the purchase of groceries by the appellant. I appreciate that the order was to pay \$350 cash per fortnight. However, if the parties have accepted another means of satisfying that debt, it is unjust and inequitable to disregard expenses incurred in satisfying the maintenance.
16. If the respondent did not agree that groceries were bought and received on behalf of the children, then it was for the appellant to prove that he did buy the groceries and the extent of the purchase.
17. The court ought to have then made a finding on what should be the actual amount that ought to be deducted from the JDS. It simply refused to deduct it on the basis that the respondent did not agree for the deduction.
18. The appellant cannot be subjected to additional financial exposure if he has, by consent of the parties, been fulfilling the order in another form which benefited the children. It is unjust and inequitable to disregard his contribution in another form which cost him money. It was erroneous to proceed to hear the means of the appellant without first working out what was due and owing to the respondent.
19. After the proper amount was worked out, the court ought to have then enquired from the appellant if he was able to meet the remaining arrears in absence of which his means to pay the same ought to have been examined.
20. As at, there is no finding on the true value of the JDS. That needs to be worked out. If there is any arrears left, the appellant's means need to be worked out to pay the arrears if he indicates his inability to satisfy the debt.
21. If he is found to have the means then he should be given time to pay the same. A timeframe must be set for him to make the payments. The court must also outline what happens in case of default. It may say that in default an order for imprisonment will take effect.
22. In that case, a committal warrant will be issued. Before the committal order is made effective, the debtor will again have to be examined on why he defaulted. If he had reasonable excuse and he did not willfully refuse to pay the debt, then he cannot be committed to prison. *S.9(2) of the Constitution of Fiji.*

23. A simple example could be that a person had the means to pay but due to some unforeseen circumstances, he had to use his money somewhere else to meet his priority expenses like his medical bills. In that case he cannot be found to have wilfully disobeyed the order. He cannot be committed to prison. The Constitution protects a person from being sent to prison if he defaults on reasonable basis.
24. In this case the court did not make a finding that the appellant had the means to pay the arrears in the sum of \$12,000. The court made a finding that he had the means to pay the maintenance. There was no finding that he had the means to pay the \$12,000 immediately.
25. If the appellant had the means to pay \$12,000, how he was going to have that money available and when he could have that available should be a factor to be considered. \$12,000 is not a small amount of money for a person in the income bracket of \$30,000-40,000 per annum.
26. By the order it made, the court expected the appellant to find the sum from somewhere. That order to pay the whole amount immediately in lieu of which he should go to prison is unconstitutional. The order for imprisonment is bad in law.
27. There is no evidence before me that the appellant has the capacity to satisfy the entire sum at once. Further, there is no evidence that the actual arrears is in the sum of \$12,000. The process invoked under the JDS is erroneous and the orders are bad both in law and in fact.

Final Orders

28. For the above reasons, I allow the appeal and set aside the committal order of the court below.
29. A fresh JDS can issue if desired. A proper process needs to be followed in dealing with the JDS.
30. There shall be no order as to costs.

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Hon. Madam Justice Anjala Wati

3.10.2024

To:

1. ***Lal Patel Bale Lawyers for the Appellant.***
2. ***Ms. Veitaitai for the Respondent.***
3. ***File: Family Appeal Case Number: 13/NAN/0357.***