

IN THE FAMILY DIVISION OF THE MAGISTRATE'S COURT AT SUVA

FILE No: 0346 of 2005

BETWEEN:

TS

Applicants

AND:

TM

Respondent

APPEARANCES/REPRESENTATIONS

Ms. Prem Narayan for the Applicant.

Ms. Peniana Salele for the Respondent.

RULING OF THE COURT

Background facts

1. This is a matter where the Applicant has applied for contempt of Court under the ambit of Family Court Rules 7.08.
2. The Applicant mother filed a Form 7 contempt application against the Respondent father for contempt of Court Order application pursuant to section 196 of the Family Law Act by way of Family Court Form 7 on 11.02.13. The said application alleges that the Respondent-father had wilfully disobeyed a Court Order dated 9.08.07 (hereinafter referred to as "the Order"). The Order was made by consent and the consenting parties that signed were the Solicitors representing the Applicant and the Respondent respectively.
3. The Order that was made by the learned Magistrate Mr.David Balram in particular paragraph 2 which states:
"Respondent is also to meet all school related expenses of the three children".

4. The Respondent pleaded not guilty to the charge of contempt.

Issues

- (a) Whether the evidence shows beyond reasonable doubt that the Respondent had failed to comply with the Order of 9.08.07; and
- (b) That the Respondent deliberately and wilfully failed to comply with the Order.

The Applicant's Evidence

5. The Applicant whilst giving evidence confirmed that the Court Order that was pronounced on 9.08.07 by the then Learned Resident Magistrate Mr. David Balram as stated above;

The charges that have been put to the Respondent were that:

- (a) That the Respondent failed to pay for the school related expenses for the child "L" for the years 2007 and 2008 to the sum of \$456.00 and that the Respondent failed to pay the sum of NZ \$23,659.00 for the year 2009;
- (b) That the Respondent failed to pay for the school related expenses for the child "G" being:
 - the sum of \$240.00 for the year 2007;
 - the sum of \$3,660.00 for the year 2008;
 - the sum of \$3,679.00 for the year 2009;
 - the sum of \$4,406.00 for the year 2010;
 - the sum of \$4,124.00 for the year 2011;
 - the sum of \$4,070.00 for the year 2012; and
 - the sum of \$5,780.00 for the year 2013
- (c) That the Respondent failed to pay for the school related expenses for the child "V" being:
 - the sum of \$240.00 for the year 2007;
 - the sum of \$240.00 for the year 2008;
 - the sum of \$240.00 for the year 2009;
 - the sum of \$240.00 for the year 2010;
 - the sum of \$240.00 for the year 2011;
 - the sum of \$240.00 for the year 2012; and
 - the sum of \$240.00 for the year 2013.

6. **Respondent's Evidence**

- (a) The Respondent was contracted by the United Nations to work in Iraq for 1 year and 6 months in 2007.
- (b) He had taken leave in May 2007 to visit Fiji when he found out in Nadi Airport that there was a stop departure Order and subsequently found out that it was due to arrears in child maintenance due to a late payment.

- (c) He engaged Mr. AV Bale as his lawyer who obtained a discharge of the Stop Departure Order before Resident Magistrate Mr. Balram who allowed him for leave to resume work in Iraq only after he produced a surety in Court so he did and left for Iraq to resume work.
- (d) Further he stated that, he only engaged Mr. AV Bale to appear for him to discharge the Order and nothing further.
- (e) He did not know about any consent order and did not instruct Mr. AV Bale to consent to any such Order.
- (f) He did not know that “G” had learning problems and did not know that the Applicant had enrolled her into an expensive school.
- (g) He did not know that his eldest daughter “L” was to go and study in New Zealand.
- (h) Regarding the children, there was no effort by the Applicant-mother to discuss about them or even tell him as what is going on.
- (i) The Applicant-mother does not even allow him to see them or spend time with him so he cannot know what is going on and accommodate their mother’s plan and make arrangement for any extraordinary expenditure required for that.
- (j) Applicant-mother makes the decisions herself without letting him know; The respondent stated that if she does not want to communicate with him then she has other means of getting the message to him and through his sisters, relatives, employer.
- (k) He went to school at the “SCS” after one of his sisters told him that his daughter “G” was attending it.
- (l) If he was informed properly and fully informed about “G” he could have found other alternatives that is affordable but where “G” could still get the special needs provided for.
- (m) He was not allowed to talk to her or hold her and could only see her from a distant.
- (n) He only became aware of the Order and all the expenses in December when he came to Fiji.
- (o) He also went to “G”’s school at Suva Christian in January 2014 to find out the truth about what disability “G” has and how were that diagnosed, the educational needs and costs involved.
- (p) He has been paying maintenance and at no time was he advised either by his lawyer or the Applicant about the separate educational expenses and particularly extraordinary costs involved.
- (q) When he came to check at the maintenance section of the Family registry, he found out about the arrears and followed up with his lawyer Mr. Lal Patel Bale who was

appointed by him when he visited Fiji in 2008 that he knew all money he was sending was paid into the maintenance section.

- (r) The Respondent in his evidence has admitted to failing to pay school fees of the children.
 - (a) “V”’s school fees for the years 2007 to 2013; and
 - (b) “L”’s school fees for the year 2007 and 2008.
- (s) He admits he did not pay school fees to “School SJ” and stated once he went to pay school fees and was informed that the school fees been already paid.
- (t) The Respondent denies that he should pay for “G”’s school related expenses. The evidence of PW2 proves that the child “G” suffered from a learning disability and all efforts was made by the Applicant mother to ensure that the child was educated to the best ability.
- (u) The Respondent gave evidence that he tried to visit the child “G” at “School CC” in 2008. He was not allowed to see the child at school, but he was very much aware of the school and the costs related to the school.
- (v) He confirmed in his cross examination that his sister informed him that “G” is attending to “School SGS”.
- (w) Further in his evidence the respondent stated that he was thinking that the MTC payment is going to school fees.
- (x) Further the Respondent gave evidence that he had received more than \$30,000.00 from his FNPF funds on retirement which he paid for his labourers on his farm.

7. **The Law**

a. ***The Family Law Rule 7.08 (1) of the Family Law Rules 2005 states that;***

“Where a person alleges that another person has committed contempt of the Court, other than contempt in the face of the Court, the Registrar may file an application in a Registry of that Court for the other person to be dealt with for that contempt”.

b. **Rule 7.10 of the Family Law Rules 2005 states that;**

“On the Hearing of an application under rule 7.08 (1), and in proceedings for contempt in the face of the Court, the Court shall –

- (a) cause the person against whom the contempt is alleged to be orally informed of the contempt with which that person is charged and call upon that person to plead thereto;
- (b) hear such evidence as the Court requires;

- (c) require that person to make any defence that the person may wish to make to the charge;
- (d) after hearing that person and any evidence that that person adduces, determines the matter of the charge and whether that person had purged his contempt; and
- (e) make such order as is considered just in all circumstances.

c. I also consider Section 196(1) of Family Law Act 2003 which provides as follows;

(1) A court which has jurisdiction under this Act may punish persons for contempt in the face of the court when exercising that jurisdiction or for wilful disobedience of any order made by the court in the exercise of jurisdiction under this Act. (2) The Rules of each Family Division may provide for practice and procedure as to charging with contempt and the hearing of the charge. (3) Where a person in contempt is not a corporation, the court may punish the contempt by committal to prison or fine or both. (4) Where a corporation is in contempt, the court may punish the contempt by sequestration or fine or both. (5) An order under this section may include an order for -

- (a) punishment on terms;
- (b) suspension of punishment; or
- (c) the giving of security for good behaviour.

Analysis of the Evidence

8. The respondent submits that any lawyer must act on his/her client's instructions otherwise it is an unauthorized act and anything (consent order) arising out thereof is null and void. Much of the Respondent's evidence was do with his former solicitors and how he was not aware of the order 9 August 2007. However, his affidavit evidence of 28th January 2009 says otherwise. He was at that time represented by AVB Bale Tax & Legal. It is the same solicitor who represented him at the time of the Order of 9 August 2007.
9. In his affidavit sworn on 28 January 2009 he stated at paragraphs 7 and 8 that he would be able to make payment towards the children "L" and "V"'s school fees once his salary was regularized and that he did not have the means to pay for the child "G". This particular affidavit shows that the Respondent was aware about that "G" (younger child) is attending to SC School. By stating that he has no means to pay her the school fees indicates that the Respondent was aware that he had to pay for the same.
10. However, he did not apply to this Court at any stage to vary the order. Further he did not make payments as ordered by the court.
11. The respondent in his evidence stated that he only became aware of the Order and all the expenses in December when he came to Fiji. But after perusing of the case record the court note that after the order was delivered by RM Mr. Balaram, the Respondent was present before the Court on 17/10/2007 and on 19/10/2007. On the both appearance the

Respondent was represented by Mr. AV Bale. Therefore, the respondent's evidence on not knowing the order in relation to the school expenses is uncatchable. It is also noted that there is no any evidence to show at least the respondent had taken any actions (eg:- Complaints to the LPU) against his lawyer.

12. The Applicant also alleges that the Respondent failed to pay overseas education of the child "L" amounting to NZ\$ 23,659.00.
13. In all the circumstances of this case, one hand, it is premature to conclude that the Respondent failed to pay the school related "expenses" of this child who studied in New Zealand. On one hand the Court has to satisfy first that the Respondent have had means to pay the sum of NZ\$ 23,659.00 and the term "education" to be defined and this court has to be satisfied the term "education" whether not inclusive of the "overseas education".Sec.42 of the FLA defines "education" as follows; that the "education includes apprenticeship or vocational training". The sec.42 is silent about whether or not the education includes overseas education. The obligation of the judicial officer is to define the law but not to amend the same. Therefore, I am of the view that the term "education" (if it is not interpreted as discussed above) to the higher court is the most suitable court to interpret the same. It is also noteworthy to mention that the respondent deny any knowledge of the child "L"'s education in New Zealand.
14. Even though, the Court disregarded the overseas education expenses, the Respondent still did not take any action to pay local school related expenses of the children.
15. The Respondent also has failed to adduce any evidence either orally or to adduce any documentary evidence to justify his failure to comply with the order of a Court of law that was made and pronounced by the then Magistrate RM Mr. Balaram in the Family Court in Suva. The court also noted that Respondent has had access to funds through his FNPF pension which he collected at the age of 55. He could have paid the school fees. But, he opted not to so.

Conclusion

16. The onus of proof in contempt proceedings is that of criminal nature and that is one of beyond reasonable doubt.
17. The Respondent has admitted not paying for the school related expenses for "L" for the years 2007 and 2008 and for "V" for the years 2007 – 2013. Contempt to that extent is admitted. Further the Respondent has admitted to part of the contempt as set out above.
18. Thus the Respondent deliberately and wilfully failed to comply with the Orders. Non-payment is a wilful act. The fact that he knew that he had to pay school related expenses and did not pay demonstrates that the non-payment is deliberate.
19. In light of the above paragraphs, the Respondent has not raised any reasonable or lawful defence of Court order made on 9.08.07, in particular, "Respondent is also to meet all school related expenses of the three children". Accordingly, after the trial of **contempt**, I find that the Applicant has discharged the burden of proof that lay upon her.

Accordingly, I find the accused guilty for the offence of **Contempt** of Court contrary to section 196 (1) of the Family Law Act 2003.

20. Considering all the circumstances of this case, I am of the view that a fine would suffice. Therefore, I order you to pay a fine \$200.00 (2 penalty units) to be paid within 30 days; In default 20 days imprisonment.

30 days to appeal

Lakshika Fernando

Resident Magistrate

On this 09th day of May 2014.