

**IN THE COURT OF APPEAL, FIJI**  
**[Civil Appellate Jurisdiction]**

**Civil Appeal No: ABU 0039 of 2014**  
**(Suva Family Court File No. 12/APP/0017)**

**BETWEEN** : **THE FIJI NATIONAL PROVIDENT FUND**

*Appellant*

**AND** : **JOJI BUTADROKA**

*1<sup>st</sup> Respondent*

**RANADI VAKAMEAU**

*2<sup>nd</sup> Respondent*

**Coram** : Almeida Guneratne, JA  
Chandana Prematilaka, JA  
Brito Mutunayagam, JA

**Counsel** : Ms. N. Choo for the Appellant  
Mr. A. Vakaloloma for the 1<sup>st</sup> Respondent

**Date of Hearing** : 9 September 2016

**Date of Ruling** : 30 September 2016

**JUDGMENT**

**Almeida Guneratne, JA**

- [1] This appeal is against Orders dated 20 May, 2014 made by the High Court in Suva (Family Division exercising appellate jurisdiction over orders made by the Magistrate's Court dated 23 August, 2012).

- [2] The matter that occasioned the proceedings to have been set in motion was on account of an application made by the mother (2<sup>nd</sup> Respondent) of three children seeking payment of maintenance arrears on their behalf which the father of the said children (1<sup>st</sup> respondent) had defaulted for which reason the 2<sup>nd</sup> Respondent had sought orders against the Fiji National Provident Fund (FNPF) (appellant) for the release of the said maintenance arrears held by the Appellant as per the general and preserved Accounts of the 2<sup>nd</sup> Respondent (an Employee) and a member of the FNPF.
- [3] The learned Magistrate in his initial orders had noted that, the 2<sup>nd</sup> Respondent had consented to the release of the moneys claimed from the FNPF funds.
- [4] Although the jurisdiction of court to order maintenance arrears to be paid from a member's FNPF fund was initially canvassed by the Appellant in its notice/grounds of appeal before this court (re: Ground 1), the same was withdrawn by the Appellant in its written submissions dated 29 March, 2016 as well as at the hearing on 9<sup>th</sup> September 2016. The 3<sup>rd</sup> ground of Appeal which was to the same effect was also withdrawn.

### **Grounds of Appeal that remain to be considered**

Re: Ground 2

- [5] Under this ground it has been urged that the learned Judge erred in law and in fact in making order (Order 3) that, the FNPF had failed to provide the court with necessary information about how much money was held in the Account of the Respondents when in fact such information had already been supplied to the Family Court on 5<sup>th</sup> September, 2013.
- [6] Even a fleeting glance at the said order shows that, the learned Judge's focus was on the sufficiency of moneys available in the 2<sup>nd</sup> Respondent's general and preserved accounts to meet the amount claimed as arrears of maintenance. The antecedent concerns shown in the learned Judge's judgment are also clear in making the said order given the

consequences that could have visited the 2<sup>nd</sup> Respondent in the event of him failing to comply with the Court's order to pay the sum of \$8,641.50 as "arrears of maintenance".

[7] For the aforesaid reasons I cannot see any error of fact made on the learned Judge's part leave alone any error of law in as much as even if the said order is viewed equivocally, I cannot see how it can affect the merits of the case.

[8] I reject the said ground of appeal.

**Re: Grounds 4 and 5 read with ground 7**

[9] It was submitted on behalf of the Appellant that, the learned Judge erred in law in making order (e) when she held that moneys could be withdrawn from the FNPF with the consent of its Board for the benefit of the children and that the children had to be irrevocably nominated as the beneficiaries to the funds in question (ground 4) and in making order (f) when she imposed an obligation on the wife to nominate the children as beneficiaries (ground 5).

[10] The Appellant, while acknowledging that it has no issues with the intent of the said orders contended whether the court has the power to make an order requiring beneficiaries to be nominated on behalf of an FNPF member's account.

[11] That contention *prima facie* is not without merit for Section 56 of the relevant Decree (viz: FNPF Decree) speaks of "Nomination as to payment of entitlements on death"

The Issue that arises in that context

[12] How then is one (the mother in the instant case) to recover funds lying in a defaulting father's account in the custody of the FNPF for the benefit of children's maintenance?

The learned High Court Judge's Approach

- [13] It is on the general jurisdiction regarding Child Maintenance in the Family Law Act (No. 18 of 2003) that, the learned Judge is seen giving effect to that intent (vide: paragraph [10] above).

Was that approach Justified?

- [14] I am of the view that the approach adopted by the learned judge was justified.
- [15] How else could the 1<sup>st</sup> Respondent (the mother) have reached the funds of the FNPF lying to the credit of an errant father who had failed to pay maintenance for his children? Moreso, when the father (the 2<sup>nd</sup> Respondent – the FNPF member) himself had consented to the release of funds?
- [16] There being no evidence before Court that the 2<sup>nd</sup> Respondent had creditors claiming on his account I can see no issue on confidentiality that could have inhibited the FNPF from disclosing the moneys lying with it, held in custody on the 2<sup>nd</sup> Respondent's behalf.

Court as Upper Guardian of Minors

- [17] This is a universally accepted concept.
- [18] The Appellant contends that, the learned Judge did not base her Order on any proviso to the FNPF Decree and that such order appears to go against Section 56 of the said Decree.
- [19] The learned judge admittedly did not base her said orders on any express provision in the Decree in question.

**What is not prohibited must be taken as permitted.**

- [20] There is no provision in the Decree that prohibits a Court from making the said orders either. It is an inveterate principle of law that what is not prohibited in a Statute must be taken to be permitted.

In the Indian Supreme Court decision in **Narasingh Das v. Mangal Dubey** [1983] 5 Allahabad 16 it was held that “Courts and Tribunals must not act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for but on the converse principle that every procedure is to be understood as permissible.”(cited in a single judge ruling of the Fiji Court of Appeal in Ghimli Fashion (Fiji) Limited v. Ba Town Council, (Misc. Action No. 3 of 2012).

Who would be the most competent person as the natural guardian of her children to nominate them as beneficiaries on a claim for arrears of maintenance against a defaulting father?

- [21] Taking into consideration the factors articulated above I have no hesitation in holding that, the learned High Court Judge, being in the shoes of the upper guardian of the children in question had the power to make the said orders canvassed by the Appellant in Grounds 4 and 5.
- [22] I also see no error in the learned Judge’s interpretation of Sections 94 and 136 of the FNPF Decree. I see no omissions on her part either in regard to confidentiality of information relating to the 2<sup>nd</sup> Respondent’s Accounts.
- [23] As noted earlier the Appellant concedes that, it does not join issue with the intent of the impugned order.

**Benignus leges interpretandae sunt quo voluntas earum conservetur**

- [24] In my view this is a legal maxim that cries to be employed in the instant case. It means that,  
“laws are to be more liberally interpreted so that their intent may be preserved.”
- [25] What was that intent on the part of the Court? It was to ensure the interests of the three children in question. Thus, although there is no express provision in the FNPF decree conferring power in the Court to make an order as the one it made, in the absence of any

prohibition therein the Court derived power as the upper guardian of the said children to make the said order.

[26] For the aforesaid reasons I reject Grounds 4 and 5 urged in the Notice of Appeal and Ground 7 as well in which context I reiterate what I have penned earlier at paragraphs [15], [16], [21] and [22] of this judgment. In any event Ground 7 was abandoned by learned counsel for the Appellant. (Vide: Both in her written submissions dated 27 March, 2016 as well as at the hearing before this Court on 9 September, 2016).

**A Brief Pause before I move on to consider the remaining ground of appeal**  
**(viz: Ground 6)**

[27] That pause arises on account of the order (f) decreed by the learned High Court Judge where she had decreed that,

*“If the mone(y)s (sic) are transferred to the wife’s account under an order, the FNPF must ensure that paragraph (e) above is complied with .....”*

[28] What paragraph (e) decrees is that,

“If any order is made for payment of money(s) (sic) from the member’s account, the money(s) (sic) should be deposited in the FNPF account of the party who is entitled to receive maintenance for the children...”

[29] While I did not see any problem arising from the said order (which view my brother Justice Mutunayagam agreed with) my brother Justice Prematilaka however thought different. His Lordship’s view being, “to so ensure” as decreed in the said order would amount to imposing an unnecessary burden on the FNPF, my own view being that, in any event this was not a matter urged in the grounds of appeal urged on behalf of the Appellant quite apart from the learned High Court Judge’s thinking in making the said order given her long experience as a Justice of the Family Court Division in order to be doubly sure that the children’s interests are secured.

[30] Accordingly I shall leave that matter leaving room for my brother Justice Prematilaka to express his views.

**Re: Ground 6**

[31] The Appellant contended that the learned Judge erred in law and in fact in making order (g) when she imposed an obligation on the FNPF to file in Court the details of the transfer payments and nominations.

[32] The appellant appeared to contend that, “the Court” was not an authorized forum to have made that order?

[33] The Appellant’s submission was that the said order be substituted by an order that the Appellant simply advises the Court that the Orders have been duly complied with.

[34] Is a Court to accept the mere (ipse dixit) of a party to litigation that orders made by Court have been duly complied with?

[35] Why is the Appellant making attempts to draw a smoke screen at every turn? What are its concerns? Particularly when its member had consented to the release of funds lying to his credit?

[36] In that regard I re-iterate what I have already articulated in paragraphs [12] to [22] in this judgment.

[37] For the aforesaid reasons I reject Ground 6 of Appeal as well.

**Should costs be ordered against the Appellant?**

[38] I posed this question for myself for the reason that, the learned High Court Judge in her order had decreed “that each party shall bear their own costs.”

[39] There is no cross-appeal by the Respondents on that aspect and therefore I shall not comment on that matter.

**Chandana Prematilaka, JA**

[40] I have had the benefit of reading the draft Judgment of my brother Dr. Almeida Guneratne JA (with which Justice Brito Mutunayagam has agreed).

[41] At the hearing of the appeal, I raised some concerns with regard to certain parts of the Order of the Learned High Court Judge and my brother Dr. Almeida Guneratne, JA wants me to express my views accordingly.

[42] The Learned High Court Judge in her Final Order (b) has determined that maintenance arrears could be paid from a member's fund in FNDF and that any such payment has to be made or transferred to an account kept and maintained by FNDF for the party who is ordered as the party entitled for payment or entitled to receive payments on behalf of the children. The party so identified as being entitled to receive maintenance on behalf of the children is the 01<sup>st</sup> Respondent who is the wife of the 02<sup>nd</sup> Respondent. At the hearing counsel for the Appellant, FNDF withdrew appeal Ground One based on this order, possibly because Order (b) could be justified and sustained under section 136 read with section 141 (2) of FNPF Decree.

[43] Then in the first part of the Order (e) the Learned High Court Judge further said as follows.

*'If any order is to be made for payment of monies from the member's account, the monies should be deposited in the FNDF account of the party who is entitled to receive maintenance for the children.'* Though the Appellant challenges Order (e) under Ground 4 of appeal, I believe that in view of conceding Ground One the Appellant cannot challenge this part of Order (e) as it is in substance more or less the same as Order (b).



[44] The second part of Order (e) is as follows:

*'Subject to the authorization of the Board, the custodian of the fund may be allowed to withdraw the money for the benefit of the children and shall hold all monies on trust for children which means that the children must be irrevocably nominated as the beneficiaries.'*

[45] The Order (f) is to the effect

*'If the monies are transferred to the wife's account under an order, the FNPF must ensure that paragraph (e) above is complied with in that the wife has nominated the respective children as the beneficiaries. The details of the children could be obtained from the Registry.'*

[46] To give effect to the Order (b) the Appellant has to act under section 136 (2) (a) and (b) read with sections 131 (1) and 141 (2) of FNPF Decree. With that, the 01<sup>st</sup> Respondent would become a member of FNPF and be subject to the provisions of the said Decree. An FNPF member may give the Board a nomination of only one person which is revocable under section 56 of FNPF Decree. Such nomination as to payment of entitlements on death must necessarily originate from the member. The FNDF or its Board does not have power in the matter of nomination.

[47] Therefore, the second part of the Order (e) which *inter alia* states that 'the children must be irrevocably nominated as the beneficiaries.' and the part of Order (f) that 'the FNPF must ensure that paragraph (e) above is complied with in that the wife has nominated the respective children as the beneficiaries.' are the areas of concern to me in that as to whether they are orders that could be given effect to strictly within the purview of FNDF Act. For the purpose of clarity, I must mention I have no issue with directing the FNDF to comply with the first part of Order (e) but only with the nomination of more than one irrevocably in the second part of Order (e) and the obligation appearing to cast on FNPF on nomination in Order (f).

- [48] However, upon reading the Judgment of my brother Dr. Almeida Guneratne JA, I am prepared to go along with the reasons adduced therein as to why Order (e) *in toto* might be sustained. In addition to those reasons, Order (e) may be justified on the basis that in terms of section 136 (4) of the FNPF Decree, section 136 does not affect any other power of the court allowing court to make appropriate orders in proceedings under the Family Law Act [which extend to making orders under section 136(2)]. It could also be justified *inter alia* on the constitutional principle of English Law that "Everything which is not forbidden is allowed" and also within the ambit of Family Law Act.
- [49] However, the part of Order (f) that '*the FNPF must ensure that paragraph (e) above is complied with in that the wife has nominated the respective children as the beneficiaries.*' in my view, is not an obligation that could be legitimately cast on or carried out by the FNPF, because as I have already indicated the power of nomination is solely with the member who in this instance is the 01<sup>st</sup> Respondent which could not be vested in any other person or authority.
- [50] Therefore, I propose that this Court makes order that the obligation on nomination of beneficiaries referred to in Order (e) and (f) should be carried out or given effect to by the 01<sup>st</sup> Respondent and once it is done the FNPF should act as directed by the Learned High Court Judge. Subject to that, I concur with the Orders of Court proposed by my brother Dr. Almeida Guneratne JA with which my brother Brito Mutunayagam, JA has agreed.

**Brito Mutunayagam, JA**

- [51] I agree with Justice Almeida Guneratne's conclusions.

**The Orders of the Court are:**

1. *The Appeal is dismissed and the Orders (canvassed in this Appeal) made by the High Court are affirmed.*
2. *There shall be no order for costs.*



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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

Handwritten signature of Chandana Prematilaka in blue ink.

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**Hon. Justice Chandana Prematilaka**  
**JUSTICE OF APPEAL**

Handwritten signature of Brito Mutunayagam in blue ink.

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**Hon. Justice Brito Mutunayagam**  
**JUSTICE OF APPEAL**