

**IN THE FAMILY DIVISION OF THE HIGH COURT
AT LAUTOKA
APPELLATE JURISDICTION**

APPEAL CASE NUMBER: 09/BA/0001

**MAGISTRATES' COURT CASE
NUMBER:** 08/BA/0032

BETWEEN: PRITIKA

AND: APPELLANT
PRAVESH

RESPONDENT

Appearances: Dr. M. S. Sahu Khan for the appellant.
Ms. Natasha Khan for the respondent.

Date/Place of hearing: Friday, 26th March, 2010 at Lautoka.

Date/Place of judgment: Tuesday, 6th April, 2010 at Lautoka.

Judgment of: The Hon. Actg. Justice Anjala Wati.

Delivered By: The Hon. Justice Sosefo Inoke.

Category: *All identifying information in this judgment has been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*

JUDGMENT OF THE COURT

Catchwords

APPEAL - MARITAL STATUS PROCEEDINGS - application for dissolution of marriage filed by the husband - response filed by wife disputing the date of separation-court also informed verbally that date of separation was disputed-court relies on the date of separation stated in the maintenance application by the wife and grants dissolution of marriage on the grounds that at the time of the grant of the order for dissolution of marriage, the parties had been separated for a period of 12 months and that it was in the interest of the parties to get a dissolution of marriage as there was no possibility that the parties would ever live together- order granting dissolution appealed-computation of time for dissolution of marriage discussed-courts duty to find out whether the marriage has broken down irretrievably - time period when the conditional order should become final discussed- power to reduce time period under special circumstances also discussed - appeal allowed with costs to appellant.

COSTS - powers of Family Court to award costs discussed-powers of Family Court to award costs against solicitor personally discussed-opportunity granted to solicitor to show cause why an order for costs should not be made against the solicitor personally.

Legislation

Family Law Act No. 18 of 2003.

Family Law Rules 2005.

Family Law Regulations 2005.

Cases/Texts

In the Marriage of Todd (No.2) (1976) 25 F.L.R. 260.

In the Marriage of Pavey (1976) 25 F.L.R. 450.

In the Marriage of Falk (1977) 29 F L.R. 463.

In the Marriage of Wiggins (1976] F.L.C. 90-004.

In the Marriage of Bozinovoc (1989) 99 F.L.R. 155

Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co. Sydney.

The Appeal

1. This is appeal from the decision of the Ba Magistrate against an order for dissolution of marriage granted in March, 2009.
2. His worship had ordered on the day in March, 2009 that a conditional order be granted dissolving the marriage of the parties and that the order was to become final within 28 days of the grant.
3. The conditional order was issued by the registry on the 10th day of March, 2009.
4. The sealing of the final order was suspended. The court was informed by Dr. Khan that he obtained an order for stay against the grant of a final order. Apparently

there was nothing in the file or the court record which gave me any indication that the order granted by his worship was stayed at any point in time.

5. The appeal is opposed.

The Grounds of Appeal.

6. The grounds of appeal as outlined in the Notice of Appeal are as follows:-
 - "1. The Learned Trial Magistrate had no jurisdiction to grant the dissolution of Marriage when 12 months had not expired from the date of separation and the filing of the application for Dissolution of Marriage by the respondent particularly when the counsel for the Appellant specifically raised an objection as to this issue.
 2. The learned Trial Magistrate erred in law and in fact in holding that he could take into account facts of the period after the filing of the application for Dissolution of Marriage by the appellant and this particularly when Counsel for the Appellant specifically raised objection as to this issue.
 3. The Learned Trial Magistrate erred in law and in fact in not taking relevant matters into account and taking irrelevant matters into account in making his decision.
 4. The decision of the Learned Trial Magistrate is unreasonable and cannot be supported having regard to the clear Mandatory Provisions of the Family Law Act 2003.
 5. The Learned Trial Magistrate had no jurisdiction to make the order that the Conditional Order would become final after the expiring of 28 days as had been done.
 6. The Learned Trial Magistrate erred in law and in fact in making the decision without hearing any evidence particularly Oral Evidence when Counsel for the appellant specifically required him to do so".

The Orders Sought

7. The appellant seeks the following orders in this appeal:-
 - "1. That the order by the Learned Trial Magistrate for the dissolution of the Marriage of the Appellant and the Respondent be set aside.
 2. That the Decree Nisi not be made absolute until the determination of the Appeal and/or further Order of the court.
 3. That the respondent do pay costs on indemnity basis as the Application at the hearing by the respondent was absolutely frivolous and without any ground whatsoever".

Reference to Parties.

8. The husband was the applicant in the dissolution of marriage proceeding and was represented by Ms. Khan. He is the respondent in the appeal. I shall refer to the original applicant/ respondent as the "husband" throughout my judgment. The original respondent/ appellant, the wife, who was and is represented by Dr. Khan shall be referred to as the "wife". This is done for reasons of convenience and to comply with the rule restricting publication of proceedings identifying a party to the proceeding: s. 210 (1) (a) and s. 210 (2) (a) (i) of the Family Law Act No. 18 of 2003.

The Appellant's Submission.

9. In support of his appeal, Dr. Sahu Khan succinctly submitted as follows:-
 - a. The application for dissolution of marriage was filed on the 29th day of February, 2008, in which the husband had indicated that the parties had separated on the 20th day of February, 2007.
 - b. In response to the application for dissolution of marriage, he filed a response on behalf of the wife wherein he had specifically said that the parties had not been separated for a period of 12 months and that the Magistrate in light of that had no jurisdiction to grant the dissolution of marriage. It was also stated that the families had not concluded the marriage as over.
 - c. In Court, the separation date was also raised as an issue on numerous occasions.
 - d. Once the learned Magistrate was aware that the date of separation was in issue, he was bound to hear oral evidence and make a determination on the issue which he failed to do. The Magistrate relied on a date of separation provided by the wife in a maintenance application form, in which the wife had stated that the date of separation was 23rd August, 2007. Even if this date of 23rd August, 2007 was the date that was properly applied, then the period of separation preceding the date of filing the application would be less than 12 months as the application was filed in February, 2009. The period of separation must not be 12 months preceding the date of filing the application.
 - e. The Magistrate cannot take the date of separation as being 12 months at the date of hearing as the law specifically requires the 12 month period to be met preceding the date of filing the application for dissolution of marriage.
 - f. The Magistrate's power to hear a dissolution of marriage application is derived by section 3 (1) (a); section 21 (1) (a); section 24(1) (b) and section 25 (1) of the Family Law Act No. 18 of 2003. Section 30 of the Act requires that the marriage must breakdown irretrievably as evidenced by 12 months separation preceding the date of filing the application for a court to grant dissolution of marriage. Since the ground under the Act was not established, his worship had no jurisdiction to grant the dissolution of the marriage.

Respondent's Submission

10. Counsel Ms. Natasha Khan on behalf of the husband submitted the following:-
 - a. Under Rule 6.07 (1) of the Family Law Rules 2005, any person who wishes to oppose an application for dissolution of marriage must file a response in accordance with Form 4. Part D in Form 4 contains an affidavit which is required to be signed by the wife but she did not sign it, instead the solicitor for the wife Dr. Khan signed it making the Form 4 defective. Since Form 4 was defective, the only date of separation that was before the court was the date in the application for dissolution of marriage. That date in the application for dissolution of marriage indicated that parties had been separated for 12 months preceding the date of filing the application and so the magistrate was right in granting an order for dissolution of marriage based on the date outlined in the application for dissolution of marriage.
 - b. In light of the defective Form 4, there was no need to hear the evidence. In any event Dr. Khan should have been in a position to be able to present evidence which he was not because he sought an adjournment from the court. His client was not present either, to present evidence on the separation date so the Magistrate was quite correct in dealing with the matter on the documents available before him.
 - c. The Magistrate had not relied on the date of separation in the application for maintenance filed by the wife but if he did then he was still correct in granting the dissolution as the time when the order for dissolution of marriage was granted, the 12 months period was already met. It was further argued that under Rule 5.01 of the Family Law Rules, the court had the powers to waive the requirement of 12 months separation period preceding the date of filing the application and rely on the 12 months separation period as at the date of granting of the application for dissolution of marriage.

Appellant's Submission In Reply

11. In response to the submission by Ms. Natasha Khan, Dr. Khan raised the following:-
 - a. He had never asked for an adjournment from the court. He agrees that his client was not present in court but he stated that he did not need his client as he was confident that he could establish his case by way of cross-examination of the husband who would have been cross examined on the date of separation.
 - b. No objection was taken on the defective Form 4 as it is raised now. In any event, Regulation 7 of the Family Law Regulations 2005 states that non-compliance with the Regulations or the Rules does not render proceedings void unless the court so directs. In exercising its discretion under the Regulation, the court must have regard to the real merits of the case, the minimizing of expense, and whether any party to the proceedings has suffered injustice or has been prejudicially affected

by non-compliance. The Magistrate had not rendered the proceedings void although the Form 4 was signed by him but the signing of the form by him does not affect the merits of the case. It did bring to the attention of the parties and the court the fact that the date of separation was in challenge and as such there should have been a hearing on merits instead of determination of the issue on papers.

The Determination

12. All the grounds need to be discussed together as they are inter-related and overlap.
13. By virtue of section 21 (1) (a) and section 24 (1) (b) of the Family Law Act No. 18 of 2003 hereinafter referred to as the "Act", the Magistrates' Court has power to hear and determine an application for a matrimonial cause.
14. By virtue of section 2 of the Act, matrimonial cause means to include proceedings between the parties to a marriage, or by the parties to a marriage, for an order for dissolution of marriage.
15. Section 2 of the Act reads as follows:-

"2 (1)... "matrimonial cause" means-

(a) Proceedings between the parties to a marriage, or by the parties to a marriage, for an order of -

(i) dissolution of marriage; or..."
16. Section 21(1) (a) of the Act reads as follows:-

"21 (1). The Family Division of the Magistrates' Court has jurisdiction in matrimonial causes and all other matters instituted or continued under this Act; ..."
17. Section 24 (1) (b) of the Act states that:-

"24 (1). Subject to this part a person may institute a matrimonial cause under this Act-

(a) ...In the Family Division of the Magistrates' Court."
18. The issue raised by Dr. Khan is that although the magistrate had the powers to hear the application for dissolution of marriage, he did not have powers to grant an order for dissolution of marriage. In order to determine this issue I have to look at the grounds for dissolution of marriage.
19. The ground for dissolution of marriage is outlined in section 30 of the Act and I shall recite the entire section in full as it is of so much relevance and the entire appeal hinges on this section.
20. Section 30 of the Act reads as follows:-

"30 (1). An application under this Act by a party to a marriage for an order for dissolution of the marriage must be based on the ground that the marriage has broken down irretrievably.

(2) Subject to subsection (3), in a proceeding instituted by an application, the ground will be held to have been established, and an order for dissolution of marriage must be made, if, and only if, the court is satisfied that the parties have separated and have thereafter lived separately and apart for a continuous period of not less than 12 months immediately preceding the date of filing of the application for dissolution of marriage.

(3) An order for dissolution of marriage will not be made if the court is satisfied that there is reasonable likelihood of cohabitation being resumed".

21. It might appear from an initial reading of s. 30(1) and (2) that an initial question to be asked in respect of these two subsections is whether the effect of subs. (2) is that 12 months' separation alone establishes their retrievable breakdown of marriage for the purposes of subs. (1), or whether it must be demonstrated that both the marriage has broken down irretrievably and that the parties have separated for not less than 12 months. I must say that there is only one requirement for the dissolution of marriage. This is the irretrievable breakdown of marriage as established by the fact that the matrimonial relationship between the parties has effectively broken down for at least 12 months: **Dickey, A, "Family Law" 4th Edition (2002) Lawbook Co. Sydney at page 202.**
22. Having stated what the ground for dissolution of marriage is, I will now have to determine whether this ground for dissolution of marriage was met when his worship granted the conditional order for dissolution of marriage.
23. The application for dissolution of marriage was filed on the 29th day of February, 2008. The application states the date of separation to be the 20th February, 2007. It also states that the husband regarded this date as the date when the marriage was over. The application also states that the husband had attempted to contact the wife to revive the marriage but the wife had not been forthcoming. Both families had met and concluded that the marriage be dissolved.
24. In response to the application for dissolution of marriage, Dr. Khan filed a response on the 29th day of February, 2008 in the prescribed Form 4 in accordance with the rules. The response states as follows:-
 - "1. That we have not been separated for minimum period of 12 months as claimed by the applicant.
 2. Accordingly, this Honourable Court has no jurisdiction to grant the application for dissolution of marriage.
 3. It is also false that both families concluded that the marriage be dissolved."

25. The application for dissolution of marriage was listed in court for the first time on the 6th day of May, 2008. On this day her worship adjourned the matter to the 17th day of June, 2008 to fix a date of hearing of the application on the issue of date of separation. After that the matter got adjourned on various occasion, most adjournments being due to the fact that the magistrate was not available to deal with the matter.
26. On 5th March, 2009 Ms. Natasha Khan advised the court that she wished to proceed with her application for dissolution of marriage. She told the court that the dates in the application for dissolution of marriage, the response and the maintenance application all indicated that the parties have been separated for over a year.
27. Dr. Khan advised the court that the application for dissolution of marriage was challenged on the grounds that the separation date was disputed. The court then remarked to Dr. Khan as appears from page 5 of the Magistrates' minutes in the court records that even in Dr. Khan's application for maintenance for his client the date of separation was 23rd August, 2007 which indicated that the parties have been separated for a period of over a year as at the 5th day of March, 2009. Dr. Khan maintained his objection that dissolution of marriage cannot be granted on the application still because the date of separation was in issue. Ms. Natasha Khan then said that the Family Law Act gave the husband liberty to apply for divorce as of right after the expiry of one year. She added that she saw no reason why the dissolution could not be granted. Dr. Khan then added that he was also objecting because the interim maintenance as ordered was not paid and the items were not returned to her. The husband was in contempt as a result. Ms. Khan replied and said that they had written to Dr. Khan on the 5th February, 2009 to advise his client to make arrangements to pick her items and the wife had failed to do that. The maintenance could be updated as it was sitting in her trust account. The principles of contempt did not apply as it was a new application for dissolution of marriage. Dr. Khan then replied that the court had no jurisdiction to grant the divorce.

28. After hearing the parties, his worship gave a very brief ruling as follows:-

"The parties have come again before the court this morning for the granting of dissolution orders.

Dr. Khan for the respondent lady vehemently objects to the granting of the Divorce Orders simply because they have filed a response disputing the alleged date of separation on 20/02/07 by the Applicant Man.

This application for dissolution was filed on 29/02/2008. The matter was listed for 6/5/2008.

When the matter was called on 6/5/2008 the Magistrate noted that the matter will be set for Hearing on the issue of date of separation.

Then there were several adjournments as no Magistrate was available.

On the 9/4/2008 respondent/lady filed an application for maintenance. On this maintenance application she cited the date of separation as 23/08/07. This, on the Form is cited as the final date of separation.

Meanwhile the matter had been continuously listed for maintenance application by the respondent/lady and dissolution application by the applicant/man.

On 25/11/08, due to the non-appearance of the applicant/man for the maintenance application, orders of interim maintenance were given in favour of the respondent/lady. The court considered the date of separation of, 23/08/07 on her application as the final date of separation.

I don't find any reason why I should not take this as the date of separation even for the dissolution application.

The applicant/man is consenting to this even if the court is going to take the 23/08/07 as the date of separation. They are still entitled to their divorce.

The only issue in the response of the respondent/lady on the dissolution application was date of separation. She has clarified that on her application for maintenance on which she has interim orders of. I can't see how she can expand on that on a hearing of the dissolution application to such an effect that dissolution won't be granted.

Further there is no indication whatsoever that parties will get back together. The respondent/lady is already in Australia with child.

The greater issues here are maintenance and matrimonial property. There is no point on holding the parties from moving forward in bringing this marriage to an end.

Even though the applicant/man has not paid into Court the orders of interim maintenance, I am told by his solicitors that that will be done tomorrow as the monies are in their trust account.

The non payment of interim maintenance can be dealt with in a separate way. Therefore the marriage between the applicant/man and the respondent/lady is hereby dissolved.

Decree nisi will become absolute within 28 days".

29. It is very clear from the record and the ruling that Dr. Khan had made it known to Ms. Khan, her client and the Court that he was challenging the date of separation and the jurisdiction of the court to grant dissolution of marriage. He had said that in his response form and he said it in court over and over again. His worship also acknowledged that in his ruling:-

"Dr. Khan for the respondent lady vehemently objects to the granting of the Divorce Orders simply because they have filed a response disputing the,, alleged date of separation on 20/02/07 by the Applicant Man".

30. The court record is also clear that his worship did not hear evidence on the date of separation. He chose to deal with the matter on papers. He chose to take the date of separation stated by the lady in her maintenance application so that the lady could not herself raise any challenge to the date of separation after having stated in her application that the final date of separation was the 23rd day August, 2007. His worship was of the view that no hearing was needed if the date of separation stated by the wife was taken instead of the date of separation by the husband. His worship specifically mentioned in his ruling that he does see fit to hear the case as the wife will not be able to expand on the date of separation as she had already committed herself by giving a final date of separation in her application for maintenance.
31. I must say that once the court is made aware that the date of separation is in dispute, the Court must then, to be able to establish the actual date of separation, hear the parties on the date of separation. His worship grossly erred when he failed to ensure that the disputed ground for dissolution of marriage was established before granting an order dissolving the marriage.
32. The date of separation in the maintenance application must not be equated with the date of separation in a dissolution of marriage application. In a maintenance application, the date of separation usually means the date on which one party has finally stopped providing for the family since the liability only starts when one party ceases in his or her obligation to maintain the other party and/or the child (ren). The date therefore could be a date when the parties still cohabit together but the financial support ceases or it could also be a date of physical separation. A person can still apply for maintenance if the earning partner has stopped providing for the family but has still maintained the marriage in other aspects. The person applying for the maintenance relief who states the date of separation in the maintenance application is the person who would clarify what is meant by that date of separation. The court cannot speculate that that is the date when the parties have regarded their marriage as over specially when it made known to the court that the date of separation provided for by the husband is not proper or disputed or that 12 months separation period preceding the date of filing the application has not been met
33. The notion of "separation" in s. 30 of the Act concerns not only physical separation but the effective breakdown of the matrimonial relationship, or "consortium vitae" (literally "partnership of life") as it is sometimes referred to.
34. The modern classic statement of what constitutes separation for the purposes of s. 30 is that by Watson J. in *In the Marriage of Todd (No .2)* (1976) 25 F. L. R. 260 at 262, which was subsequently cited with approval with just two minor

amendments by the Full Court of the Family Court in *In the Marriage of Pavey* (1976) 25 F. L. R. 450 at 453-456 (this amended statement was subsequently referred to with approval by the Full Court of the Family Court in *In the Marriage of Falk* (1977) 29 F. L. R. 463 at 470).

"'Separation' means more than physical separation - it involves the breakdown of the marital relationship (the consortium vitae). Separation can only occur in the sense used by the Act where one or both of the spouses form the intention to sever or not to resume the marital relationship and act on that intention, or alternatively act as if the marital relationship has been severed. What comprises the marital relationship for each couple will vary. Marriage involves many elements some or all of which may be present in a particular marriage-element s such as dwelling under the same roof, sexual intercourse, mutual society and protection, recognition of the existence of the marriage by both spouses in public and private relationships, and the nurture and support of the children of the marriage ".

35. With the above notion, any problem concerning the relationship between subsections (1) and (2) disappears. Taken together, these two subsections state that a decree of dissolution is now based on the irretrievable breakdown of marriage as established by effective breakdown of the matrimonial relationship for a period of not less than 12 months immediately preceding the date of filing of the application for dissolution: *In the Marriage of Wiggins* (1976) F. L. C. 90-004 at 75,065. Sub section (2) thus does little more than require a minimum period of time for which a matrimonial relationship must have been broken down before a court can find that the marriage has broken down irretrievably.
36. In this case, the minimum period of 12 months separation was in challenge and to make a finding of irretrievable breakdown of marriage the parties needed to give evidence on the date of separation. His worship failed to take evidence from the parties and decided to use the date in the application for maintenance. There was also no clarification obtained under oath as to what the wife meant to be the date of separation in her maintenance application. Was it the date of physical separation or was it the date on which the man stopped providing support financially to her and the child. All this must have been clarified under oath and as such a hearing on the issue of separation date was essential.
37. I do not see how Ms. Natasha Khan can say that the separation date in the maintenance application was not the date that his worship took into account when granting the dissolution of marriage. The plain reading of his worship's ruling indicates that he just relied on the date of separation in the maintenance application. Comments of nature by Ms. Khan that such date was not relied on by his worship is either a deliberate misreading of the ruling to suit the counsels submission or a deliberate misleading of the Court with the hope that the court may also misread to counsels advantage. Why would his worship make comments like:-

"On the 9/4/2008 respondent/lady filed an application for maintenance. On this maintenance application she cited the date of separation as 23/08/07. This, on the Form is cited as the final date of separation.

Meanwhile the matter had been continuously listed for maintenance application by the respondent/lady and dissolution application by the applicant/man.

On 25/11/08, due to the non appearance of the applicant/man for the maintenance application, orders of interim maintenance were given in favour of the respondent/lady. The court considered the date of separation of 23/08/07 on her application as the final date of separation.

I don't find any reason why I should not take this as the date of separation even for the dissolution application.

The applicant/man is consenting to this even if the court is going to take the 23/08/07 as the date of separation. They are still entitled to their divorce.

The only issue in the response of the respondent/lady on the dissolution application was date of separation. She has clarified that on her application for maintenance on which she has interim orders of. I can't see how she can expand on that on a hearing of the dissolution application to such an effect that dissolution won't be granted".

38. Ms. Khan stated that the court did not need to hear the evidence as Form 4 was defective for want of being signed by the wife. It was contended that the signing of the Form 4 by the counsel instead of the wife made the response defective which was not entitled to be used in the proceeding. It was further argued that since the only evidence of the date of separation was in Form 1 which was not disputed at all because of any proper response form, there then was no need to hear the case. It was also said that the date in the maintenance application was another date of separation which the magistrate did not rely on but if he did then he waived the requirement for the grounds outlined in s. 30 as Rule 5.01 provides for dispensation of compliance with rules by Court. Ms. Khan further added that when the matter was heard the requirement for 12 months separation was already met.
39. I find Ms. Khan's argument totally absurd. She says that Dr. Khan, by signing the Form 4 made the response defective and as such there was no dispute as to the separation date. Without even dealing with the issue of defective form, I must say that Ms. Khan and the court always knew that Dr. Khan was vehemently challenging the date of separation. One cannot turn a deaf ear to Dr. Khan's repeated submissions that the date of separation was disputed. If Ms. Khan thought that the form was defective and as such no hearing ought to be accorded to the wife despite Dr. Khan otherwise by his oral submissions making it known to the court that the separation date was in issue, then of course there is an

incursion to the rule of access to justice which shall not be allowed by any court of law. The public might think that we have taken leave of our senses.

40. I must deal with the issue of who is to sign the form. This may for once and for all clear the issue on procedure.
41. Rule 3.07 (2) of the Family Law Rules 2005 states that "strict compliance with the forms in Schedule I is not required and substantial compliance is sufficient". I must say that Form 4 that was filed had substantially complied with the rules and as such the Form 4 was valid and proper in its current form. It was before the Court and through it were the objections of the wife on the date of separation. The husband and the court could not ignore it and determine the dissolution of marriage application on the date of separation listed either in the application for dissolution of marriage or maintenance application.
42. Rule 3.07(7) states that "unless the contrary intention appears, a form or notice pursuant to these Rules may be signed or given by a party or by the solicitor for the party". Is there any contrary intention to this rule?
43. Form 4 contains Part D which is headed "your affidavit". It also states in its mandatory form that "you must complete the following affidavit. You must sign it in the presence of a Justice of Peace, notary public or lawyer. The person witnessing the affidavit will fill in the place and date". A careful perusal of the form indicates that the affidavit is required to be signed by the wife as the reference to the use of the word "you" is to the respondent or the interveners. Part B of Form 4 is headed "About you [the Respondent or Intervener]" so definitely the use of the word "you" is referring to a party or the intervener to the proceeding. This may give a contrary intention of the legislature to that of the rule. In this way Ms. Khan's that part of the argument that Form 4 must have been signed by the wife is not wholly without substance. However the signing of the form by Dr. Khan does not make the form defective as there is no need for strict compliance as long as there is substantial compliance.
44. If this defective form was an issue for Ms. Khan then she should have raised this in the lower court so that Dr. Khan was aware that the propriety of the response was in issue. The court would then have had to determine whether it was going to allow use of Form 4 or not or what orders it was going to make to meet the interest of justice.
45. By virtue of Rules 5.01 and 5.02 of the Family Law Rules, the court has powers to either dispense with the compliance of the rules either before or after the occasion for compliance has arisen or for non-compliance dismiss the application or response, or stay the proceedings or make any other order it considers fit. No objection on Form 4 was taken and no orders were made under Rules 5.01 or 5.02 and as such Form 4 could not be assumed as rendered void.

46. Regulation 7(1) of the Family Law Regulations 2005 also states that non-compliance with a rule of procedure does not render proceedings void unless court so directs.
47. I do not see how Ms. Khan would have suffered any injustice by Dr. Khan signing Form 4. The merits of the case would remain the same irrespective of who signed the form. If there was anyone to suffer hardship by Dr. Khan signing the form then it would have been his client but incidentally the court did not render Form 4 null and void so the issue of prejudice to the wife even does not arise.
48. Dr. Khan further stated that when the Learned Magistrate took into account the date of separation from the maintenance application the ground even then was not met. Ms. Khan submitted that there was 12 months separation as at the date of grant of the order. She further submitted that even if the ground was not met, the magistrate has the power under rule 5.01 to waive the ground.
49. I must state the law clearly in regards the time frame when the period of 12 months must be met. The party applying for the dissolution must establish that the marriage has broken down irretrievably as established by 12 months separation immediately preceding the date of filing the application. The words specifically used in s. 30(2) are "**immediately preceding the date of filing**". The date of hearing or any other date is therefore immaterial and irrelevant.
50. The case of *In the Marriage of Bozinovoc* (1989) 99 F. L. R. 155 states that in computation of the time of 12 months, it must be 12 months preceding the date of filing the application, the date of filing is not to be taken into account. If the rule has been so strictly applied in this case, then the 12 month period as established on the date of hearing or grant of the order is out of question.
51. I also find Ms. Khans interpretation of Rule 5.01 as totally misconstrued. The rule says that if there is any non-compliance with the rules then the court can dispense with the non-compliance. Even Regulation 7 (1) says that non-compliance on a rule of procedure does not render proceedings null. The essence of the Rule and the Regulation is to deal with procedural non-compliance. It cannot be used to invoke or waive a ground giving rise to a matrimonial causes proceeding not in accordance with the Act.
52. Section 3 (1) (a) of the Act states that "proceedings by way of matrimonial cause cannot be instituted except under this Act". Section 25 (1) states that "the jurisdiction conferred on a court, or with which a court is vested, by this Act must be exercised in accordance with this Act". The ground for dissolution of marriage is stated in the Act. The court has to exercise its jurisdiction to hear the dissolution of marriage in accordance with the Act. The rules cannot dispense with the requirements of the Act as they merely set the procedure to meet the requirements of the Act.

53. His worship in his ruling had said that the greater issues were maintenance and property settlement. He had also said that there was no point in holding the parties from moving forward in bringing the marriage to an end. Emotion and Sympathy and reasons of good future of parties must not dispense with mandatory requirement that the marriage must only be dissolved if and only if the marriage of the parties have broken down irretrievably as established by 12 months separation preceding the date of filing the application for dissolution of marriage.
54. Ms. Khan stated that Dr. Khan should have been ready to go ahead with the matter and that his client should have been present in court. There is nothing on the record to suggest that Dr. Khan was afforded an opportunity to present his case to the court and that he failed to do so or asked for an adjournment. He was not at all given the opportunity to present the evidence, and, to add to that, he does not have to have his client in court to give evidence on matters he thinks would be clarified by evidence of the husband in cross-examination.
55. Since there was no determination of the issue as to whether the parties marriage had broken down irretrievably as established by 12 months separation immediately preceding the date of filing the application, the magistrate did not have jurisdiction to grant the dissolution of marriage as he did . The 12 months period that the magistrate computed was erroneous and as such no dissolution of marriage could have been granted on his worships computation of the separation date.
56. His worship also erred when he ordered that the conditional order must become final after 28 days. A conditional order by virtue of 35 (1) of the Act becomes final after a period of one month after the making of the order. Section 35 (2) (b) of the Act empowers the court to reduce the period at the expiration of which the conditional order shall become final if there are special circumstances. The record shows nothing of what the special circumstances were by virtue of which his worship dispensed with the requirement that the order should become final after a period one month from the grant of the conditional order. His worship erred when he did reduce the time period without the presence of special circumstances.
57. For the above reasons I must say that his worship fell in error when:-
 - a. He did not hear the evidence to establish the ground for dissolution of marriage when the date of separation was in issue;
 - b. He used the date of separation in the maintenance application form which did not in any way absolutely establish the ground for dissolution of marriage to grant a conditional order for dissolution of marriage;
 - c. He granted the dissolution of marriage on the ground that the date of separation was the 28th day of August, 2009 when this date did not meet

the 12 month period preceding the date of filing the application for dissolution of marriage;

- d. He granted the dissolution of marriage on the consideration that the parties need to move on with their lives which was a blatant disregard of the mandatory requirement of the Family Law Act that matrimonial causes proceedings must only be dealt with in accordance with the Act; and
 - e. He ordered that the conditional order become final in 28 days instead of ordering it to become final after one month without existence of special circumstances.
58. All the grounds of appeal are allowed except ground 3 which is a very general ground and no specific argument was raised under this ground. In any event as shortly as I may, ground 3 is very poorly drafted. One cannot just draft a general ground of this nature and expect to introduce specific arguments and surprise the other party. Grounds of appeal must specifically allege the error of the lower court.
59. I must now turn to the issue of costs. Dr. Khan submitted that he claims costs in the sum of \$3,500. His reason for asking for that sum is that he had to make an application for stay of his worship's orders; he instructed agents and paid the Suva agents, the length of the ruling itself indicates what argument was involved; he had to prepare the substantive appeal application and conduct the argument on the same. He has paid filing fee and hearing fee as well for the appeal. Although Ms. Khan had at one point indicated that she would concede the appeal; she did not want to pay costs and he was not ready to let the appeal be determined without the issue of costs being determined.
60. Ms. Khan submitted that there should be no costs. She had indicated to Dr. Khan that she would concede to the appeal.
61. In this case I am of the judgment that although the applicant had filed a dissolution of marriage, it was his counsel who always handled the matter when it came to court. She was the one who knew that the separation date was in dispute. She is a very senior counsel and she tried to get an order for dissolution of marriage without a hearing. There was no harm to the husband if he presented evidence to prove his case. I do not know why this was not preferred. Having obtained a dissolution of marriage erroneously, she opposed the appeal very strongly without any merits and I am of the judgment that Dr. Khan has unreasonably incurred costs because of the counsel's failure to conduct the proceedings with reasonable competence. Ms Khan's client would expect her to advise him on matters of law that is why he engaged her. If she does not advise him and the case is prolonged and erroneously determined without merits, then the client should not suffer the consequences of a successful appeal merely on procedure that was not followed by the lower court. In my record there is nothing

to suggest that there was a stay application and whether it was opposed. However the appeal was opposed and it went for a hearing. The appeal went for hearing on a matter of law and it is not the client who would be instructing solicitors on matters of law. It should be the solicitors who should advise what merits if any the appeal holds on matters of law.

62. I am of the judgment that the costs in this matter should be paid by counsel Ms. Khan. I urge that the counsels discuss this issue on costs and come to some agreement failing which I will on the next occasion hear from Ms. Khan why she should not be made personally liable to pay the cost.
63. In this aspect I am bound by Order 62 rule 11 (4) of the High Court (Amendment) Rules 1998. I get my powers to use Order 62 Rule 11 (4) of the High Court (Amendment) Rules from section 22(2) of the Family Law Act. I must first quote section 22(2) of the Act and then Order 62 Rule (11) (4) of the High Court (Amendment) Rules 1998.
64. Section 22 (2) of the Family Law Act states that:-

"In so far as the rules of the respective Division are in sufficient, the High Court rules or the Magistrates' court Rules respectively apply (so far as they are capable of such application and subject to any directions of the judge of the Family Division or the Chief Magistrate, as the case may be) to the practice and procedure of the Division".
65. Under the Family Law Act there is no provision on personal liability of legal representatives for costs so I have to be guided by the High Court Rules.
66. Order 62 Rule 11 states, and I quote the material parts of the same:-

"11 (1) ..., where it appears to the court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may-

 - (a) Order-
 - (i) The legal representative whom it considers to be responsible (whether personally or through a servant or agent) to repay his client costs which the client has been ordered to pay to any other party to the proceedings; or
 - (ii) The legal representative personally to indemnify such other parties against costs payable by them; and
 - (iii) The costs as between the legal representative and his client to be disallowed; or...

(4) Subject to paragraph (5), before an order may be made under paragraph (1) (a) of this rule the Court shall give the legal representative a reasonable opportunity to appear and show cause why an order should not be made.

67. Before I make any orders against the counsel for costs I shall allow her an opportunity under Order 62 rule 11 (4) to show cause why an order for costs shall not be made against her personally.

Final Orders

68. For the above reasons, the appeal is allowed on all grounds except ground 3.
69. Consequently, I now set aside the conditional order made by his worship on the 5th day of March, 2009.
70. I order the parties to return to the court all original conditional orders that were forwarded to them (if any).
71. The Registry must now endorse on all the conditional orders a note indicating that it is set aside and the date of setting aside.
72. The Form 1 application must now be assigned a date of hearing or call over to fix a date of hearing in the Magistrates' Court.
73. There shall be costs in favour of the appellant.
74. Counsels to agree on costs failing which counsel Ms. Khan to show cause why an order for costs should not be made against her personally.
75. I will also hear the parties on quantum of costs.
76. Matter adjourned to the 28th day of April, 2010 at 10.00 to determine the issue of costs.
77. Orders Accordingly.

ANJALA WATI

Acting Judge

6.04.2010

TO:

1. DR. M. S. SAHU KHAN OF SAHU KHAN AND SAHU KHAN FOR THE APPELLANT.

2. MS. NATASHA KHANOFYASHLAW FOR THE RESPONDENT.

3. FILE: 09/BA/0001.