

IN THE FIJI COURT OF APPEAL
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. ABU0040 of 2007
[On appeal from decision of the High Court
of Fiji at Suva in Civil Action HBC 283 of
2002]

BETWEEN:

KENNETH AJ ROBERTS

APPELLANT

AND

ROSALIA L. CHUTE and ANOTHER

RESPONDENTS

Appearances:

Appellant: Mr RP Singh

First Respondent: Mr D. Sharma with Ms C. Sanchez

Date of Hearing: 11 November 2008

Further Written Submissions: 13 November 2008

Date of Judgment: 17 March 2009

Coram: Scutt, JA

Lloyd, JA

Bruce, JA

JUDGMENT OF THE COURT

THE APPEAL

[1] This is an appeal against Orders made for property division in a matrimonial dispute under the *Matrimonial Causes Act* (Cap 51). The Matrimonial Causes Act has been repealed and replaced by the *Family Law Act* 2003. Hence it is likely that this will be the last time that this Court will have occasion to make a determination on matters arising under the old law. However, this decision may have some utility beyond the instant case, for although there is no cross-appeal, Counsel for the Respondents, Ms Rosalia L. Chute and Anor, asked the Court to exercise its powers under the *Court of Appeal Act* (Cap 12) to consider increasing the award to Ms Chute, rather than decreasing it as the Appellant, Mr Kenneth AJ Roberts, has sought in the appeal.

[2] Before setting out the Grounds of Appeal along with the basis upon which it is said that the property settlement should be increased in Ms Chute's favour, reference to the High Court decisions is necessary.

HIGH COURT JUDGMENTS

[3] The High Court made three (3) decisions, the first on 22 August 2003, the second on 8 July 2004, the third on 9 March 2007.¹ This Court has determined to dismiss the appeal but to increase the award to Ms Chute in the absence of a cross appeal. Because in so doing evidence before the High Court is relevant together with the basis upon which the High Court reached its final determination, reference to each of the High Court judgments is necessary, together with the process leading up to them.

[4] As to the first decision (22 August 2003), Mr Roberts was absent because, as his (then) Counsel put it, 'rightly or wrongly [Mr Roberts] did not know of [the] hearing date': Court Record, p. 84

¹ The Court Record p. 108. refers to '9 March 2006' however this is incorrect: elsewhere in the Court Record the date is correctly recorded as 9 March 2007.

[5] The decision of 22 August 2003 followed the High Court's hearing from Ms Chute. In adjourning at the close of her evidence, the High Court said:

I will need to identify which properties are matrimonial properties and then decide if a valuation is necessary.

Ruling on notice in this preliminary aspect. Balance of hearing fee can be transferred to next hearing: Court Record, p. 83

[6] When the decision was delivered on 22 August 2003, Counsel for both parties were present. Mr Roberts' Counsel said he would 'need to look at [the] judgment and consult [his] client for further proceedings'. The case was then listed for mention on 12 September 2003.

[7] On that date, Counsel for Ms Chute noted an application had been received from Mr Roberts to have the Ruling set aside. That application was heard on 27 November 2003: Court Record, p. 84

[8] Having heard from Counsel for both parties, the High Court observed that the application should have been made within seven (7) days. As to the proposition that Mr Roberts had not been present due to not being notified of the hearing, the High Court said there was 'no doubt that [Mr] Roberts made little efforts to protect his own interest and is now taking a swipe at the Court Registry'.

[9] The High Court added that this was a matrimonial dispute 'which normally generates a lot of controversy' and that Ms Chute 'was handicapped in relation to certain matters which may be elicited' from Mr Roberts. Therefore, the 'court's coercive powers [would not] shut [Mr Roberts] out totally': Court Record, p. 88

[10] Orders were then made, in the presence of Counsel for both parties, that the Ruling of 22 August 2003 be set aside on condition:

- (a) That a transcript of Ms Chute's evidence be provided to Mr Roberts within 14 days by the High Court;
- (b) Mr Roberts to have liberty to cross-examine Ms Chute;
- (c) Mr Roberts to pay wasted costs summarily fixed at \$500.00 to Ms Chute within 14 days;
- (d) Mr Roberts, his servants or agents are restrained from interfering, removing, disposing or further encumbering the four properties the High Court had earlier ruled as matrimonial property until finalisation of this action;
- (e) Case fixed for hearing on 16 and 17 February 2004 (tentative) at 9.30am:
Court Record, p. 86

[11] When the tentative hearing dates arrived, Mr Roberts' Counsel sought an adjournment, advising there were 'difficulties today' as Mr Roberts 'has five meetings today'. Ms Chute's Counsel did not object. The hearing was then fixed for 9.30am on 8 April 2004. Upon that day, Counsel for both parties were present. Ms Chute was called for cross-examination, then Mr Roberts gave evidence. Orders were made for filing of simultaneous written submissions and responses, with 'Decision on Notice': Court Record, p. 94

[12] This hearing led to the second judgment (of 8 July 2004) – billed as the first because that of 22 August 2003 had been set aside. In the 8 July 2004 judgment, the High Court said the object of section 86 was 'to produce whether by agreement of parties or by [the Court]'s own order an outcome ... fair to both parties'. Spouse contributions should be taken into account in exercise of discretion in ordering a settlement:

Contribution is widely construed so it encompasses not only monetary contributions but also contributions like looking after the children or doing household duties. A homemaker's contribution is no less than that of a salary earner. They are both equally valuable to a relationship of marriage: Court Record, at 69

[13] This is wholly consistent with principle and authority: *Protima Devi v. Rajeshwa Singh* (1985) 31 Fiji LR 109; FJCA No. 29 of 1985

[14] The High Court then distinguished between pre-marital and post-marital acquisitions of property, saying Ms Chute ‘appears to have owned no real properties when she began the relationship’ with Mr Roberts, whilst Mr Roberts was then the owner of assets. Properties owned by Mr Roberts prior to the relationship were ruled as exclusively his property rather than matrimonial property.

[15] As for the properties accumulated during the relationship, Ms Chute said their acquisition came about through funds from the company Mokosoi Products Limited (Mokosoi).² Mokosoi she characterised as a ‘family company’, saying her efforts in building it and expanding its business enabled the property acquisition occurring during her relationship with Mr Roberts. Mr Roberts’ position was that Ms Chute was paid for her efforts in Mokosoi, with a yearly salary of \$18,000.00 and, in any event, she ‘was more of a liability in spending her time and money to the detriment of Mokosoi’, that she ‘made no financial contribution to the acquisition of any property’ and:

The marriage was entered into to protect the interests of the only child. In other words ... [her] role in Mokosoi was only ornamental and peripheral to making a success of the business: Court Record, at 70

[16] Ultimately, the Court decided that Ms Chute’s receipt of the annual salary together with her holding of 100,000 shares in Makosoi and use of car CV 295 ‘express[ed] more than adequately her contributions to this relationship and what the parties intended should be her total interest in properties’:

I therefore hold that [Ms Chute] is entitled only to a car of value equivalent to CV 295 and value of her shares in Mokosoi. Beyond that, in the circumstances of this marriage it would be unjust to declare any of the other properties as matrimonial properties: Court Record, at 74.

² Mokosoi Products Limited (Mokosoi) appears in the Court Record, on occasion, as ‘Makosoi’. This is clearly a transcription error, so throughout this judgment the correct spelling is substituted.

[17] The Court concluded:

With these remarks I hope the parties can sit down and work out a reasonable sum for settlement acceptable to both parties: Court Record, at 74

[18] In the event, the Court's hope was unfulfilled. There was, then, a further hearing on 5 March 2007. This followed the hiatus between 8 July 2004, the date of delivery of the second judgment (the first if one ignores the ruling set aside), and 17 May 2005 when the Court Record shows the matter was recalled before the High Court. Upon that occasion, there was no appearance of or for Mr Roberts. Ms Chute was represented by Counsel. The Court was informed that papers had been served upon Counsel for Mr Roberts however: 'We are having difficulty especially as [Mr Roberts is] not responding. Shares not valued.' A hearing was then set for 21 July 2005 'for purpose of valuation of car and 100,000 shares'. A Notice of Adjourned Hearing was ordered to be served on Mr Roberts: Court Record, p. 95

[19] Subsequently dates were set for 8 August 2005 and 22 September 2005, at which dates there was no appearance of or for Mr Roberts.

[20] It was on 22 September 2005 that the hearing proceeded in the absence of Mr Roberts or his Counsel. Despite Mr Roberts' having been 'informed personally' of the date: Court Record, p. 96 he did not appear. The High Court said:

Mr Roberts has a history of not coming to court.
At least he should have been here today.
[His Counsel]'s sickness is not something which occurred suddenly.
Another counsel should have been engaged.
No guarantee [Counsel will recover shortly].
We will proceed: Court Record, p. 92

[21] Ms Chute then gave further evidence.

[22] This was not, however, the end of the matter. Albeit the High Court adjourned on 22 September 2005 for 'judgment on notice' the matter was recalled on a many further

occasions explicitly for the purpose of obtaining evidence from Mr Roberts. On none of them did Mr Roberts appear, and on the vast bulk nor did his Counsel.

[23] Upon the first such occasion – 25 November 2005 – the High Court said the matter had been called on as:

I find even though [Ms Chute] is entitled to some form of financial relief, I cannot value shares on evidence available.

Counsel to consider what type of order regarding accounts they think proper so I can order [Mr Roberts] to produce those records: Court Record, p. 99

[24] Upon the next mention date – 1 December 2005 - there again being no appearance of or for Mr Roberts, the Court advised:

I am having difficulty in assessing value of shares as there is hardly any basis for me to tag on a value.

I order [Mr Roberts] and [Ms Chute] to produce to the court audited accounts of Mokosoi (Products) Fiji Limited for the years 2000, 2001, 2002 in 35 days form service of order – legal vacation is not to be excluded in calculating the number of days: Court Record, p. 100

[25] The matter was then adjourned for mention to 24 January 2006. On that day Counsel for both Mr Roberts and Ms Chute appeared. Mr Roberts' Counsel said he had the audited accounts, with an accountant having determined upon the value of a share in Mokosoi 'as at 14/4/00 the date [Ms Chute] left the house and the company'. The High Court then received the accounts – 2000, 2001, 2002 - granting liberty to the parties to photocopy them. An Order was made that calculation as to value of shares as at 14 April 2000 was to be filed and served by 13 April 2006. The matter was adjourned to 1 May 2006 for hearing on valuation: Court Record, pp. 100-101

[26] On 1 May 2006, Counsel for Mr Roberts and Ms Chute were present. Counsel for Ms Chute advised that valuation of Mokosoi had been received but without a report. A chartered accountant had been engaged to 'conduct valuation and examine that report'.

Copy of the report was then handed to him by Mr Roberts' Counsel. Ms Chute's Counsel requested fourteen days for assessment of that report, saying if 'satisfactory then there would be no need to proceed to trial on matters of valuation'. On that basis, the High Court adjourned to 18 May 2006: Court Record, p. 101

[27] Upon 18 May 2006 Counsel appeared for Ms Chute, advising that no report had yet been received from the chartered accountant. There was no appearance for Mr Roberts. Ms Chute's Counsel advised the High Court of a 'possibility it might be settled', seeking a two-week adjournment, which was granted: Court Record, pp. 101-102

[28] Upon the adjourned date - 13 June 2006 - Mr Roberts was not present; nor was his Counsel. Counsel for Ms Chute advised her client was involved 'in a serious car accident' and a month's adjournment was sought. Upon 13 July 2006 (the adjourned date), again there was no appearance of or for Mr Roberts. Ms Chute's Counsel said no settlement had been reached and in light of the car accident a further month's adjournment was sought and granted: Court Record, p. 102-103

[29] On 21 August 2006, neither Mr Roberts nor his Counsel appeared. Ms Chute's Counsel advised of Ms Chute's recovery from the accident, requesting an adjournment to seek her instructions. Counsel for Ms Chute undertook to inform Mr Robert's Counsel of the adjourned date: Court Record, p. 103

[30] On 4 September 2006 (the adjourned date), there was no appearance of or for Mr Roberts'. Ms Chute's Counsel advised of having written to Mr Roberts' Counsel 'with proposal for settlement', together with 'some questions'. No response had been received. The matter was adjourned for a month. On that next adjourned date - 5 October 2006 - there was no appearance for or of Mr Roberts. Counsel for Ms Chute advised having written again to Mr Roberts' Counsel, without reply. Counsel advised the Court of his awareness that Mr Roberts' Counsel 'is unwell': Court Record, pp. 103-104

[31] On 30 November 2006, again there was no appearance of or for Mr Roberts. Counsel for Ms Chute advised he had written to Mr Roberts' Counsel but without reply. It was again noted that Mr Roberts' Counsel was unwell: Court Record, p. 104

[32] On 1 March 2007, then next adjourned date, Counsel for Ms Chute appeared. There being no appearance for, nor of, Mr Roberts, the High Court observed:

Neither the plaintiff['s Counsel] nor his client appears to take any interest in the [proceedings].³ I cannot allow matters to drag on. Hearing on 5/3/07 at 11.00am: Court Record, p. 105

[33] On that date (5 March 2007), there being no appearance of or for Mr Roberts, with Counsel for Ms Chute present, the High Court noted there was 'still no appearance of plaintiff or his solicitor. I will proceed'. Ms Chute then gave evidence, stating amongst other matters that she had sought property settlement and that the judgment had 'not been honoured. Car not given': Court Record, p. 105 She went on to provide further evidence about the Isa Lei Drive property (the matrimonial home) and Rosewood (the company that 'owned' the matrimonial home), along with various other matters including Mokosoi and other companies 'funded by Mokosoi': Court Record, pp. 105-107

[34] The High Court then reserved judgment. That judgment was delivered on 9 March 2007,⁴ Counsel appearing for Ms Chute and there being no appearance of or for Mr Roberts: Court Record, p. 108.

[35] In that (third) decision of 9 March 2007, His Lordship said he had 'thought the parties would be able to work out among themselves the value of 100,000 shares [Ms Chute] held in Mokosoi but that has not happened'. The cause of what might be classed as an extraordinary delay between judgments was, as the Court said:

... because [Mr Roberts] had not appeared on eight occasions since 1 July 2006. On the hearing day [Mr Roberts] again did not appear and the only available

³ The word in the Court Record is 'pleadings'. This is clearly an error and 'proceedings' is the correct word.

⁴ It is on this page of the Court Record that the date is incorrectly recorded as 9 March 2006.

evidence is the oral testimony of [Ms Chute] together with some documentary evidence of accounts of Makosoi: Court Record, at 5

[36] The Court added: ‘I was not minded to let [Mr Roberts] drag on any further as that would paralyse [the] court process’: Court Record, at 5 then went on to assess the Mokosoi shares. This was done on the basis that:

- The date for valuation is 14 April 2000, the date of the parties’ separation when Ms Chute ‘no longer participated in any way in the operations of Mokosoi or contributed to its growth’;
- Share capital of Mokosoi is one million shares of \$1.00 each, Ms Chute’s holding one-tenth of the shares;
- The report before the Court said ‘valuation of shares on [the] basis of earnings being generated by business was not appropriate’;
- The appropriate method ‘would be to arrive at fair market value of the assets represented by net assets of’ Mokosoi’;
- 2001 financial statements prepared (‘it appears’) for tax purposes show comparative figures for the year 2000, which show a ‘total asset of \$646,349 [and] currently liabilities of \$53,113.00 representing the total amount owing to two banks – as ‘secured borrowings [they] are therefore payable in the future’;
- For the purposes of calculation current liabilities only are deducted from total assets;
- Future liabilities to the banks ‘are of no concern as this exercise is to work out assets as at 30th April 2000’;

- Hence net assets of Mokosoi would be \$593,236.00 of which Ms Chute ‘would be entitled to one tenth or \$59,323.00’: Court Record, at 5

[37] The Court then considered the family home at Isa Lei Drive (the Isa Lei Drive property). Ms Chute’s evidence was that although the financial accounts ‘did not disclose this property’, it was acquired in 1993 for \$275,000.00 and paid for by Mokosoi albeit placed in another company name – Rosewood.

[38] The evidence was that the Isa Lei Drive property was native land, however, there was no evidence of the term of lease. A company search of Rosewood showed it was subject to a mortgage dated 15 May 1993, securing the sum of \$193,500.00: Court Record, at 5

[39] Concluding that by 2000 ‘some of the mortgage debts must have been paid’, the High Court said it was not informed of how much; nor was there any valuation of the Isa Lei Drive property. If it were freehold land, ‘one could safely say it must have increased in value’. The same could not, however, be said of native land ‘which holds little attraction for most with reducing term of lease for each passing year’. The High Court concluded:

There is [a] singular lack of evidence regarding this Isa Lei [Drive] property. All I know is the purchase price in 1993. I also know there was a mortgage over the property. I assume the mortgage was given to pay for the property. Doing my best I would place the nett value of the property in 2000 (purchase price less balance [of] mortgage debt) at \$90,000.00 which would give [Ms Chute] an entitlement of \$45,000.00 being half share in the family home. So her total entitlement in matrimonial property would be \$12,000.00 for car plus \$59,323.00 being for Mokosoi shares and \$45,000.00 her entitlement in [the] Isa Lei Drive property, that is a total of \$116,323.00: Court Record, at 6

[40] Counsel for Ms Chute having asked for interest, the Court said ‘generally courts in Fiji do not allow interest when considering settlement of matrimonial property’:

However, given the protracted nature of the litigation due particularly to [Mr Roberts'] absences from court, I award costs in the sum of \$4,000.00: Court Record, at 6

[41] Judgment was then entered for Ms Chute in the sum of \$116,323.00 plus costs fixed at \$4,000.00.

GROUND OF APPEAL

[42] Mr Roberts asks that the judgment of the High Court delivered on 9 March 2007 be wholly set aside or that the Court of Appeal should make 'such other Order ... deem[ed] fit, just and expedient'. Mr Roberts further seeks costs of the appeal together with costs in the High Court.

[43] Grounds of Appeal are:

- (1) The learned trial Judge erred in law and in fact in holding that the total entitlement of the Respondents [Rosalia L. Chute and Another] in the matrimonial property is \$116,323.00 (one hundred and sixteen thousand three hundred and twenty three dollars) on the ground that the award is not borne out by a totality of the evidence and therefore ought to be wholly set aside.
- (2) The learned trial Judge erred in law and in fact in awarding the sum of \$4000 (four thousand dollars) in costs which was in all the circumstances of the case harsh and excessive.
- (3) The learned trial Judge erred in law and in fact in not holding that in the absence of evidence to the contrary, the valuation report of the shares in the company submitted by [Mr Roberts] was undisputed and stands as [in]controvertible evidence binding on the Court.

- (4) The learned trial Judge erred in law and in fact in **not** holding that in the absence of evidence to the contrary, ‘2001 financial statements prepared for tax purposes’ submitted by [Mr Roberts] was undisputed and stands as incontrovertible evidence binding on the Court.
- (5) The learned trial judge erred in law and in fact in holding that net assets of Mokosoi is (\$598,236.00) five hundred and ninety eight thousand two hundred and thirty six dollars which is unsupported by the valuation report on the shares of the company and the 2001 financial statements or by any evidence before the Court. (Emphasis in original)

[44] The right reserved to ‘alter, amend or add any further grounds of appeal upon compilation of the record’ was not acted upon: no further grounds were added.

[45] Ms Chute neither appealed nor cross-appealed. However, Counsel for Ms Chute sought dismissal of Mr Roberts’ appeal, together with an increase in the High Court award to Ms Chute, by reference to Regulation 22 of the Court of Appeal Regulations. The Court requested written submissions specifically on this point. In addition to the assistance provided by the parties’ Counsel through both written and oral submissions in the appeal, those on this aspect were of great assistance to the Court.

POWERS OF COURT OF APPEAL

[46] The Court of Appeal is empowered by Rule 22 of the Court of Appeal Rules to make orders other than those made by the High Court, albeit there is no appeal on the particular point, or (as here) no cross-appeal. Counsel for Ms Chute focused particularly on Rule 22 (3) and (4).

[47] Rule 22 says:

General powers of the Court

- 22. -** (1) In relation to an appeal, the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court.

(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.

(3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.

(4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(5) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.

[48] Albeit not referred to by Counsel, it is also useful to bear in mind the provisions for appeal in the Matrimonial Causes Act, under which Mr Roberts' appeal is brought. Section 91 (now replaced by provisions as to appeal in the *Family Law Act* 2003) said:

Appeals

91. (1) A person aggrieved by a decree of the High Court exercising its original or appellate jurisdiction under this Act may, within such time as may be prescribed by the rules, appeal from the decree⁵ to the Court of Appeal.

⁵ 'Decree' is used to refer to 'orders', albeit it is commonly understood to refer to 'decree of nullity', 'decree of dissolution/divorce'. This is apparent from Part XVII – 'Enforcement of Decrees' which relates to maintenance, property and custody orders.

(2) ...

(3) Upon an appeal under this section, the Court of Appeal ... may affirm, reverse or vary the decree appealed against, and may-

(a) make such decree as in its opinion should have been made at first instance or on appeal, as the case may be; or

(b) order a rehearing at first instance on such terms and conditions, if any, as it thinks fit.

(4) ...

[49] Finally, both in regard to the submissions made by Counsel for Ms Chute, and in respect of the Grounds of Appeal advanced for Mr Roberts, this Court must also take into account the provisions of the Matrimonial Causes Act, under which the original decision was made.

[50] Section 86 provided:

Powers of court in proceedings with respect to settlement of property

86. (1) The court may, in proceedings under this Act, by order, require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to ... the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

(2) ...

(3) ...

[51] Sections 87 and 88 are also relevant in illustrating the extensive powers and broad discretion conferred by the Matrimonial Causes Act:

General powers of the court

87. (1) The court, in exercising its powers under this Part, may do any or all of the following:-

(a) order that a lump sum or a weekly, monthly, yearly or other periodic sum be paid;

- (b) order that a lump sum or a weekly, monthly, yearly or other periodic sum be secured;
- (c) where a periodic sum is ordered to be paid, order that its payment be wholly or partly secured in such manner as the court directs;
- (d) order that any necessary deed or instrument be executed and that such documents of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
- (e) appoint or remove trustees;
- (f) order that payments be made direct to a party to the marriage, or to a trustee to be appointed or to any other person or authority for the benefit of a party to the marriage;
- (g) ...;
- (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;
- (i) impose terms and conditions;
- (j) in relation to an order made in respect of a matter referred to in any of sections 84, 85 or 86, whether made before or after the commencement of this Act-
 - (i) discharge the order if the party in whose favour it was made marries again or if there is any other just cause for so doing;
 - (ii) modify the effect of the order or suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event;
 - (iii) revive wholly or in part an order suspended under subparagraph (ii); or
 - (iv) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid by the court;
- (k) sanction an agreement for the acceptance of a lump sum or periodic sums or other benefits in lieu of rights under an order made in respect of matters referred to in any of sections 84, 85 or 86, or any right to seek such an order;

(l) make any other order which it considers necessary to make to do justice;

(m) include its order under this Part in a decree under another Part; and

(n) subject to this Act, make an order under this Part at any time before or after the making of a decree under another Part.

(2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied-

(a) that, since the order was made or last varied, the circumstances of the parties or either of them ... have changed to such an extent as to justify its so doing; or

(b) that material facts were withheld from the court, or the magistrate's court, as the case may be, or material evidence previously given before such court was false.

(3) The court shall not make an order increasing or decreasing-

(a) the security for the payment of a periodic sum ordered to be paid; or

(b) the amount of a lump sum or periodic sum ordered to be secured, unless it is satisfied that material facts were withheld from the court, or the magistrate's court, as the case may be, or that material evidence given before such court was false.

Execution of deeds etc., by order of the court

88. (1) Where-

(a) an order under this Part has directed a person to execute a deed or instrument; and

(b) that person has refused or neglected to comply with the direction or, for any other reason, the court thinks it necessary to exercise the powers of the court under this subsection,

the court may appoint an officer of the court or other person to execute the deed or instrument in the name of the person to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument.

(2) The execution of the deed or instrument by the person so appointed has the same force and validity as if it had been executed by the person directed by the order to execute it.

(3) The court may make such order as it thinks just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

DISMISSAL OF THE APPEAL

[52] For Mr Roberts it was submitted that the hearing (leading to the judgment of 9 March 2007) was ‘merely to determine the value of the car CV 295 and ... of [Ms Chute]’s shares in Mokosoi’. However, Counsel for Mr Roberts also acknowledged that in the absence of settlement between the parties, the High Court ‘heard further evidence from [Ms Chute], [Mr Roberts] having been absent because of not having [had] adequate notice of the hearing’: Written Submissions, p. 5

[53] It was, said Mr Roberts’ Counsel, ‘surprising’ that the High Court ‘added \$45,000.00 as entitlement in the Isa Lei Drive property’.

[54] The Court does not accept this submission. As to Mr Roberts’ absence from the hearing, the (necessarily lengthy) recitation of hearing dates and adjournment dates set out earlier makes clear Mr Roberts’ apparent unreadiness to cooperate in the High Court process (as the High Court observed): he was absent from the hearing which led to the first judgment (of 22 August 2003), set aside upon his (late) application. The second judgment – that of 8 July 2004 - was clearly not a final judgment. Mr Roberts was present at the hearing giving rise to that judgment, as was Ms Chute. Each gave evidence. The 8 July 2004 judgment urged that the parties reach agreement. This they did not do, albeit it is apparent from the Court Record that efforts were made by Counsel for Ms Chute to engage with Mr Roberts’ Counsel for that purpose.

[55] Thus, the High Court was obliged to make a further determination. This is consistent with what the High Court said at the outset of that earlier judgment as to the application of section 86 of the Matrimonial Causes Act:

The object [section 86] aims to achieve is for a court to produce whether by agreement of parties or by its own order an outcome that is fair to both parties': Court Record, at 69

[56] The High Court was not precluded from hearing further evidence. Having done so, a number of further opportunities were extended to Mr Roberts to appear and to present his own evidence. Indeed, the High Court sought that he do so. The Court Record confirms that in making the judgment of 9 March 2007 upon Ms Chute's evidence and the other material available at that time, the High Court considered itself to be frustrated in the making of a proper valuation of the Mokosoi shares. That frustration was engendered by the absence of Mr Roberts (and his Counsel) from numerous hearings, and the failure of Mr Roberts to provide all the information sought by the High Court (and which Counsel for Ms Chute had sought).

[57] Eventually, the High Court delivered its judgment of 9 March 2007 taking into account the Isa Lei Drive property as a matrimonial property and making a calculation as to Ms Chute's entitlement to a share in it. The Court was perfectly entitled, in accordance with the discretion conferred by section 86, to make the finding as to this property being matrimonial property, and to endeavour to estimate its value and the share that should be awarded to Ms Chute. Indeed, Mr Roberts had himself acknowledged the Isa Lei Drive property as the matrimonial home, in his evidence:

Property at Isa Lei road was used [as] a family home. I still live there. I am not certain if Rosie [Chute] is director of company which owns it: Court Record, p. 93

[58] As noted, the numerous opportunities to appear, provided by the High Court, were not availed of by Mr Roberts. That according to Counsel he had 'no adequate notice' of the (final) hearing does not overcome his failure to appear on those earlier occasions. Nor is his excuse convincing. Nor, indeed, does it take into account that he did give evidence on one occasion and upon that occasion his evidence was not particularly illuminating. For example, on 8 April 2004 in relation to the shares he said:

I do not know value of shares in Mokosoi: Court Record, p. 93

[59] Yet he was the person who had or ought to have had – and provided - the information ready for the High Court to consider. If he did not have it upon the occasion of his giving evidence, he clearly had notice of its relevance and the importance of his providing it.

[60] It cannot go unremarked that by 8 April 2004, Mr Roberts was giving evidence in a proceeding that had come before the High Court on 6 February 2003, upon which day the Court Record indicates His Lordship said to Counsel for Mr Roberts and Ms Chute:

Parties need to get title, company financially audited accounts: Court Record, p. 77

[61] That Mr Roberts failed to respond fully to the need to provide it, nor did he make himself available to satisfy the High Court’s requests despite having been ‘on notice’ for at least well over a year, cannot now be used by Mr Roberts to seek to have the judgment of 9 March 2007 overturned or set aside.

[62] Mr Roberts having had numerous opportunities to put further evidence to the Court or to counter any further evidence put by Ms Chute, nor can he now complain that when the Court finally decided it should draw matters to a conclusion it did so in his absence. Mr Roberts’ absenting himself and failing to instruct new Counsel when his existing Counsel became ill, apparently suffering from an extended period of indisposition, or failing to appear in his Counsel’s absence, is not a basis upon which this Court is disposed to grant the appeal. Nor indeed should it.

[63] In all the circumstances, and having heard from Mr Roberts when he did appear, with cross-examination of Ms Chute, the High Court was entitled to decide that it would go ahead with the adjourned hearing in Mr Roberts’ absence. Courts should not lightly hear a matter in the absence of a party. That much is trite. It is, however, drawing an excessively long bow to suggest that in this case the High Court acted ‘lightly’ or without

due regard to Mr Roberts' right to be heard. Ms Chute had a right to have the matter concluded – as, indeed, did Mr Roberts. Mr Roberts' right to be heard had been granted through the setting aside of the 22 August 2003 judgment, and hearing him on the occasion he appeared, as well as then being indulged by the numerous adjournments and resetting of dates, including many mention dates and alerts to Mr Roberts and/or his Counsel that the High Court sought further evidence.

[64] As to the valuation of the Mokosoi shares, this was a matter the High Court sought to have settled between the parties. As the parties did not do so (despite, as the Court Record shows, Ms Chute's Counsel's efforts), the High Court had no option but to step in. In all the circumstances, the High Court's omission of current liabilities was appropriate. The evidence that was provided by Mr Roberts as to the share valuation was taken into account, the High Court's making a calculation in the light of it. That evidence was relevant to the High Court's determination, but could not bind the High Court in the exercise of its discretion.

[65] Contrary to Mr Roberts' position, Ms Chute says that the evidence provided by Mr Roberts and the way it was taken into account by the High Court resulted in an underestimate of her entitlement both as to the Mokosoi shares and the Isa Lei Drive property. This question requires consideration in the light of the authorities and the submissions made in respect of the Court of Appeal's powers under Rule 22.

INCREASE OF AWARD TO RESPONDENT

[66] For Ms Chute, it is said that the valuation of the shares in Mokosoi and the monetary value of her (half-share) interest in the Isa Lei Drive property should be increased. In this regard, Counsel relies upon the authorities in respect of Rule 22 and the facts of the case.

[67] In respect of the latter, Ms Chute says:

The Court relied on Mr Roberts' Share Valuation Report for the decision as to valuation of the shares, but Ms Chute did not have the opportunity to challenge and dispute these figures 'despite repeated requests and court order for [Mr Roberts] to allow [Ms Chute's] accountants to have access, and due to [Mr Roberts'] failure to comply with [Ms Chute]'s Notice to Produce Records': Written Submissions, 13 November 2008, para 3

[68] As to the Isa Lei Drive property, Ms Chute's position is that accepting (as the evidence before the High Court showed) it was the family home and hence a matrimonial property to be shared between the parties, the calculation should properly have been made as follows:

- The debt on the Isa Lei Drive property was \$140,000 as confirmed by Mr Roberts when questioned by the Court;
- The true value of Ms Chute's share should therefore have been:

Formula: Value of Property less debt = total equity/2

\$275,000 - \$140,000 = \$135,000/2:

Equal shares: \$67,500.00

[69] A perusal of the transcript of evidence in the Court Record affirms that it is fair, just and equitable for Ms Chute, as entitled to a half-share in the matrimonial home – the Isa Lei Drive property – to be awarded a half-share in the amount of \$67,500 rather than \$45,000 as determined by the High Court.

[70] The law in relation to division of matrimonial property under the Matrimonial Causes Act is clear. The Court's discretion to award equal shares is undisputed. In the assessment of the Court of Appeal, a half-share of \$67,500 was the appropriate award to Ms Chute taking into account all the evidence.

[71] As to the value of the shares in Mokosoi, for Ms Chute it is said that she did not accept the Set of Accounts prepared by Mr Roberts' accountants. The background upon which she challenged Mr Roberts' valuation is set out by her Counsel:

She had tried to get her own Accountants to audit the Mokosoi accounts but ... was denied access to the accounts by [Mr Roberts]. [Ms Chute] testified to this effect in Court but she was denied such access. [T]o circumvent this procedure, [she] challenged the accounts by having her solicitors serve a Notice to Produce on [Mr Roberts] to produce company records for the last 5 years but [Mr Roberts] ignored such Notice and did not attend Court to produce the accounts. The accounts could neither be verified nor independently scrutinised because of the denial of access by [Mr Roberts]: Written Submissions, 13 November 2008, para 20

[72] Nonetheless the Court is not without evidence upon which a fair, just and equitable assessment can be based. For Ms Chute, it is said that there was evidence ‘that the par value of the shares was \$1.00 per share. This was confirmed in the Annual Return of Mokosoi, up to 18 October 2000, filed by Mr Roberts on 5 December 2002. Discount on these shares had n to been written off, and the amount called on the shares was specified as \$1.00: Court Record, pp. 113-14

[73] Counsel for Ms Chute says further that there was:

... evidence that [Mokosoi] had grown from a backyard operation to one ... servicing the international market and ... local tourist market ... after all if the business was in decline would it buy cards for the salespersons – [Mr Roberts’] evidence: Court Record, p. 93 In her evidence [Ms Chute] had stated at Court Record p. 79 that it started off with a one room enterprise and when she took over the management of the Company from 1990 she added new product ranges, she increased the suppliers and when she was working at the factory the monthly sales [grew] from \$45,000.00 to \$70,000.00: Court Record, p. 80 [Ms Chute] said that [Mr Roberts] was by then working full time for the Fiji Employers Federation: Court Record, p. 79 [Mr Roberts] confirmed ... that he was a part-timer with Mokosoi: Court Record, p. 92 where he stated ... *I visit Mokosoi in the morning after I drop Benjamin [the son] to school from eight to nine or ten o’clock. At times if need be I go back in the afternoon ...*: Written Submissions, 13 November 2008, para 22 (Emphasis in original)

[74] The High Court considered amongst other matters that Ms Chute’s ‘role cannot be significant or instrumental to [the] success’ of Mokosoi, taking into account that she was ‘away working for Diners Club for ten months at one time’. Yet not only does this affirm the High Court’s acceptance of Mokosoi as a successful company – relevant to the valuation of the shares and hence consistent with Counsel for Ms Chute’s submission as

to the ‘true’ value to be put upon her shareholding. At the same time, the High Court accepted – as did Mr Roberts, it appears – that Ms Chute *was* contributing to Mokosoi by engaging in work within the company that had a monetary value. The High Court and Mr Roberts (as it appears) accepted that Ms Chute’s work in Mokosoi was properly valued at \$18,000 per year, the annual salary she received. On this basis alone the estimate of Ms Chute’s share of the property may be said to be too low, for the distribution of property at the end of a marriage should not be undercut by reason of a party’s receiving payment (or support) during the course of the marriage: see for example *In the Marriage of Andrew Meldrum Dawes Respondent/Husband and Elizabeth Wade Dawes Appellant/Wife Appeal* [1989] FamCA 71; (1990) FLC ¶92-108 (2 November 1989).⁶

[75] In property division (whether under the Matrimonial Causes Act or Family Law Act), as the authorities make clear, the role of the court is to determine:

- What is matrimonial property;
- What are the contributions of the parties;
- What is a fair and equitable distribution of the matrimonial property at the time of separation or dissolution of the marriage?

[76] Whatever the parties have received during the course of the marriage may assist in determining:

- the parties’ contributions to accumulation of assets; and
- what assets have been accumulated in the course of the marriage by monies received during the course of the marriage,

⁶ There, Ms Dawes received certain income from family companies but this did not preclude her from sharing equally in the distribution of family property, upon the determination of the appeal in her favour. That this is a decision of the Family Court of Australia under the *Family Law Act* 1975 (Cth) does not inhibit its application as authority for the proposition under the Matrimonial Causes Act.

– for example, Ms Chute’s \$18,000 might have been traced into the purchase of property/ies or other assets, confirming a monetary contribution by her to matrimonial property.

[77] Otherwise, what is received during the course of the marriage is not relevant to the estimate of ‘fair and equitable distribution’ at the time of separation or dissolution. The \$18,000 received by Ms Chute during the marriage was a salary she received for work in Mokosoi and for her use during the years she received it. What must be looked at in property distribution at the end of a marriage is the position of the parties *as at that date* – and what is ‘fair and equitable’ for a distribution *at that date*.

[78] As to the 100,000 Mokosoi shares, the High Court did accept them as explicitly the property of Ms Chute. The question then was how were they to be valued so that she could walk away with a money-amount in substitution for them, the Mokosoi shares remaining with Mokosoi which itself remained in Mr Roberts’ hands.

[79] Counsel for Ms Chute says that the evidence submitted by Mr Roberts was relied upon by the High Court in making the determination of the share value, so that the High Court’s finding was based upon the par value of \$1.00 per share, minus current liabilities, but all the evidence as to Mokosoi – its growth, expansion, entry into both domestic and international markets, etc should have been taken into account. For Ms Chute it is said that had all relevant factors been considered, the High Court would have found the shares to be worth more than \$1.00 each: ‘Instead, [His Lordship] basically found the shares to be worth 60 cents’: Written Submissions, 13 November 2008, para 23

[80] The value to be put upon Ms Chute’s shareholding is, it is said by her Counsel, ‘\$100,000 being par value or \$200,000.00 taking into account the growth of [Mokosoi] from 1990-2001’: Written Submissions, 13 November 2008, para 23

[81] Albeit Mr Roberts’ evidence placed a negative value on Ms Chute’s contribution to the success of Mokosoi, Mr Roberts asserted Mokosoi had met with some success.

This he attributed to his own contribution and efforts rather than to anything Ms Chute did. However, his evidence stands as testimony to the growth in value of Mokosoi and hence to an increase in value of the shares. The High Court's view that Mr Roberts was the main or the driving force behind Mokosoi and its successful growth and expansion does not undermine Ms Chute's share valuation: in the end, whoever is asserted to be the party making the greatest (or 'only') contribution to Mokosoi's success, 'success' was recognised as having occurred. Even if, in the final analysis, the value of Mokosoi was sought to be downplayed at the end of the marriage, so that the shares would stand at a lesser value than otherwise, that the shares had a real and an increased value over and above their original value remains relevant.

[82] In all the circumstances, in this Court's view, a fair, just and equitable valuation of the shares would have been the par value of \$1.00 per share, making Ms Chute's entitlement \$100,000.00.

AUTHORITIES – COURT OF APPEAL RULE 22

[83] Counsel for Ms Chute provided to this Court a number of authorities, both civil and criminal, going to the application of Rule 22 or its equivalent in other jurisdictions: *Gir v. Devi* [1989] FJCA 6; [1989] 35 FLR 229 (27 October 1989); *Dovan v. Public Prosecutor* [1988] VUCA 2; [1989-1994] Van LR 400 (8 March 1988); *Reef Pacific Trading Ltd v. Island Enterprises Ltd* [1995] SBCA 1; CA-CAC 001 of 1992 (31 August 1995) Those authorities go most specifically to the scope of the power in terms of the capacity to hear and taken into account further or fresh evidence on appeal. This does not arise the present case, the evidence before the High Court being that before this Court and upon which this Court relies.

[84] However, those authorities also confirm the breadth of discretion held by the Court of Appeal, and that an appeal is a rehearing. They also confirm the power of the Court of Appeal to make a determination different from that of the court below, albeit the particular matter is not raised in Grounds of Appeal. They confirm this Court's power to

make a determination in favour of Ms Chute despite her not having filed an appeal or cross-appeal.

[85] Appeal courts should always take care in overturning or interfering with the decision of a court below, where the trial court has had the opportunity of hearing witnesses and gauging their credibility, and especially where the trial court has a broad discretion in respect of its decision-making. This latter is particularly so in matrimonial causes or family law: *MAK and KN* (FamMagCt Appeal No. 06/SUV/0021, 25 July 2008) As the High Court of Australia emphasised in *CDJ and VAJ* (1998) 197 CLR 172, [1998] HCA 76, appellate courts need to exercise ‘much caution in a case where an error of principle cannot be clearly identified’:

Such reasons for appellate restraint ... have particular relevance to appeals within, and from, the Family Court of Australia. This is because of the functions and purposes of that Court and the difficult and evaluative decisions which it often has to make. The peculiar nature of decisions relating to the intensely personal questions of the division of the property of parties to a failed marriage and the welfare of their children makes it essential that those who decide appeals respect the onerous responsibilities of those whose decisions they review. They need to recognise that it is of the very nature of such decisions, including those relating to the residence of children, that any two decision-makers may, with complete integrity and upon the same material, often come to differing conclusions.

While I think one must be careful not to lose the ordinary sense of a passage by focussing excessively on one or two words, ... the ambit [is] wide enough, at a minimum, to contain reasonable disagreement. In other words, something more even than actual disagreement is required before interference is justified. Attention is then drawn to the strength of disagreement, to determine whether the appellate court may interfere or not.

It seems reasonable to imagine in that, along the continuum of levels of disagreement, before a conclusion is reached that the result below was plainly wrong or manifestly excessive, the appellate Judge may pass through a stage of uncomfortable uncertainty about the result below, of which uncertainty that result is entitled to the ‘benefit of the doubt’.

Reinforcing the proper reluctance of an appellate court to interfere, is the observation that a trial Judge, in exercising a discretion, may have an advantage over the appellate court in reviewing that exercise. We are, of course, familiar with discussion of the advantage of a trial Judge, particularly in relation to

conclusions about the credibility of witnesses. But there are other reasons for such advantages beyond the opportunity to observe witnesses: at 231, per Kirby, J.

[86] As to the role of appellate courts generally, *Warren v. Coombes* [1979] HCA 9; (1979) 142 CLR 531 (13 March 1979) (a negligence case) and *Gronow v. Gronow* [1979] HCA 63; (1979) 144 CLR 513 (14 December 1979) (a family custody case) have been referred to by Counsel for Ms Chute. This Court has also had reference to additional authorities referred to in *MAK and KN* (FamMagCt Appeal No. 06/SUV/0021, 25 July 2008)

[87] In *Warren v. Coombes* the Australian High Court extensively reviewed the authorities, referring particularly to *Cashman v. Kinnear* (1973) 2 NSWLR 495, in the NSW Court of Appeal:

Even though a finding of negligence was open on the evidence, the question still remains whether the conclusion of the trial judge that there was negligence was right or wrong. If I finally reach the conclusion that it was right, the appeal fails. If I finally reach the conclusion that it was wrong, then in my view the appeal succeeds. ***No 'judicial restraint' should lead me, on an appeal ... to refrain from giving effect to that conclusion of fact to which I finally come. It appears to me, though I speak with some diffidence and with great respect, that the only stage at which 'judicial restraint' can properly be exercised is upon the initial question whether or not I should arrive at a different conclusion from that of the trial judge.*** If I apply that restraint, as it has been expressed in many decisions of the [English] House of Lords, the [English] Privy Counsel and the [Australian] High Court, I will give great weight to the conclusions of the trial judge. In cases where the credibility of witnesses is involved the weight is so great that an appellant who seeks to overturn findings of facts so based faces an almost, but not quite, insuperable task. But even in cases of the latter category the weight of the trial judge's conclusion is very great. ***Even if I am inclined to a different view it is likely that the weight of the trial judge's view will outweigh that inclination. If, however, on final balance it does not, then I am bound to say that the conclusion of the trial judge is wrong:*** at 498-99, per Jacobs, P. (Emphasis added)

[88] And, later:

Thus, if by judicial restraint is meant the lack of overweening certainty in one's own opinions so that respect and weight is given to the opinion of the judge below, then it is something always to be sought. The effect of that respect and weight will vary depending upon the subject matter and will be greatest where the

opinion involves a discretionary judgment and next where the subject matter is one of conclusion or evaluation drawn or made from the facts found. But in truth this quality of respect must be all prefacing whether the subject be fact or law. ***However, if it be suggested that by judicial restraint a judge exercising his office under the Supreme Court Act, 1970, and its predecessors should restrain himself from giving effect to his own conclusion once he has, after applying to himself the mental restraint which flows by the process which I have described, finally reached that conclusion then it is my view a suggestion contrary to that Act and its predecessors and I do not think that it should be adopted in the absence of clear authority binding this Court:*** at 499-50, per Jacobs, P.

[89] The Australian High Court referred also to *Kouris v. Prospector's Motel Pty Ltd* (1977) 19 ALR 343, where it was said:

The Full Court of the Supreme Court was also bound to come to its own conclusion on the case and if it is different from that of the trial judge to give effect to it, even if the reasoning of the trial judge did not disclose any error of principle and was open on the evidence: at 357, per Murphy, J.

[90] Then in *Livingstone v. Halvorsen* (1979) 53 ALJR 50:

The Court of Appeal correctly took into account the trial judge's assessment of the reliability of the witnesses, but then came to their own view which differed from that of the trial judge. The appellant relied on statements in some of the reasons in *Edwards v. Noble* [1971] HCA 544; (1971) 125 CLR 296 to support the contention that the Court of Appeal should not have interfered with the trial judge's decision. My view of the correct role of an appellate court is stated in *Kouris v. Prospector's Motel Pty Ltd* (1977) 19 ALR 343. ***The appeal to the Court of Appeal was a true appeal. Such an appeal is not a mere exercise of supervisory jurisdiction. The parties to the appeal have a statutory right to the appellate court's decision on the merits of the case. If the appellate court is of the view that the appellant is entitled to succeed on the merits, it must not defer to the view of the primary judge.*** On an appeal to this Court [the High Court of Australia], the parties have a constitutional right to the decision of the Court on the merits (see s. 73 of the Constitution): at 57, per Murphy, J.

[91] In *Warren v. Coombes* [1979] HCA 9; (1979) 142 CLR 531, the Australian High Court said:

... in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which,

having been disputed, are established by the findings of the trial judge: at 538, per Gibbs, ACJ, Jacobs and Murphy, JJ, at 551

[92] In the present case, the trial judge was in a difficult position, a position he acknowledged as difficult, due to the paucity of evidence before him both as to the value of the Mokosoi shares, and the value of the Isa Lei Drive property. The High Court was obliged to ‘do its best’ because Mr Roberts had not provided to it the information it had sought, particularly in respect of the Mokosoi shares. As to the Isa Lei Drive property, as noted, the High Court downgraded its value by reference to its being Native lease land rather than freehold.

[93] This Court is not persuaded that the values fixed upon by the High Court were, in all the circumstances, fair, just and equitable. This is not simply a lack of satisfaction on this Court’s part, and a matter of overturning the discretion of the High Court. Rather, it is a fundamental question to which this Court is enjoined to address itself by reason of the Court of Appeal Rule. Having ‘power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require’, this Court considers that the increased values suggested by Counsel for Ms Chute to be appropriate are those which ought to have been fixed upon by the High Court, and are those that should, therefore, be substituted by Orders of this Court.

[94] It is this Court’s responsibility in exercising its appellate jurisdiction to ‘ensure the determination on the merits of the real question in controversy between the parties’. The question is controversy here is:

- What is a fair, just and equitable assessment of the value of Ms Chute’s 100,000 shares in Mokosoi as at the date of separation of the parties to the marriage;
- What is a fair, just and equitable assessment of the value of Ms Chute’s half-share of the matrimonial home, namely the Isa Lei Drive property.

[95] This Court considers that a fair, just and equitable assessment of the value of Ms Chute's 100,000 shares in Mokosoi at the relevant date is \$100,000.00, rather than the sum of \$59,323.00 fixed upon by the High Court.

[96] As to the value of the matrimonial home, namely the Isa Lei Drive property, this Court considers that a fair, just and equitable assessment of the value of Ms Chute's half-share is \$67,500.00 and not the sum of \$45,000.00 fixed upon by the High Court.

INTEREST & COSTS

[97] Consistent with the High Court's determination, this Court makes no order for payment of interest.

[98] In respect of costs, Counsel for the Respondent said amongst other matters that there were no fewer than twenty-seven (27) appearances in the High Court in respect of this matter. Nonetheless, for indemnity costs to be payable they must be pleaded: *Rajendra Prasad v. Divisional Engineer Northern and Ministry for Transport. Works and Energy (No 2)*(Judicial Review No. HBJ 03 of 2007, 25 September 2008); *Huntsman Chemical Company Australia Limited v. International Cools Australia Ltd* (1995) NSWLR 242; *Sayed Mukhtar Shah v. Elizabeth Rice and Ors* (CrimApp No. AAU0007 of 1997S, High Court Crim Action No. HAA002 of 1997, 12 November 1999), at 5, per Sir Moti Tikaram, P. Casey and Barker, JJA

[99] This Court does not make any order for indemnity costs.

[100] As to costs generally, the appeal having been dismissed and the Respondent's being successful, she is entitled to a costs award. In all the circumstances a 'gross' or 'global' costs award is appropriate, here in the amount of \$10,000.

Orders

1. The appeal is dismissed.

2. In accordance with Rule 22 of the Court of Appeal Rules, the Respondent's share of the matrimonial property is determined to be:
 - A. \$12,000.00 in respect of the car;

 - B. \$100,000.00 in respect of the 100,000 shareholding in Mokosoi;

 - C. \$65,000.00 in respect of a half-share in the (former) matrimonial home, the Isa Lei Drive property.

3. The total amount of \$177,000.00 is to be paid to the Respondent by the Appellant within 48 days of these Orders.

4. Costs to the Respondent in the amount of \$10,000, to be paid within 14 days of these Orders.

Scutt, JA

Lloyd, JA

Bruce, JA

Suva

17 March 2009