

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 57 of 2022

BETWEEN: **THE DIRECTOR OF PUBLIC PROSECUTIONS** of the Republic of
Fiji, 25 Gladstone Road, Suva.

APPLICANT

AND: **SULEIMAN ABUSAIDOVICH KERIMOV** being the beneficial owner
of the Motor Yacht Amadea with International Maritime Organisation
Number 1012531 having his address of service at Haniff Tuitoga, 12 Vesi
Street, Flagstaff.

1st RESPONDENT

MILLEMARIN INVESTMENT LTD having its' address of service at
Haniff Tuitoga, 12 Vesi Street, Flagstaff.

2nd RESPONDENT

Counsel : **Applicant: Ms Prasad. J**

 : **Respondent: Mr Haniff. F**

Date of written submissions : **5.05.2022**

Date of Judgment : **06.05.2022**

JUDGMENT

INTRODUCTION

1. Applicant filed originating summons seeking registration of foreign restraining order in terms of Section 31(3) of Mutual Assistance in Criminal Matters Act 1997(MACMA). This was pursuant to warrant issued in foreign jurisdiction against Motor Yacht *Amadea* with International Maritime Organization Number 1012531(*Amadea*). The 'foreign order' was to seize *Amadea* which was subjected to an action in foreign jurisdiction in terms of laws of that country. This was not a seizure of a property upon forfeiture in a foreign

jurisdiction but prior to such order, as a ‘preliminary step’ to seize the property for an action in foreign court. The restraint sought by way of a warrant issued by foreign court was, on the property due to its high mobility to evade jurisdiction of courts in international waters. This court granted the application to register the ‘foreign order’ which is contained in the warrant of the foreign jurisdiction filed in this action. Being aggrieved with that order the registered owner of *Amadea* (referred to as Respondent) had appealed against the said order allowing the registration of warrant against *Amadea*. Respondent filed *ex parte* summons seeking stay of enforcement, which was converted to *inter partes*. The stay of enforcement is sought in terms of Order 47 rule 1 of High Court Rules 1988.

ANALYSIS

2. Judgment delivered on 3.5.2022, was made pursuant to Section 31(3) of MACMA to register ‘foreign order’ which contained in the warrant issued by foreign court.
3. Once the judgment for registration of ‘foreign order’ is granted, by the court Section 31(6) of MACMA applies.

Section 31(6) of MACMA states;

“(6) A **foreign restraining order registered in the Court** under this section has effect, and may **be enforced**, as if it were a restraining order made by the Court under the proceeds of Crime Act, 1997 at the time of registration.”(emphasis added)

4. After judgment was handed down on 3.5.2022, granting registration of ‘foreign order’ contained in the foreign warrant, it was required to be registered in terms of Section 31(6) in terms of MACMA for enforcement.
5. Order 47(1) of High Court Rules 1988 , applies when there is an enforcement of judgment, hence there is no dispute that Applicant had already registered the ‘foreign restraining order’ contained in the foreign warrant in terms of Section 31(6) Order 47 rule 1 of High Court Rules 1988 states.
6. Order 47(1) of High Court Rules 1988 states,

“Power to stay execution by writ of *feri facias* (O.47, r.1)

(1) **Where a judgment is given or an order made for the payment by any person of money**, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or **other party liable to execution-**

(a) that there are special circumstances which render it **inexpedient to enforce the judgment or order**, or

(b) that the applicant is unable from any cause to pay the money,

then, notwithstanding anything in rule 2, the Court **may by order stay the execution** of the judgment or order by writ of *fiery facias* either absolutely or for such period and subject to such conditions as the Court thinks fit.” (emphasis added)

7. Supreme Court in Hussein v Prasad [2022] FJSC 7; CBV 15 of 2020 (3 March 2022) Chief Justice Kamal Kumar, discussed the factors to be considered in stay of execution and held,

“Courts have over number of years identified various factors that needs to be considered in determining application for stay of execution of judgment.

In Chand v. Lata [2008] FJHC; Civil Action No. 38 of 2011 (18 July 2008) identified the principles governing stay of execution as follows:-

“1. *The grant or refusal of a stay is a discretionary matter for the Court: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing AG v. Emberson (1889) 24 QBVC, at 58, 59.*

The Court does not make a practice of depriving a successful litigant of the fruits of litigation by locking up funds to which prima facie the litigant is entitled, pending an appeal: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing Supreme Court Practice 1979, p. 909; The Annot Lyle (1886) 11 PD, at 116 (CA); Monk v. Bartram (1891) 1 QBV 346.

When a party is appealing, exercising an undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing Wilson v. Church (No. 2)(1879) 12 ChD, at 456, 459 (CA).

If there is a risk that the appeal will prove abortive if successful and a stay is not granted the Court will ordinarily exercise its discretion in favour of granting a stay: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing Scarborough v. Lew’s Junction Stores Pty Ltd (1963) VR 129, at 130.

In exercising its discretion the Court will weigh considerations such as balance of convenience and the competing rights of the parties before it: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing AG v. Emberson.

A stay will be granted where the special circumstances of the case so require, that is, they justify departure from the ordinary rule that a successful litigant is entitled to the fruits of the litigation pending the determination of any appeal: Prasad v. Prasad [1997] FJHC 30; HBC0307d.96s (6 March 1997), citing Annot Lyle (1886) 11 PD 114, at 116; Scarborough v. Lew’s Junction Stores Pty Ltd (1963) VR 129, at 130; and see also Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union.

In exercising its discretion the Court will weigh consideration such as balance of convenience and the competing rights of the parties before it: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers’ Union, citing AG v. Emberson.

As a general rule, the only ground for a stay of execution is an Affidavit showing that if the damages and the costs were paid there is not reasonable probability of getting them back if the appeal succeeds: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union, citing Atkins v. GW Ry (1886) 2 TLW 400.

Where there is a risk that a stay is granted and the assets of the Applicant will be disposed of, the Court may, in the exercise of its discretion, refuse the application: Fiji Sugar Corporation Limited v. Fiji Sugar & General Workers' Union”.

In Natural Water of Fiji Limited v. Crystal Clear Mineral Water (Fiji) Limited [2005] FJCA 13 ABU0011.2004S (18 March 2005) Fiji Court of Appeal stated as follows:-

“The following non-comprehensive list of factors conventionally taken into account by a court in considering a stay emerge from Dymocks Franchise Systems (SW) Pty Ltd v. Bilgola Enterprises Ltd (1999) 13PRNZ 48, at p.50 and Area One Consortium Ltd v. Treaty of Waitangi Fisheries Commission (12993) 7PRNZ 2000:

- (a) *Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). Phillip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2NZLR 41 (CA).*
- (b) *Whether the successful party will be injuriously affected by the stay.*
- (c) *The bona fides of the applicants as to the prosecution of the appeal.*
- (d) *The effect on third parties.*
- (e) *The novelty and importance of questions involved.*
- (f) *The public interest in the proceeding.*
- (g) *The overall balance of convenience and the status quo.”*

In Murthi v. Patel [2000] FJCA 17; ABU0014.2000S (5 May 2000) his Lordship Justice Ian Thomson JA (as he then was) stated as follows:-

“A number of considerations have to be taken into account by a judge exercising his discretion whether or not to grant a stay of execution. Prima facie the party succeeding in the High Court is entitled to enjoy immediately the fruits of his success. However, if an appellant shows that he has a good arguable case to present on the hearing of the appeal and if refusal of the stay will cause detriment to the appellant which cannot be effectively remedied if his appeal succeeds, so that the appeal will be rendered nugatory, it may be appropriate for the discretion to grant a stay to be exercised in his favour.”

His Lordship Justice Calanchini (as he then was) in New World Ltd v. Vanualevu Hardware (Fiji) Ltd ABU0076.2015 (17 December 2015) stated as follows:-

“The factors that should be exercised by this Court in an application such as is presently before the Court were identified in Natural Waters of Viti Ltd v. Crystal Clear Mineral Water (Fiji) Ltd (ABU 11 of 2004 delivered on 18 March 2005). Generally a successful party is entitled to the fruits of the judgment which has been obtained in the court below. For this Court to interfere with that right the onus is on the Appellant to establish that there are sufficient grounds to show that a stay should be granted. Two factors that are taken into account by a court are (1) whether the appeal will be rendered nugatory if the stay is not granted and (2) whether the balance of convenience and the competing rights of the parties point to the granting of a stay.”

In view of what is stated in **New World** case, Courts when dealing with Application for Stay of Execution should:-

- (i) Consider whether appeal if successful will be rendered nugatory; and
- (ii) The balance of convenience.

In assessing balance of convenience Court would take into account the factors stated in **Natural Waters** case which factors are not exhaustive.”

8. From the above Supreme Court decision relating to stay of enforcement of judgment what can be deduced is that there are accepted factors that needs consideration, but depending on the circumstances and novelty of the application the factors and considerations can be adopted to exercise discretion of the court.
9. I now consider factors that needs to be considered.

Whether the successful party will be injuriously affected by the stay.

10. The request for registration of ‘foreign order’ was made in terms of United Nations Convention Against Transnational Organized Crimes (UNTOC) and the order sought was a ‘preliminary step’ in terms of the said request made to Central Authority of Fiji.
11. An *ex parte* interim order was granted till final determination of this application. This was to stop movement of *Amadea* until this application for registration is heard and determined. Now, this is not operational as final order for registration of ‘foreign order’ was granted.
12. If the stay of enforcement is granted, there is no order to restrain *Amadea*, as interim order had lapsed when final order for registration is granted, and *Amadea* can be moved, out of jurisdiction. So the enforcement of foreign order will not be possible. If so, the orders granted by the court will not have any practical use.
13. Respondent argues that Applicant has no interest in *Amadea*. Applicant is only the authority authorized to make this application, hence not affected by the grant of stay of enforcement.

14. In this instance the initial request for registration of 'foreign order' was from Central Authority of foreign country. This request was made pursuant to a warrant issued against *Amadea* for seizure by a foreign court in an action for forfeiture.
15. As such the successful party is not Applicant or Central Authority in Fiji, but the requesting party which is Central Authority of foreign country in terms of UNTOC.
16. It is clear that if stay of enforcement is granted the order for registration becomes nugatory as the purpose of mutual assistance under UNTOC was to enforce the foreign warrant after it was duly registered in terms of Section 31(6) of MACMA.
17. If the enforcement in terms of Section 31(6) of MACMA is granted the Central Authority of foreign country who made application to register 'foreign order' is the affected party.
18. It is not pragmatic to keep a property of this nature with its crew in local jurisdiction till conclusion of Appeal, considering logistics and security etc. Long term, keeping of a property subject to a court action in foreign jurisdiction is going to affect successful party injuriously, due to cost of providing security for such an item.
19. Apart from that *Amadea* is required for an action in foreign jurisdiction as preliminary step.

The bona fides of the applicants as to the prosecution of the appeal.

20. I do not have doubt about the appeal that it was done in mala fide. This is an exercise of due process and it should proceed accordingly.
21. Counsel for Respondent said that already an Appeal is filed in Court of Appeal when the summons was called in open court and there was no dispute as to that at that time.
22. Applicant had stated that there is no evidence of an appeal attached to this application. This is not mandatory and I have taken judicial notice of the Appeal filed.

The effect on third parties.

23. Apart from Applicant and Respondent there are parties such as foreign court that had issued warrant for seizure. If the enforcement is stayed that enforcement of registered order will be stayed, making registration a nugatory.

The novelty and importance of questions involved.

24. There is novelty in the issues involved due to application of UNTOC to domestic legislation MACMA.
25. *DPP v Christopher Chase and Ors* [2017] FJHC HBM 114 of 2015, 28 February, 2017 was an action where registration of foreign orders after foreign court had made final orders, not as 'preliminary step' for seizure of a property subject to forfeiture in foreign court. In

that case court had already convicted the person and confiscation of proceeds of crime in foreign court was subsequent to conviction of an offence and sentence.

26. The above case can be distinguished as the request made by Central Authority in this case was to register a foreign warrant. (i.e.orders contained in the warrant of foreign court).
27. The registration was granted in relation to ‘foreign orders’ which were not final orders but orders to assist proceedings in foreign court under UNTOC and MACMA.

The public interest in the proceeding.

28. There is no public interest in this action.

Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative)

29. If the stay of enforcement is not granted there is likelihood that *Amadea* will be moved to foreign jurisdiction in terms of execution of the registration of ‘foreign order’ in terms of section 31(6) of MACMA.
30. *Prima facie*, appeal will become nugatory if property is moved out of jurisdiction, but this is done in pursuant to a foreign court order contained in the warrant.

Appeal Grounds

31. The prospect of success is considered in terms of appeal grounds;

Ground 1: The learned Judge erred in law in registering a United States of America warrant to seize property (*Amadea*) subject to forfeiture issued by the United States District Court for the District Court of Columbia in Case No 22-SZ9 wherein section 31 (2) of the Mutual Assistance in Criminal Matters Act 1997 only permits an application to restrain persons from dealing with the property to be made.

32. Court can register ‘foreign restraining order’ and the orders contained in the warrant are registered in terms Section 31 (3) of MACMA which grants power to do that. Above ground was not raised as objection in written submissions, at the hearing of originating summons. That shows it is an afterthought and not a requirement under section 31(3) of MACMA.

Ground 2 : The learned Judge erred in law in holding that the Warrant to seize property subject to forfeiture issued by the United States District Court for the District Court of Columbia in Case No 22-SZ-9 was a foreign restraining order when the order was for the seizure of the Motor Yacht *Amadea* with International Maritime Organization Number 1012531.

33. This was discussed in the judgment and warrant to seize the property subject to forfeiture is permitted in terms of Section 31(3) of MACMA.

Appeal Grounds 3, 4, 5

Ground 3: The learned Judge erred in law in holding that section 31 (6) of the Mutual Assistance in Criminal Matters Act was irrelevant to application to register a foreign restraining order when section 31(6) expressly required the Court to consider the parallel provision in the Proceeds of Crimes Act 1997 determining an application for a registration order against property.

Ground 4: The learned Judge erred in law in holding that the Court is not required to consider the factors in the Proceeds of Crime Act 1997, particularly Part 2, Division 2A, Civil Forfeiture Orders act section 19(B) before registering a foreign restraining order.

Ground 5: The learned Judge erred in law in failing to consider section 19B of the Proceeds of Crime Act when registering the non-conviction based foreign restraining order from the United States District Court of Columbia against the Motor Yacht *Amadea* with International Maritime Organisation Number 1012531.

34. It is clear that Section 31(6) of MACMA is applied when at the time of enforcement. This is an effect after registration of foreign orders. So, there was no need for the court to consider these provisions when the registration of foreign order is made in terms of Section 31(3) of MACMA.

Ground 6: The learned Judge erred in law in failing to give any reason or inadequate reason in not following the parallel High Court Case of *Director of Public Prosecutions of the Republic of Fiji v Chase* [2017] FJHC 156; HBM 114.2015 (28 February 2017) where the High Court in Chase consider the Proceeds of Crimes Act before registering a foreign restraining order.

35. The above mentioned decision was a request by foreign court after conviction of specific offences in sharp contrast with present application for 'preliminary step' to register a warrant to seizure a property subject to forfeiture abroad. So *Amadea* is not forfeited by foreign court, but required mutual assistance for proceedings in foreign court.

Ground 7: The learned Judge erred in law in failing to consider section 19(B) of the Proceeds of Crime Act which required the Court to be satisfied that there were reasonable grounds for suspecting that the Motor Yacht *Amadea* with International Maritime Organisation Number 1012531 is tainted property before registering the foreign restraining order.

36. As discussed prior there was no requirement to apply Section 19(B) of Proceeds of Crime Act 1997 when the court is registering foreign warrant as preliminary step, in terms of Section 31 (3) of MACMA.

Ground 8: The learned Judge erred in law and in fact in registering the foreign

restraining order when there was no evidence that Motor Yacht *Amadea* with International Maritime Organisation Number 1012531 property used in, or in connection with, the commission of the offence and/or property intended to be used in, or in connection with, the commission of the offence and/ or proceeds of crime

37. Once a request is made by Central Authority of Fiji to Applicant, there is no requirement in terms of Section 31 (3) of MACMA to re-consider evidence relied by Central Authority of Fiji.

Ground 9: The learned Judge erred in law and in fact in failing to find that the second respondent was the beneficial owner of the Motor Yacht *Amadea* with International Maritime Organisation Number 1012531 given that there is undisputed evidence before the Court was that the beneficial owner of the Motor Yacht *Amadea* was Mr. Eduard Khudaynatov.

38. This is no a requirement as the warrant was issued *in rem* as against *personam*. This cannot be dealt in this court in limited scope as it is a matter that is yet to determine in foreign jurisdiction in terms of foreign law. Respondent may take such objections in the court that issued warrant.

Ground 10: The learned Judge erred in law ordering an interim restraining order without inquiring who the registered owner of Motor Yacht *Amadea*.

39. As the warrant was issued *in rem* to register it in terms of Section 31(3) of MACMA and there cannot be detail investigation of an order of foreign court under UNTOC and MACMA. When *ex parte* order is made to restrain movement there is no detail examination of ownership is needed *in rem* restraining order. In any event this interim order had now lapsed due to final determination of Application, and only a moot.

The overall balance of convenience and the status quo.

40. *Latiff v Hakim* [2020] FJHC, Civil Action No. HBC 115 of 2012, 28 February, 2020)

“The test here is a determination of which of the two parties will suffer greater harm from granting or refusal of an interim stay pending a determination of the appeal on merits, balancing of conflicting consideration is required, between the underlying principle that a litigant, is entitled to the fruits of his judgment forthwith and the obvious injustice in refusing a stay where such a refusal will render the appeal nugatory or substantially nugatory”.

41. Considering that the nature of the property and safety of the property that is subject to forfeiture the balance of convenience does not favour Respondent. Respondent is not precluded from recourse in foreign court under due process. There was no evidence that Respondent cannot claim this property in foreign jurisdiction which had issued warrant in an action to forfeiture for offences stated in the warrant. Balance of convenience lies with not granting the stay of enforcement of the registration of ‘foreign order’.

CONCLUSION

42. Considering above factors the stay of enforcement sought in the summons is refused. The cost of this application is summarily assessed at \$2,000 to be paid by second Respondent to Applicant within 30 days.

FINAL ORDERS

- a. Application for stay of enforcement is refused.
- b. Cost of this application is summarily assessed at \$2000 to be paid by second Respondent to Applicant within 30 days.

Dated at Suva this 6th day of May, 2022.



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Justice Deepthi Amaratunga
High Court, Suva