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

FILE NO: ACTION NO. 05/SUV/0207

BETWEEN:

T.H

Applicant

AND

B. E. A

Respondent

APPEARANCES/REPRESENTATIONS

The Applicant: Mr. O' Driscoll G.A and Mr. Harper R. (O'Driscoll & Co. Lawyers)

Respondent: Ms. Nayacalevu S.M ("S.L")

JUDGMENT

INTRODUCTION

1. This matter is a dispute between the two parties following their divorce from 2005. Consent Orders had been delivered by the learned Resident Magistrate Mr. John Semisi on the 22nd June 2005 and the matter came up again on an issue for which Ruling granting clarification on the nature of the payment of the FJ $5,000.00 in dispute had been delivered by the learned Magistrate Mr. John Semisi on the 23rd March 2006.

2. The 2006 Court Orders have never been appealed and the Applicant argues that despite the standing of the Court ruling, the Respondent has not complied with it by actually making payment.

3. The Applicant lady filed her Form 9 Application on the 8th of April 2015 seeking the release of the $5,000.00 paid by the Respondent into the Trust Account of "S . L" as per the Orders of the Court of the 27th of March 2009.

4. The Respondent man filed his Form 10 Response on the 30th of July 2015 seeking the following Orders. I wish to quote in verbatim -

   I. "An Order for the Hearing of this matter to be by way of Skype, since I reside in Australia and it is costly for me to travel to Fiji.

   II. An Order that the Court dismiss the Form 9 Application of the lady.

   III. An Order that the money paid into the Trust Account of my lawyers "S.L" to be released to me for the following reasons –

   IV. The money was paid as a bond to allow me to travel out of Fiji prior to the final determination of this matter, being the Application by the lady for increase child maintenance that was not allowed by the Court.

   (i) My children with the Applicant are now over the age of 18 and thus maintenance payments for them has ceased.

   (ii) I do not owe any money for child maintenance.

   (iii) The money rightfully belongs to me and the lady is misdirecting the Court in asking for an Order that the money be released to her.

   (iv) An Order for costs against the Applicant lady.

   (v) Any other Orders that this Court deems fair and just in this matter".

5. On the 15th of December 2015, after the filing of written submissions and oral submissions that were made, the Court delivered its Ruling allowing the Respondent to give his evidence via Skype.

6. The matter was fixed for hearing in Court on 25th of May 2016. The Applicant lady gave evidence in person, whilst the Respondent man gave his evidence via Skype from New Zealand. Counsellors for the both parties were present as well.

THE BACKGROUND

7. The facts of the matter are that the parties are divorced and signed a matrimonial agreement on the 21st June 2005 containing certain mutual clauses as to their divorce, custody and access, maintenance and property. Although the agreement was signed by the parties it was not registered. But t**he terms and conditions of the agreement were subsequently contained in a Consent Order delivered by the learned Resident Magistrate Mr. John Semisi on the 22nd June 2005.**

8. The parties have 02 children namely; E.B.A a male born on 6th of October 1995 and P.N.A a female born on 26th of August 1997.

9. The Respondent submitting that he was paying maintenance and / or child support to the Australian Child Support Agency (CSA) AU$427.42 per month for the two children and continued to do until the said E.B.A and P.N.A attain age of 18 years.

10. The respondent was ordered to pay child maintenance by the court order (by consent) on the 25th October 2012. The Court also notes that on 28 September 2012, the court granted a Judgement modifying the child maintenance. (increased)

DOCUMENTS FILED AND/OR RELIED UPON

11. I will not reiterate the entire evidence on the court but reference would only be made to the relevance of evidence to the present application and for analysis purpose.

12. This Court has heard all the evidence in Court. It has further scrutinized the documents that were tendered in Court together with the submissions for the parties.

13. I wish to reproduce from both learned counsels' submissions which reflect verbatim principles of law and the chronology of the case when it is necessary. I wish to cite the submissions where the contents are correctly reflected. (Please refer MMB v.TL Fiji Family High Court Case No 13/Suv/0013). In the current matter, both counsels filed submissions with substance, so re produce, not blindly but with cautious and after perusing the court file.

14. The Documents that are relevant for consideration as they give a clear understanding of the history of the matter: I list some of amongst others the important documents as follows.

    a) Consent Order entered on 7th July 2005 from an order in Court of 22nd June 2005, including paragraphs 3.3 and 3.5;

    b) Notice of Motion and Supporting Affidavit both filed on 5th October 2005 seeking a clarification as to whether $5,000-00 should be deducted from the amount notified by the Child Support Agency of Australia (CSAA) or not. Affidavit in reply to the application referred to in (iii) above filed on 10th November 2005;

    c) Application for final orders (Form 9) filed on 18th March 2009 seeking absconding warrant with affidavit of T.H filed at the same time in support.

    d) Application for final orders (Form 9) filed on 26th March 2009 seeking cancellation of absconding warrant with affidavit of B.A filed at the same time in support.

    e) Response (Form 10) filed on 16th April 2009 with Affidavit of T.H seeking payment of $5,000-00 as a relief. This Form 10 was amended and the amended Form 10 filed on 23rd September 2009.

THE ISSUES

15. The following are the issues to be determined by the Court:-

    (i) The issue before the Court as per the parties Forms 9 and 10 respectively; are whether the $5,0000 held in the Trust Account of "S.L" as per the Order of the 27th of March 2009 in the light of the court order Resident Magistrate Mr. John Semisi, should be released to-

        a). the Applicant lady; or
        b). the Respondent man.

THE LAW, EVIDENCE AND ANALYSIS

16. The Respondent submits that as the issues before the Court as a result of an Absconding Warrant Application filed by the Applicant lady on the 18th of March 2009, seeks to consider the relevant law that addresses Absconding Warrant. Therefore consider the Debtors Act [Cap. 32] in Section 6 of the Debtors Act states that-

    "*6. If it is shown to the satisfaction of the court that the defendant in any action for the recovery of a sum exceeding ten dollars is about to abscond, the court may, in its discretion, issue a warrant to arrest the defendant and commit him to prison, there to be kept until he shall have given bail or security in such sum, to be expressed in the warrant, as the court thinks fit, not exceeding the probable amount of debt or damages and costs, for his appearance at any time when called upon while the action is pending and until execution or satisfaction of any judgment that may be made against him in the action; and the surety or sureties shall undertake, in default of such appearance, to pay any sum of money that may be adjudged against him in the action with costs:*

    Provided that the court may at any time, upon reasonable cause being shown, release the defendant from such arrest".

17. The Respondent submits that the provisions of Section 6 of the Debtors Act is clear that if it is shown to the satisfaction of the court that the Defendant in any action for recovery of a sum exceeding ten dollars and the defendant is about to abscond, the court may in its discretion issue an absconding warrant.

18. It is submitted by the Respondent; that there was never any "action for the recovery of a sum", either by way of a Judgment Debtor Summons (JDS), Committal Application or any other means by the Applicant, when the absconding warrant application was filed.

19. The Court did exercise its discretion in granting the absconding warrant order, which resulted in the Respondent filing an Application for the suspension of the orders, resulting the Orders of the 27/03/2009.

20. The Respondents also submits to consider the fact that no "action for the recovery of a sum" by way of JDS Application; Committal Application or in any other respect was filed against the Respondent by the Applicant in 2009 or to date the Respondent submit, he satisfied his obligations of the payment of the $5,000 FJD as per the **Orders of the Court as of 22nd June 2005 and 23rd March 2006.**

21. The Respondents also submits that Section 16 of the Magistrates Court Act empowers the Court to exercise its civil jurisdiction to release the $5,000 FJD paid by the Respondent into the Trust Account of "S.L" (as per the Orders of the Court of the 27th of March 2009), back to the Respondent.
22. **Section 16 of the Magistrates Court Act** (Cap 16) gives the Jurisdiction to hear civil suits. I reproduce section 16(1) for clarity.

    "16.-(1) A resident magistrate shall, in addition to any jurisdiction which he may have under any other Act for the time being in force, have and exercise jurisdiction in civil causes-

        (a) (i) in all personal suits arising out of any accident in which any vehicle is involved where the amount, value or damages claimed, whether as a balance claimed or otherwise, is not more than three thousand dollars;

        (ii) in all other personal suits, whether arising from contract, or from tort, or from both, where the value of property or the debt, amount or damage claimed whether as a balance claimed or otherwise, is not more than two thousand dollars;

(b) (i) in all suits between landlords and tenants for possession of any land (including any building or part thereof) claimed under any agreement or refused to be delivered up, where the annual value or annual rent does not or did not exceed two thousand dollars;

23. In the Applicant submission it states that, according to the court order (consent order) the Respondent will also make a lump sum payment of FJ $5,000.00 to the Petitioner, which will be from the Property Settlement funds held with Messrs. Inder Lynch in Papakura Office New Zealand (representing previous child supports).

24. On the 4th August 2005 the sum of FJ $5,000.00 was paid by the Respondent to the Applicant out of the funds realized from the sale of their property which was held for both parties by Inder Lynch Lawyers. This was shown in a letter with a statement attached from Inder Lynch. The said letter and statement were annexed by the Respondent in a Form 23 Affidavit dated the 25th March 2009 and marked as "E". The payment of the FJ$5,000 as shown in the said letter was not disputed by either party at the hearing.

25. The Applicant stated that this payment is for the time in or around the years 2000 to 2002.

26. On the 23rd of March 2006, pursuant to an application by the Applicant the Court ordered as follows: "Clause 8.5 of the parties Agreement dated 21st June 2005 obviously envisages an **"additional" payment of FJD$5, 000.00 to the arrears alluded to in Clause 8.3 of the said Agreement. The word "also" in Clause 8.5 clearly supports this view. This Court therefore orders that the Respondent must make the said additional payment of FJD$5,000.00 to the Petitioner. I rule accordingly".**

27. The Applicant further stated that payments for "arrears as notified by CSA" under paragraph 3.3 of the Consent Order relate to arrears of maintenance accumulated in or around 2004 and 2005. This Court in its ruling of 23rd March 2006 clearly conflicts with the findings in Australia, but Applicant submits that this Court's orders should prevail because the entire matrimonial dispute was adjudicated on in Fiji, not in Australia.

28. In 2009, the Applicant lady filed an Absconding Warrant Application against the Respondent stating that the Respondent had not paid the FJD$5,000.00 as per clause 3.5 of the Consent Order

29. On the 27th of March 2009, the then Resident Magistrate Maika Nakora granted the following Orders in this matter after perusing the Form 9 Application of Mr. A filed on the 26th of March 2009 and hearing the lawyers for both parties.

30. “That the Absconding Warrant Order against B.E A be cancelled upon the production by B.EA of a Bank notification and/or satisfactory confirmation that the amount of FJ$5,000.00 (Five Thousand Dollars Fijian) has been transferred into the Trust Account of “S.L”. The FJ$5000.00 is not to be disbursed by “S.L” until further order of the Court.”

31. These proceedings lead to a Court Order that the Respondent deposits the sum of FJ $5,000.00 in “S.L” trust account as security under the absconding warrant so as to allow him to leave Fiji. At the hearing the Respondent testified to paying a "bond" so as to be allowed to leave and on cross examination stated that he did not believe it was as a result of the absconding warrant proceedings or the contempt proceedings.

32. There is confusion about the orders and I admit it. The confusion in particular about the $5000.00 which was deposited in "S.L" "until further order of the Court". It is a bond or advance payments? The court record is silent as the learned Resident Magistrate Maika Nakora not explained about it on 27th of March 2009 or is it that **additional" payment of FJD$5, 000.00 to the arrears alluded to in Clause 8.3 of the said Agreement pursuant to the order granted o**n the 23rd of March 2006?

33. The court noted that after 28 September 2012 (Maintenance order) or prior to this date or after 27th of March 2009. The Applicant did not file a Judgement Debtor Summons. No outcome in return to Form 7, if so by Form 7 the court could have determined as to whether the order **granted o**n the 23rd of March 2006 was compiled or not. (The responded convicted for the offence of contempt or not) By a JDS the court could have concluded as to whether the respondent in arrears or not.

34. This was not done and reasons are best known to the applicant lady. She filed the application in question after few years later in 2015.

35. On the other hand the respondent had been represented by "S.L" and $5000.00 in their trust fund. It is also not clear as to why the respondent then failed to institute an action before the court seeking to release the monies to him. (should he cleared all the arrears and complied with the court orders) Again, reasons are best known to the Respondent.

The Applicant's Evidence

a. The Applicant testified inter alia that "…. what B.E.A did was he paid the $5000.00 out of the money from the sale of our joint property and then he applied for the child support agency and used that extra $5000.00 to offset his arrears. So he short paid what he owed. That sum was paid but they used that amount and deducted it from his arrears with child support agency in Australia. $5000.00 was deducted from his arrears from child support agency. $5000.00 is still outstanding for me and my children."

b. I also wish to quote from her evidence (relevant potions only)

c. "We did go back to the court and ask the court to decide because some other the other the child support agency in Australia decides to amend some issues with the arrears. They allowed him to use the $5000 in the other paragraph 3.3. They allowed him to use that money to clear his arrears in Australia for that.

d. The Suva Family Law Court. Family Law Court has made a ruling in my favour that this $5000.00 should be paid.

e. I did not allege it was stated in the Court ruling that he owed me $5000.00 and our agreement stated that he would clear his arrears in full. Plus I would get an extra payment of $5000.00 from his share of the house sell proceeds.

f. I got a Court Ruling for that from the Judge and that's why the man owes me the money. I didn't receive the full amount because it's been twisted around for someone else's benefit.

g. I only filed the contempt application and absconding warrant because I had a Court Ruling in the Fijian Court of Law. That stated the extra $5000 should be paid to me and that why I filed for that. The child support still owed from the child support agency in Australia.

h. Otherwise I would have not wasted anyone's time by filing an absconding warrant if I didn't have the Ruling. My arrears were not paid to me by the time we had an out of Court settlement. It should have been appeal in Fiji Court and not in Australia.

i. My child support pay the $600.00 that I receive per month for my 2 children was never put through any agency in Australia or New Zealand it came directly to O' Driscoll trust account and it was short paid anyway. I did not agree for them to take the $5000.00 to offset the arrears.

j. From 2000 to 2001. Think it was 2004 to 2005, I can't remember because it was long time ago, but it was *arrears owing for child support.* Clearance of arrears that was owed plus an extra $5000.00. Not entire arrears were not paid. The $5000 was paid to me in 3 instalments when the property was sold.

k. There's a statement that came to my Lawyer and went into my Lawyers trust account. For the child support arrears. He used that $5000.00 to pay to me through indulgence trust account. He used that for cancelling out his debt for child support agency of Australia.

l. There are we Agreed to have out of Court settlement. Whereby the property we had was slipped. I undertook half of any debts we had jointly. It was agreed that Mr. B .E.A would pay $600.00 per month for my 2 children's maintenance and also greed that he would clear his arrears for the child support agency which was over $6000.00 I can't remember the exact figure it was many years ago. That was what the agreement was. But before I complained to the child support agency for child support that was I period of 24 months. Where I was not even getting 50 cents for the support of my children. So it was an offer of $5000 to cover that period of time, 2 years. So he cleared the arrears and the extra $5000.00 for his portion for the house sell proceeds. That's my understanding.

m. Paragraph 3.3 reads;

    a. The respondent will pay to the Australian child support agency whatever arrears is owing as notified.

n. We gather a statement on the day we went to court. That's the correct amount that's in the arrears at the time we went to court and had our settlement.

o. What B.E.A did was he paid the $5000.00 out of the money from the sale of our joint property and then he applied for the child support agency and used that extra $5000.00 to offset his arrears. So he short paid what he owed. That sum was paid but they used that amount and deducted it from his arrears with child support agency in Australia. $5000.00 was deducted from his arrears from child support agency. $5000.00 is still outstanding for me and my children.

p. My understanding was the arrears will be cleared in full, which was $6900 or whatever plus I got an extra payment of $5000 because before I apply for child support payment that was 2 years where I didn't even receive 50 cents for my children's maintenance.

q. All I know is that he was supposed to clear his arrears with the child support agency of Australia. You got the figure and it was also an out of court settlement. He agreed to pay me

an extra $5000.00 for two years of no support for my children. That was our out of court settlement. It was 2001 – 2002 two years of arrears.

r. The child support arrears for his child support payments in Australia. Of set with the money that agreed out of court settlement, that he would pay $5000.00 for me for the struggles I had with my children for lack of support and that the arrears he owed trough the child support agency of Australia would also be clearly cleared away.

s. That $5000.00 was payment for something else."

The Respondent's Evidence

36. The evidence of the Respondent was inter alias as follows;

a. "My position is that the $5000.00 was paid on the 12th of as she wanted that money because it took too long to get the money from the child support agency, so she wanted $5000.00 up front.

b. First case was opened in November 2000 in New Zealand.

c. I agree that was the arrears owe. Their decision was that they traded the $5000.00 to the non-agency case. So there was no open case therefore child support was not being paid.

d. I have not always been up-to-date but now I have cleared all the arrears with child support agency.

e. I had to lodge with the "S.L"s $5000.00 Fijian Dollars so I can leave the country. It was a bond, so I can leave the country.

f. Contempt was never heard by the Court. I believe it's the payment over and above of what I am required to pay in the original orders.

g. This money should be released back to me. I have already paid the $5000.00 that's in dispute. The lady has agreed the money was received $5000.00 that was for child support nowhere in the document it says I have to make any extra payments.

h. Because I have already paid $5000.00 so I should not be my cost I had to cancel my Air fares. I am asking for $9700.00 Fijian Dollars, bearing in mind that exchange rate has changed to. That is 2009 rate. The reason for visit in 2009 was to visit the children.

i. It was served on me on Denarau Island the night before I had to depart to Australia."

In cross examination:

j. I agree its two separate payments but paragraph 5.3 was written exact amount owed at the time.

k. Paragraph 3.5 is paid.

l. I was not aware of the arrears amount at the time.

m. I believe it's about $6000.00 but I am not so sure what the New Zealand agency had in there arrears. Because there was 2 cases pending at the same time.

n. But that did not take into account any monies already owing or paid in New Zealand at the time.

o. There were arrears in Australia that did not take in account the arrears in New Zealand. Because one case was against the other.

p. I paid all arrears.

q. Nothing I can produce today because I was not aware that it was required.

r. That amount is child's support took into account $5000.00 FJD I paid. Applicant said she didn't want the payment to go to CSA but pay direct because it took too long to get the money.

s. $5000.00 was deducted from the arrears. There is no need to replace it, with that.

t. There is no missing $5000.00 under clause 3.3 I had to pay, one of that was notified by CSA . The CSA took into account the $5000.00. Nowhere it say that I have to pay $6000.00 as payment. Notified by CSA. It <u>was CSA decision to deduct $5000.00 from my arrears.</u>

u. I didn't take any money, the CSA deduct the $5000.00 from my arrears. They did not take it from any account. The $5000.00 under paragraph 3.5 and it said it's representing child support.

v. By 2006, the Applicant was already being paid the $5000.00. My understanding is there is no extra payment. I don't know where the word extra came from. It's not in the original documents or the original Court Orders. There's only one $5000.00 payment be made. It's still not the way I interpreted it. I paid $5000.00 as a request from Applicant at the time of the court case, when she wanted $5000 upfront. She is been paid. When the Court was issued, the money was already being paid. I paid a bond so I could leave the country. I had no other option. I disagree to pay another $5000.00, because I have already paid the $5000.00."

37. As noted, the Respondent will also make a lump sum payment of FJ $5,000.00 to the Petitioner, which will be from the Property Settlement funds held with Messrs. Inder Lynch in Papakura Office New Zealand (representing previous child supports).

38. On the 4th August 2005 the sum of FJ $5,000.00 was paid by the Respondent to the Applicant out of the funds realized from the sale of their property which was held for both parties by Inder Lynch Lawyers. This was shown in a letter with a statement attached from Inder Lynch. The said letter and statement were annexed by the Respondent in a Form 23 Affidavit dated the 25th March 2009 and marked as "E". The payment of the FJ$5,000 as shown in the said letter was not disputed by either party at the hearing.

39. The Applicant stated that this payment is for the time in or around the years 2000 to 2002. The Applicant submits that; this means the Respondent has paid $5000 during 2000-2002 for the previous sale of their property

40. As noted above on the 23rd of March 2006, pursuant to an application by the Applicant the courted ordered as follows: "Clause 8.5 of the parties Agreement dated 21st June 2005 obviously envisages an "additional" payment of FJD$5, 000.00 to the arrears alluded to in Clause 8.3 of the said Agreement. The word "also" in Clause 8.5 clearly supports this view. This Court therefore orders that the Respondent must make the said additional payment of FJD$5,000.00 to the Petitioner. I rule accordingly".

41. The Applicant further stated that payments for "arrears as notified by CSA" under paragraph 3.3 of the Consent Order relate to arrears of maintenance accumulated in or around 2004 and 2005. This Court in its ruling of 23rd March 2006 conflicts with the findings in Australia, but Fiji Court's orders should prevail because the entire matrimonial dispute was adjudicated on in Fiji, not in Australia.

42. The Applicant lady filed an Absconding Warrant Application in 2009, against the Respondent stating that the Respondent had not paid the FJD$5,000.00 as per clause 3.5 of the Consent Order and on the 27th of March 2009, the then Resident Magistrate Maika Nakora granted the following Orders in this matter after perusing the Form 9 Application of Mr. A filed on the 26th of March 2009 and hearing the lawyers for both parties. Subsequently, that the Absconding Warrant Order against B.EA be cancelled upon the production by B.EA of a Bank notification and/or satisfactory confirmation that the amount of FJ$5,000.00 (Five Thousand Dollars Fijian) has been transferred into the Trust Account of “S.L”.

43. Consequently; the Respondent deposits the sum of FJ $5,000.00 in “S.L” trust account as security so as to allow him to leave Fiji. At the hearing the Respondent testified to paying a "bond" so as to be allowed to leave and on cross examination stated that he did not believe it was as a result of the absconding warrant proceedings or the contempt proceedings.

44. The Court ordered that, FJ$5000.00 is not to be disbursed by “S.L” until further order of the Court.

45. Now time to exercise court's discretion. This discretion must be done judicially within accepted norms.

46. Before that I reproduce the below Order of the Court for clarity.

"BETWEEN: T A c/- O'Driscoll&Seruvatu, Suite 2 1st Floor, 22 Carnarvon Street, Suva, Fiji, Director

AND: B.EA c/- Becker Helicopter Services Pty. Limited, P O Box 5777, Maroochydore Business Centre, Queensland 4558, Australia, Aircraft Engineer.

ORDER

BEFORE THE RESIDENT MAGISTRATE MR. JOHN SEMISI IN COURT

ON WEDNESDAY THE 22ND DAY OF JUNE, 2005

UPON HEARING Mrs Alofa Aiva Seruvatu, Counsel for the Petitioner, and Ms Laurel Vaurasi, Counsel for the Respondent

IT IS HEREBY ORDERED THAT:

i. **The Deed of Settlement be adopted as the Order of the Court**;
ii. The marriage solemnized on the 1st day of September, 1990 be dissolved; and
iii. The Decree Nisi to be absolute after 21 days.

SEALED this 13th day of July, 2005"

"B.EA

vs

T A

BEFORE JOHN SEMISI ESQ

RESIDENT MAGISTRATE

Petitioner : Absent

Respondent : Mr Nayacalevu

Date of Ruling: 23rd March, 2006

RULING

Clause 8.5 of the parties Agreement dated 21st June 2005 obviously envisages an "additional" payment of FJ$5,000.00 to the arrears alluded to in Clause 8.3 of the said Agreement. The word "also" in Clause 8.5 clearly supports this view. This Court therefore orders that the Respondent must make the said additional payment of FJ$5,000.00 to the Petitioner. I rule accordingly." (Emphasis added)

47. I also reproduce the below Order of the Court for clarity Clause 8.5;

"The Respondent will also make a lump sum of payment of FJ$5,000.00 to the Petitioner, which will be from the Property Settlement funds held in Messrs Inder Lynch in Papakura Office New Zealand (representing previous child support)."

48. The court also wishes to quote clause 3.3 for clarity. “The Respondent will pay to the Australian Child Support Agency whatever arrears owe as notified by CSA.”

49. The Applicant is claiming for the enforcement of the payment under paragraph 3.5 of the Consent Order. The Respondent denies owing this money to the Applicant claiming that it has been paid already. The Applicant argues that, due to the Respondent having deducted the payment of FJ $5,000.00 from the amount notified by CSAA or instructing for such deduction and the later intervention of the SSAT of Australia in their Ruling dated 19th December 2007, the money still owes.

50. The Respondent submitted that on the 4th August 2005 the sum of FJ $5,000.00 was paid by the Respondent to the Applicant out of the funds realized from the sale of their property which was held for both parties by Inder Lynch Lawyers. The payment of the FJ$5,000 as shown in the said letter was not apparently disputed by the Applicant.

51. The Applicant submits that despite the clear wording of the Consent Order being that payments under paragraph 3.3 were for arrears of maintenance owed to the Applicant as notified by the CSAA and the payment of the FJ$5,000.00 was for previous child support.

52. I accept the following argument by the Applicant that;

53. The Ruling on this issue was delivered by the learned Magistrate Mr. John Semisi dated 23rd March 2006. The learned Magistrate found that the FJ$5,000 referred to in clause 8.5 of the Matrimonial Agreement which is paragraph 3.5 of the Consent Order was a separate and "additional" payment to the arrears alluded to in clause 8.3 of the Matrimonial Agreement, being paragraph 3.3 of the consent Order. The "arrears as notified by CSA" were calculated by the CSAA to be in the sum of AUD$6,905.00. This figure was notified to the Applicant in Facsimile dated the 21st June 2005 which was annexed to the Form 23 Affidavit in response filed by the Applicant on the 8th April 2015 and marked as 'TH-1'. Due to the Respondent deducting the equivalent of FJ $5,000.00 from the notified amount the Order was effectively not complied with and as a result the Applicant filed for and obtained an Absconding Warrant in 2009.

54. The Applicant submits that the dispute arose again when the CSM credited the FJ $5,000.00 payment made by the Respondent to the Applicant pursuant to paragraph 3.5 of the Consent Order as being money paid under paragraph 3.3 of the same Order being maintenance monies. The Respondent then put the question before the SSAT in Brisbane, Australia which gave a decision on the 19th December 2007 finding in favour of the Respondent ruling that the FJ$5,000.00 paid by the Respondent on the 4th August 2005 was a representation of previous child support and thus justified the CSM crediting the payment under maintenance liability for child support period 1st October 2004 to 21 June 2005 as set out under paragraph 3.3 of the Consent Order. The Court also of the same view.

55. I also consider the following argument by the Applicant as well.

56. This only created confusion on the matter as the CSM and SSAT erred in law in misinterpreting clause 8.5 of the Matrimonial Agreement which was contained in paragraph 3.5 of the Consent Order. The Applicant testified at trial that the payment of the FJ $5,000.00 and the use of the term "previous child support" referred to in paragraph 3.5 of the Consent Order was made in reference to a period when the Respondent was not paying Child support at all before he came under the Australian system, that is when they were living in New Zealand. The Applicant stated

that this payment is for the time in or around the years 2000 to 2002. The Applicant further stated that payments for "arrears as notified by CSA" under paragraph 3.3 of the Consent Order relate to arrears of maintenance accumulated in or around 2004 and 2005. This Court in its ruling of 23rd March 2006 deems to conflicts with the findings in Australia, but this Court's orders should prevail because the entire matrimonial dispute was adjudicated on in Fiji, not in Australia. The Respondent should not have interfered in the CSM matter and no deduction should ever have been made.

57. Applicant submits that, in effect what happened was that even though the FJ $5,000 was paid by Inder Lynch the Respondent then took it back unjustly by deduction from the CSM notified amount. The Respondent at paragraph 14 of the Form 23 Affidavit of B.A dated the 25th March 2009 states that the payment of FJ $5,000.00 was paid to the Applicant pursuant to clause 8.5 of the Matrimonial Agreement which is reflected by paragraph 3.5 of the Consent Order. The Respondent then goes on in paragraphs 15 and 16 of the same Form 23 Affidavit and acknowledges that the CSM and SSAT then credited the payment of this FJ $5,000.00 under payments for arrears of maintenance as per paragraph 3.3 of the Consent Order.

58. The Respondent, during Cross Examination testified that he did make the payment of the FJ $5,000.00 as per paragraph 3.5 of the Consent Order. He also confirmed that this FJ $5,000.00 was then taken by the CSM and SSAT as payment for maintenance arrears and therefore credited as a payment under paragraph 3.3 of the Consent Order. It was put to the Respondent whether or not the payments under 3.5 and 3.3 were two separate payments to which he affirmed.

59. Also, it is submitted by the Applicant that in this instance the payment of FJ$ 5,000.00 as per paragraph 3.5 only to be deducted and credited under paragraph 3.3 served to shift one sum of money around and cannot account for two separate payments. Furthermore the deduction of the FJ$5,000.00 from the payment under paragraph 3.3 and the credit of the same money as a payment under paragraph 3.3 means that the payment of the FJ $5,000.00 as per 3.5 is effectively still owing to the Applicant. The Applicant submits that the Respondent deems to disregard the ruling of the Fijian Magistrates Court of March 2006 and chose to rely on the decision of the SSAT which ruled in his favour. The Respondent purports that the findings of the SSAT supersedes the ruling of the Fijian Magistrates Court. This Court also of the same view and accept this line of argument by the Applicant lady for her favour.

60. As already discussed the Respondent then filed a Form 9 Application for final orders on the 26th March 2009 seeking cancellation of absconding warrant with affidavit in support of Bryan A. The Applicant then filed a Form 10 Response on the 16th April 2009 with an Affidavit in Support of T.H seeking payment of FJ $5,000.00 as a relief. This Form 10 was amended and filed again on 23rd September 2009 as previously referenced above. These proceedings lead to a Court Order that the Respondent deposits the sum of FJ $5,000.00 in “S.L” trust account as security under the absconding warrant so as to allow him to leave Fiji. At the hearing the Respondent testified to paying a "bond" so as to be allowed to leave and on cross examination stated that he did not believe it was as a result of the absconding warrant proceedings or the contempt proceedings.

61. On one hand the Respondent claims that the absconding warrant prevented him from leaving Fiji which caused him to lose wages and earnings as well as cost him added living expenses from having to stay in Fiji longer than he expected. The Respondent also claims the cost of his and his wife's airline tickets which he cancelled as he was unable to leave Fiji at the time. His wife is not a party to this action at all. On the other hand the Applicant submits that the contempt proceedings and absconding warrant were valid legal proceedings that she was entitled to pursue

as the Respondent neglected and / or failed to comply with the Ruling and Orders of the Magistrate Mr. John Semisi in his ruling delivered on the 23rd March 2006, thereby denying the Applicant justice in the matter and the proceeds of her litigation.

62. I agree with the argument of the Applicant that the Ruling of the Magistrate Mr. John Semisi dated 23rd March 2006 was never appealed and therefore still binds the Respondent. The Applicant further submits SSAT is not above the Federal Magistrates Court in Australia which has been renamed the Federal Circuit Court in 2013. It does not hold any binding power over the Federal Magistrates Court and therefore certainly cannot bind and / or overturn decisions of the Magistrates Court of Fiji, which the Respondent is basically trying to argue that it would.

63. It is also prudent to note that an order had been made in this matter by Magistrate Mr.Semisi on the 7th of July 2005 and ordered the matter was supposed to have been filed in Australian and New Zealand courts respectively under the Reciprocal Enforcement Proceeding Act. However, the file has not been served on the relevant Authorities to facilitate and affect the orders of the Court under the Act.

64. It is important to note that, the Applicant had relied on the Ruling delivered by the Magistrate Mr. John Semisi dated 23rd March 2006 with which the Respondent failed to establish that he complied on balance of probability. As a result the Applicant filed a Form 7 Application for Contempt on the 16th March 2009 and a Form 9 Application for final orders on the 18th March 2009 seeking absconding warrant with Affidavit in support of T.H when the Respondent visited the Fiji Islands and obtained the absconding warrant.

65. The court also wishes to address the position of the respondent. He stated that the children are above 18. But the Court of the view that it is not a reason for the Respondent not to comply with a Court Order.

66. I agree with the Applicant's argument that the Respondent did not specifically plead the losses he testified as to claiming nor the particulars of same which he describes in his Examination in Chief and when cross examined as to whether or not he had any evidence as to these losses to produce in Court the Respondent answered in the negative. I also consider the argument by the Applicant that the Respondent's wife was never subjected to the absconding warrant and was in no way prevented from leaving Fiji. She stayed of her own volition and all expenses amounting as a result of her extended stay in Fiji cannot be claimed against the Applicant. On cross examination the applicant refused to acknowledge that the contempt proceedings and absconding warrant were as a result of his failure to comply with the Order for payment of FJ $5,000.00 even though the paperwork filed for that absconding warrant and contempt proceedings suggests that it was and he was served with the same.

67. As a concluding remarks I am of the opinion that it is prudent to identify as to whether there would be any uncertainty for the notion of funtus officio.

68. The principle of **functus officio** has often been raised in this Court, and they were raised in both criminal and civil litigations.
The Blacks Law Dictionary defines the words as:-

..."having performed his or her duty; without further authority or legal competence because the duties or functions of the original commission have been fully accomplished..."

69. To determine whether a court or a tribunal is **functus officio** depend on the decision the Court or a tribunal deliver at the end of the day. If it is intended to be a final determination then the determinant authority becomes **functus officio** . Next, the effect it will have on the rights of the parties.

    It also interprets as follows: That;**"...there must have been something which puts as end to the case: there must be a final adjudication…."**

70. The position in Fiji on the issues in this case is guided by case laws. In **State v Prasad [1994] FJHC 111; Haa 0039d.93s (6 September 1994)**, Justice Pain stated "A Magistrate is **functus officio** when he has discharged all his judicial functions in a case. A final adjudication brings an end to the case. In criminal proceedings he cannot re-open a case after the defendant has been convicted and sentenced. Any alteration to that sentence can only be done by an appellate court on appeal or review."

71. As discussed above On the 27th of March 2009, the then Resident Magistrate Maika Nakora granted the following Orders in this matter after perusing the Form 9 Application of Mr. A filed on the 26th of March 2009 and hearing the lawyers for both parties. That "That the Absconding Warrant Order against B.EA be cancelled upon the production by B.EA of a Bank notification and/or satisfactory confirmation that the amount of FJ$5,000.00 (Five Thousand Dollars Fijian) has been transferred into the Trust Account of "S.L". The FJ$5000.00 is not to be disbursed by "S.L" **until further order of the Court."**

72. According to the above analysis this Court is not **functus officio** for the order dated 27th of March 2009, (Resident Magistrate Maika Nakora) because the judgment or order it gives is not final. Therefore I have jurisdiction to entertain the matter again without specific jurisdiction is conferred. Where there is no such jurisdiction conferred, the only recourse open to an aggrieved party is to appeal the decision complained of. Moreover, the matter has not reached final adjudication. Once a judgement is **perfected,** the court is ***functus officio*** and cannot revisit it, let alone, set it aside or appeal. At common law, a court may recall and rehear or review a case until the judgment is drawn up, passed and entered.

73. But what about the previous orders where the learned Magistrate had made an order judgement is dated 22 June 2005 and 23 March 2006? According to the above definition the orders are perfected. On the same breath, this court also notes that there was no order for a stay of execution which has been passed and entered by this court.

74. Therefore, I am of the view that neither I nor any other magistrate of equal jurisdiction (In particular Resident Magistrate Mr. Maika Nakora) has jurisdiction to vary the terms of such Ruling in particular Ruling/Order dated 22 June 2005 and 23 March 2006. The only means of obtaining any variation is to appeal to a higher tribunal. (High Court)

75. The court hold in favour of the Applicant and state the Order granted on Resident Magistrate Mr. John Semisi on the 22 June 2005 and 23 March 2006 is final as such this court cannot use its inherent jurisdiction in favour of the Respondent, by revisiting the Judgment.
76. Moreover there is no evidence in court that the respondent paid the FJ $5,000.00 in question to the Applicant as per paragraph 3.3 of the Consent Order delivered by the Resident Magistrate Mr. John Semisi on the 23 March 2006.

77. It is also prudent to note again that the Ruling dated 28th September 2012 failed to discuss the release of the five thousand held in the Shekinah Trust fund I noted "S.L" wrote letters seeking the matter to be listed in court (27 March 2015) but may not pursue with the same.

78. In conclusion, having considered the foregoing analysis, I am of the opinion that this FJ $5,000.00 in question was then taken by the CSM and SSAT as payment for maintenance arrears and credited as a payment under paragraph 3.3 of the Consent Order which ought to be a separate payment. Clause 3.3 for clarity. "The Respondent will pay to the Australian Child Support Agency whatever arrears owe as notified by CSA."

79. This means that the payment of the FJ $5,000.00 as per 3.5 is a separate payment to the Applicant. The Respondent opted to comply the decision of the SSAT which ruled in his favour over Fiji Court Ruling in 2006 or the Respondent was of the view that the findings of the SSAT supersedes the ruling of the Fijian Magistrates Court.

80. This Court also mindful as to why the learned Magistrate had granted an Order again on 23 March 2006. It is clear that there is an *additional* $5000.00 was not paid by then to the Applicant should the Respondent paid the $5000.00 on 04th August 2005 as described by him as to why then the learned Magistrate grant an order on 23 March 2006 (after 2005) while both the parties represented in Court?

81. This Court is satisfied on the balance of probabilities; The Applicant succeeds with its claim. This Court wish to conform the Ruling delivered on the 23rd of March 2006, pursuant to an application by the Applicant as follows: "Clause 8.5 of the parties Agreement dated 21st June 2005 obviously envisages an "**additional" payment of FJD$5, 000.00 to the arrears alluded to in Clause 8.3 of the said Agreement. The word "also" in Clause 8.5 clearly supports this view. This Court therefore orders that the Respondent must make the said additional payment of JD$5,000.00 to the Petitioner. I rule accordingly".**

NOW THEREFORE BE IT ORDERED BY THE COURT THAT:

82. That the FJD$5,000 that was deposited into the Trust Account of "S.L" as per the Orders of the Court on the 27th of March 2009 should now be released to the Applicant lady. Accordingly, The Trust Account of "S.L" is hereby ordered to pay $5000.00 to the Applicant T.H within 14 days of this Judgment.

83. Ordered accordingly.
30 days to appeal.

LAKSHIKA FERNANDO
RESIDENT MAGISTRATE

Delivered at Suva this 16th Day of September 2016