IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0024 of 2022
(Suva High Court Civil Action No. HBM 57 of 2022)

BETWEEN : **MILLEMARIN INVESTMENT LIMITED**

Appellant

A N D : **THE DIRECTOR OF PUBLIC PROSECUTIONS**

1st Respondent

: **SULEIMAN ABUSAIDOVICH KERIMOV**

2nd Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Almeida Guneratne, JA

Counsel : **Mr B.F.Haniff with Mr P. Suguturaga for the Appellant**
Mr C.T. Pryde (Director of Public Prosecutions)
with Ms M. Konrote for the 1st Respondent
No appearance for the 2nd Respondent.

Date of Hearing **18th May, 2022**

Date of Judgment : **27th May, 2022**

JUDGMENT OF THE COURT

[1] This is an appeal against the Judgment of the High Court dated 3rd May, 2022. By that Judgment, the Court allowed the registration of the order on the face of it, a seizure order for warrant issued by the District Court in Columbia. (vide: page 1570 of the Copy Record).

[2] At the outset, a preliminary issue that struck this Court is whether the High Court was conferred with jurisdiction to register the said order of the Columbian Court (of the USA) being on the face of it (page 1570 of the Copy Record), a seizure order/warrant and not a "*foreign restraining order*" as contemplated by Sections3 of the Mutual Assistance in Criminal Matters Act 1997 (hereinafter referred to as the MACMA).

What constitutes a foreign restraining order by that Section 3?

[3] It means, *"an order, made under the law of a foreign Country, restraining a person, or persons, from dealing with property, being an order made in respect of an offence against the law of that foreign Country."*

Initial reflections on the said Section

[4] We could not see in the order contained in page 1570 (supra) any offence as stated therein of whatever law against that foreign country (the USA) which purports to restrain a person or persons, from dealing with property, related to any offence of any law against such foreign country.

[5] If so, could the Courts of Fiji (as did the learned Judge) have allowed the registration of:

(a) a "*seizure order*" issued by a foreign Court in the absence of any evidence as to a "*serious offence*" or subjected to a warrant to seize property and being made liable

to forfeiture as contemplated in Section 34(5)(d) of the Proceeds of Crimes Act (1997) (PCA)?

(b) when the jurisdiction vested in the Court was to register "*a restraining Order*" issued by a foreign Court and not "*a seizure order*" as envisaged in Section 35 of the Proceeds of Crime Act (1997) (PCA)?

(c) however, could the "*seizure order*" have been regarded in substance as "*a foreign restraining order*"? (without evidential material before the High Court to have been satisfied there were reasonable grounds for suspecting that "*the property*" was "*tainted property*?" (as stated in Section 35(1) taken together with Section 35(1A) and (1B) of the PCA?)

(d) notwithstanding the above, the order given by the High Court being in consequence of an application made by the 1st Respondent to the present appeal (the DPP being authorized to do so by the Attorney General) on the basis of the MACMA, (responding to a request to make such application to render assistance) in the affidavit accompanying such application (*viz*: the affidavit deposed to by Nimisha Shankar found at pages 1551 – 1581 of Vol.3 of the Copy Record) was the Court obliged to register the US Court order?

(e) lastly, and following from (d) above, and having regard to the provisions of Section 4(1), (2) and (3) of the PAC which contemplate as to whether "*the property*" in issue that has been (i) restrained or forfeited to the State shall be the responsibility of the Attorney General and, (ii) that, the Attorney-General has responsibility for the control and management of the "*forfeited properties*" until it is disposed of?

[6] Those are the issues we extracted on the basis of the submissions and the relative positions taken by both Counsel.

[7] Viewing the matter in that perspective, we proceed to deal with this appeal in order to see whether the learned High Court Judge made any error in his judgment.

(i) The response of the High Court (i) the conclusion reached and (ii) the reasons adduced in arriving at that conclusion.

(ii) The grounds of appeal urged against the said Judgment by the Appellant.

[8] We shall first take the conclusion reached by the High Court Judge and then look at the reasons adduced by him in arriving at that conclusion.

Conclusion arrived at by the Judge – vide: paragraphs 48 and 49 of the High Court Judgment

> *"**CONCLUSION***
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> *48. Applicant had established the requirements contained in Section 31(2) of MACMA in order to exercise the power granted to this court to register the warrant in terms of Section 31(3) of MACMA, issued in rem against Amadea. This is an exercise of limited jurisdiction for urgent mutual assistance made in terms of UNCTOC for registration of a foreign restraining order. This is a preliminary step for a forfeiture order in US courts. The request was made under UNCTOC for mutual assistance and by application of MACMA. Applicant had satisfied the requirements under MACMA for registration of orders contained in the warrant annexed as AA2 to the affidavit in support.*
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> *49. The warrant issued by United States District Court for the District of Columbia in Case No 22-sZ-9 (in the Matter of Seizure of the Motor Yacht Amadea with international maritime organization number 1012531 is to be registered in terms of Section 33(3) of Mutual Assistance in Criminal Matters Act 1997. For avoidance of doubt once the aforesaid order is registered, it has the same enforceability as if it were a restraining order made 'in terms of Proceeds of Crime Act 1997 at the time of registration' in terms of Section 31 (6) of MACMA."*

[9] In reaching that conclusion (before this Court goes into the reasons which the learned Judge adduced) we felt it would be necessary to look at the factual content of the dispute which the learned Judge recorded which is reproduced below for ease of reference.

The factual content of the dispute as recorded by the learned Judge

"1. The Applicant is seeking this Court to register foreign warrant to seize property upon request to Competent Authority in Fiji. The request was made in accordance with the Mutual Assistance in Criminal Matters Act 1997. The property subject to the foreign order is Super yacht Amadea international maritime organization number 1012531 (Amadea).

2. Amadea is currently restrained from leaving Fiji pending determination of the registration of the foreign restraining order by way of interim order obtained ex parte for obvious reasons.

3. There is no application to vary or set aside this interim order and Defendant who is the registered owner is not challenging interim order restraining Amadea from leaving shores of Fiji until this application for registration of warrant is determined.

4. The second Respondent was joined as a party after counsel made a request to do so on the basis that Respondent should be the registered owner of Amadea and accordingly originating summons was amended and proceeded against second Respondent.

5. The warrant was against Amadea and this is a warrant issued in rem as against In personam. This originating summons sought orders in rem against Amadea. Accordingly, registered owner is referred to as Respondent in this judgment for convenience and there was no requirement to proceed against first Respondent.

6. Applicant is seeking to register the warrant issued by US District Court for the District to Columbia instituted in rem. This is an action filed against Amadea, and the warrant was issued against Amadea as a 'preliminary step' in US proceedings."

<u>The Relevant Legal Instruments the learned justice took note of</u>

[10] (a) The Mutual Assistance in Criminal Matters Act, 1997 (MACMA) which came into force on 01.06.1998.

(b) Subsequent to the MACMA Fiji on 19.09.2017 acceded to the United Nations Convention Against Transnational Organised Crime (UNCTOC) (subject to some reservation).

(c) In pursuance of Section 51 of the Constitution of Fiji which states that "*an international treaty or convention binds the State only after it has been approved in Parliament,*" UNCTOC was approved by Parliament.

(d) On 13th April, 2022 the United States District Court for the District of Columbia issued a warrant to seize "*Property*" subject to forfeiture (the '*Property*' being described as the Motor Yacht Amadea) (Vol.4 page 1570 of the Copy Record).

(e) Consequently, in terms of the UNCTOC the Director of Public Prosecutions (DPP and the 1st Respondent to this appeal) made a request for registration of the said seizure Order (SO) issued by the U.S. Court (marked AA1 being authorized to do so under Section 31(2) of the MACMA.

[11] We have earlier referred to the factual content that formed the backdrop to the present dispute.

[12] We now advert to the conclusion reached by the High Court (re-capped above) in the light of the reasons adduced in reaching the same, having given our minds to the written submissions tendered and the oral submissions made at the hearing before us, along with the grounds of appeal urged.

The gist of the Appellant's submissions

[13] Mr Haniff (the Appellant) submitted (in essence) that:

(a) The US Court order (at page 1570 of Vol.4) is "*a seizure order for forfeiture*" for which the High Court had no jurisdiction to register "*as a restraining order.*"

(b) Therefore, the Fijian Courts being courts of a sovereign nation cannot "*rubber stamp*" a foreign Court order.

[14] As against that, the DPP submitted that (a) the matter which originated in the US Courts must continue and end there, in as much as, the material placed on the basis of the order in question at page 1570, Vol. 4 of the Copy Record supported by affidavit are not matters the Fijian Courts could and ought to go into; (b) International principle on Comity of Nations demands that.

Discussion and Determination

[15] We saw merit in that contention in as much as should the Fijian Courts go into that, it would amount to an exercise in reviewing the said US Court Order.

[16] Indeed, that would reduce to a dead letter the mutual obligations contemplated by the legal instruments which the learned Judge took note of.

Principles of Interpretation relating to International Conventions/Treaties

[17] We thought it would be convenient at this point to look at the well established principles of interpretation on international conventions (treaties). These principles are succinctly discussed by **Bennion On Statutory Interpretation** (7th ed. Butterworths, 2017).

[18] Lord Denning MR stated the basic principle in **Salomon v. Customs and Excise Commissioners** as follows:

> *"In 1950 there was a convention between may of the European countries . . . I think we are entitled to look at it, because it is an instrument which is binding in international law: and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention, nor refer to it. But that does not matter. We can look at it."* [1952] AC 401 at 417.

[19] In the same case Lord Diplock said,

> *"Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see* ***Ellerman Lines v. Murray; White Star Line*** *and* ***US Mail Steamers Oceanic Steam Navigation Co Ltd v Comerford),*** *and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarify in the words used in the legislation, the terms of the treaty are relevant to enable the court to make its choice between the possible meanings of these words by applying this presumption."*
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> [1952 AC 401 at 426]

[20] If one looks at the underlined portion in Lord Denning's approach to interpretation of treaty Acts, the Fijian position is even stronger in that, Fiji, subsequent to the MACMA (1997), in pursuance of Section 51 of the Constitution, the UNCTOC was approved by Parliament.

[21] It was consequent to the events referred to above that, after the impugned order of the US District Court for the District Court of Columbia, the US Authorities sought assistance from the Fijian authorities for its registration leading up to the DPP (1st Respondent) making an application for registration of the order (contained in page 1570 of the Copy Record (supra)).

[22] Looking at the said sequence of events we have no doubt in our minds that, the comprehensive summary of the principles and key authorities applicable to the interpretation of treaties (conventions) given by Mummery J in **IRC v. Commerzbank AG** became applicable to the issue involved in this case.

[23] Mummery J said,

> *"The parties are agreed that the correct approach is that laid down by the House of Lords in* ***Fothergill v Monarch Airlines Ltd*** *[1981] AC 251 . . . that decision makes clear the approach which should be adopted by the court.*
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> *"(1) It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that 'consideration of the purpose of an enactment is always a legitimate part of the process of interpretation: per Lord Wilberforce (at 272) and Lord Scarman (at 294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at 285) and Lord Scarman (at 290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at 279).*
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> *(2) The process of interpretation should take account of the fact that –*
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> *"The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Limited [1978] AC 141 at 152], "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation": per Lord Diplock (at 281-282) and Lord Scarman (at 293)."*

[24] Finally, we still felt the need to look at the definition of "*a foreign restraining order*" contained in the MACMA which is:

"an order, made under the law of a foreign Country, restraining a person or persons dealing with property, being an order made in respect of an offence against the law of that foreign Country."

[25] Reading that section, we were persuaded to agree with the DPP's submissions that, although the US Order (at 1570 of the Copy Record) on the face of it was a "*seizure order subject to forfeiture*", nevertheless, in substance, it satisfied the definition of a "*foreign restraining order.*"

[26] Consequently, the request made in terms of Section 31 of the MACMA, for its enforcement (by the DPP) stood as an enforceable order in which context the High Court posed the question as follows:

"21. So the first issue is whether the warrant issued by US District Court for the District of Columbia annexed as AA2 can be considered as "enforcement of foreign restraining order" which is discussed later. If it cannot be considered the court can exercise its discretion so as to refuse the request for registration exercising its powers in terms of Section 31(3) of MACMA."

[27] Having posed the said question the learned judge noted thus:

"22. DPP had made this application by way of amended originating summons seeking an order,

"That a warrant to seize property subject to forfeiture be registered of the motor yacht Amadea with international Maritime Organization number 1012531".

23. The jurisdiction of this court is confined to registration of a foreign order under MACMA.

24. The procedure for the registration has not been spelt out in the legislation and registration of orders in terms of Section 31(3) of MACMA is not mandatory. It grants discretion to court, but this discretion cannot be expanded to inquiry as to original jurisdiction of court exercised in forfeiture or restraint order Proceeds of Crime Act 1997 as argued by Respondent.

25. Respondent's contention that enforceability attached to an order after registration of the same contained in Section 31(6) of MACMA, required

the court to consider this application in terms of Section 19B(1) of Proceeds of Crime Act 1997 is without merit.

26. *The enforceability after an order made under Section 31(3) of MACMA is not a ground to consider this application for registration of foreign restraining order as an exercise of original jurisdiction in terms of Section 19B(1) of Proceeds of Crime Act 1995.*

27. *By the same token, it is not mandatory for the court to register an foreign order and scope of that is to consider the factors stated in Section 31(2) of MACMA*

28. *The requirements in terms of Section 31 (2) of MACMA needs to considered in the exercise of power granted in terms of Section 31(3) of MACMA. These factors are defined in exclusive manner in Section 3 of MACMA that provides protection to rights. This is a limited scope."*

[28] Having given our minds to the foregoing discussion (which we adopt without demur), what was left for us to consider was the responsibility visiting upon the Attorney-General in consequence of Section 4 of the PAC (and other impacting provisions thereof).

[29] On the basis of our reasoning above, we leave the Attorney-General to take steps that may seem reasonable to him for it is our fervent view that this Court ought not to go into that matter. This Court's function as an Appellate Court was to see whether there was any error (misdirection and/or non-direction) in the High Court Judgment.

[30] We could not see any such error.

[31] However, we are unable to condone the order for costs made by the High Court given the fact that, interpretation and application of several legal instruments came in for consideration with no binding authoritative judicial precedent thereon, although certain precedents were cited by both parties.

[32] Accordingly, and further, for the same said reason, we are amenable to the Appellant's Counsel's application which he made in his closing submissions that, should this Court dismiss this appeal, opportunity be given to the Appellant to test the judgments of both

the High Court and this Court, so that, the Supreme Court (being the apex Court of the Country) would be in a position to lay down a binding precedent on the issues contained in the present dispute.

[33] This Court found that application (made in open Court by Appellant's Counsel) as being reasonable and one carrying jurisprudential propensity.

[34] Consequently, we make the following Orders.

Orders of Court:

1) *The appeal is dismissed.*

2) *The order made by the High Court for costs is set aside.*

3) *This judgment is not to take effect in regard to its implementation and/or its consequential impact until 7 days from notice of it to parties.*

4) *There shall be no costs in this appeal.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL