

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBA 09 of 2021

BETWEEN : **MARC WINSTON TJIN KONKOEN** and **MITCHELL MEDONA REDDY**

APPELLANTS

AND : **DORSAMI NAIDU**

RESPONDENT

Appearances: Mr. Viliame L. on instructions of Inter-Alia for the Appellants
Mr. Chand K. & Mr. D. S. Naidu for the Respondent
Date of Hearing: 18 May 2023
Date of Ruling: 02 June 2023

RULING

1. There is a judgement debt against Konkoen and Reddy in this case. The Judgement in question was entered by the Magistrates Court after a formal proof.
2. The background to this case might be stated briefly as follows:
 - (a) Konkoen and Reddy had retained Mr. Naidu for a certain criminal charges they were facing
 - (b) Mr. Naidu had rendered a Bill of Costs to Konkoen and Reddy in relation to the said retainer
 - (c) despite numerous demands, Konkoen and Reddy simply ignored Mr. Naidu
 - (d) Mr. Naidu then filed proceedings in the Magistrates Court pursuant to the said Bill of Costs
 - (e) formal proof was conducted when Konkoen and Reddy failed to file a Statement of Defence or appear in Court
 - (f) their counsel also did not bother to follow up with the Registry
3. Following formal proof, the Learned Magistrate, entered a ruling in favour of Mr. Naidu. Konkoen and Reddy then appealed the Magistrates decision to the High Court and the matter was placed before me.
4. It appeared that Konkoen and Reddy's solicitors had not filed their appeal papers on time. This was common ground. The point of contention between Counsel was whether or not the Learned Magistrate had jurisdiction to extend time. I did deliver a Ruling, the effect of which was to enable them to file Grounds of Appeal and Notice of Appeal out of time.

5. The question on appeal was simply - whether or not the Learned Magistrate was correct to have proceeded on formal proof and to then rule against Konkoen and Reddy – given that at all material times, the country was just reeling from the first bout of Covid-19 and its associated restrictions – and that these restrictions was a hindrance to counsel attending court and sending instructions from Suva. In the event, I did dismiss the appeal.
6. It is noteworthy that the reasonableness of the Bill of Costs in question was not an issue before me. The onus is on Konkoen and Reddy to establish that it was not reasonable. There was no firm indication before me that they would question it before me. In any event, it would appear that it was not open to them to place that before me – except - perhaps – as a ground of appeal to set aside the ruling and redirect the matter for trial - and/or stay.
7. I also do not know whether or not Konkoen and Reddy had tried to apply to the Magistrates Court to set aside the formal proof ruling.
8. In any event, after I delivered my ruling and dismissed the appeal, Mr. Naidu then filed an ex-parte Notice of Motion on **19 April 2023** seeking Orders that Konkoen deliver his passport and travel documents unless he can provide free and unencumbered assets to the value of \$10,135.00 and that a Stop Departure Order be placed against him.
9. The application is stated to be made pursuant to Orders 8 and 29 of the High Court Rules 1988 and also under the “**inherent jurisdiction**” of this Court.
10. On 24 April 2023, Konkoen and Reddy filed a Notice of Motion for Stay of Execution supported by an Affidavit of Konkoen sworn on 24 April 2023. Mr. Naidu did file an affidavit in opposition of the stay application on 28 April 2023.
11. The matter was called before me for hearing on 18 May 2023 after which I then adjourned the matter for Ruling on 01 June 2023.
12. However, on 30 May 2023, Konkoen and Reddy filed a Summons to Strike Out the Notice of Motion of **19 April 2023**. I directed the Registry to issue this returnable 01 June 2023.
13. On 01 June 2023, I heard counsel on Konkoen’s 30 May 2023 Summons.
14. The following questions were raised in the hearing of the said Summons:
 - (a) after dismissing the appeal from the Magistrates Court, is this Court functus?
 - (b) if the Court is indeed functus, does this Court still have any power to deal with the Respondents application to secure its judgement as it did in the 19 April 2023 Summons.
 - (c) even if the answer to the above is “yes” – can the Court Order that the Applicant’s foreign passport be retained?
15. For point (c) above, I note that Konkoen’s Summons does not say anything about challenging the Court’s purported power to order the retention of Konkoen’s passport. I do note that in the drug-

related criminal matter which Konkoen was facing, the Criminal Court had ordered that Konkoen deliver up his passport to be kept in the Registry. However, as it turned out, Konkoen was acquitted after a nolle was filed by the Director of Public Prosecutions. It was at that point when Mr. Naidu applied for an Order that the Passport be not released.

16. Konkoen's argument is that the passport in question is the property of the issuing authority (Konkoen's country of origin) and that no one has any authority to hold it – not even this Court or the Criminal Court. He submits that the Passport was only handed up as security in the criminal proceedings upon his (Konkoen's consent). Notably, he does not explain what authority he had to consent to the surrender his Passport to this Court – if the Passport is not his to surrender?
17. I agree that an appellate Court is *functus officio* after it has delivered a ruling on the substantive appeal. The doctrine of *functus officio* is ultimately grounded on the policy of finality. Thus, once the court has made a decision, the court is prevented from revisiting or reopening the decision.
18. However, an application to enforce the Ruling in the Court below – strictly – is not about reopening any issue decided upon in litigation. Rather, it is about enforcing the Order from the Court below which the High Court, sitting in its appellate jurisdiction, has just affirmed. Arguably – although I make no conclusive legal statement on this because of the lack of any detailed submission on this – the High Court sitting as an appellate Court does have residual powers to entertain such an application in special cases of some urgency.
19. There was a sense of urgency with which the 19 April 2023 application was made. Konkoen had just been acquitted – he had a foreign passport – and he had a “money judgement” ruling against him in the Magistrates Court.
20. It was in that sense of urgency with which I granted the Order that his Passport be not released and that he be given an opportunity to come to Court to show cause why a Stop Departure Order should not be granted against him as follows:

..the defendant is to forthwith deliver his passport, passenger ticket and other travel documents to the High Court in Lautoka and furthermore that the defendant is **HEREBY DIRECTED TO** attend Court on Monday the 24th of March, 2023 at 10.30 a.m. to show cause why a **STOP DEPARTURE ORDER** should not be granted against him and/or alternatively to show caused why he should not be ordered to post security in the sum of \$10,135 into the Chief Registrar's Account.
21. I am aware of certain judgements in India which have held that the Courts hearing Criminal cases cannot order the surrender of a passport as a condition for granting bail as the power to impound a passport lies solely with the issuing authority.
22. Those decisions however, are made in reference to the relevant Passport Act in the Indian States involved. Konkoen's solicitors have not made any reference to Fiji's Passport Act. Nor have they bothered to make any detailed submission on the area of “international law” which Konkoen's lawyers allude to rather superficially.
23. Perhaps this is a question for another day before another court. All I am inclined to say at this point is that – pursuant to the Order I made above (paragraph 21 above) - and on the following oral

undertaking given in Court by Mr. Arun – of which an audio recording is available – should anyone raise any question about it - I am satisfied that Konkoen has posted sufficient security in the Fiji Court of Appeal and also with InterAlia’s Trust Account – to warrant the lifting of the Stop Departure Order and the return of Konkoen’s passport to him.

24. For the record, Mr. Arun did convey to Court the following undertaking from Ms Ali:
- (a) that Konkoen has already posted \$10,000 in the Fiji Court of Appeal based on the representation by Mr. Naidu’s agent that the amount is sufficient for the purposes of the Plaintiff’s letter dated 01 May 2023.
 - (b) based on that posting, it was understood that the plaintiff will withdraw his application of 19 April 2023.
 - (c) that Konkoen has also posted the sum of \$10,000 into InterAlia’s Trust Account – and that a portion of that is allocated for Inter-Alia’s forecasted fees (estimated to be below \$5,000) and the balance will be applied towards settlement of Mr. Naidu’s Bill of Sale

ORDERS

1. The High Court Registry in Lautoka is to forthwith release Konkoen’s Passport to him.
2. Any Stop Departure Order granted against Konkoen is hereby lifted with immediate effect.
3. No Order as to Costs.



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Anare Tuilevuka
JUDGE
Lautoka

2nd June 2023