

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 77 of 1984

Between:

K.R. LATCHAN BROTHERS LTD. Appellant

- and -

NAUSORI DAILY TRANSPORT LTD.  
AND TRANSPORT CONTROL BOARD Respondents

G.P. Shankar for the Appellant  
S.M. Koya for the Respondents

Date of Hearing : 19th March, 1985.

Delivery of Judgment : 22nd March, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

On the 29th November, 1983, the Transport Control Board purported to delete certain services from Road Service Licence No. 12/7/20, of which Nausori Daily Transport Limited (Nausori) was the beneficial holder, and grant those services to K.R. Latchan Brothers Limited (Latchans). On the 7th December, 1983, Kermode J. granted Nausori leave to apply for judicial review of the Board's decision and at the same time granted interim injunctions restraining the Board from implementing its decision, and Latchans from operating any routes or services formerly covered by licence 12/7/20. Those orders were made

ex parte, the application for interim injunctions being incorporated in the application for judicial review. In April, 1984, Latchans applied to have the interim injunction against it set aside but for some reason, which was not disclosed to us, that application was not dealt with until the 3rd August, when Kearsley J. dismissed it. We now have before us an appeal against Kearsley J's decision. The Board took no part in the appeal being content to abide the Court's decision.

Mr. Shankar's first submission was that there was nothing in the record before the Court which justified the original grant of the injunction against Latchans.

Paragraphs 4 and 18 of the Statement filed in support of leave pursuant to Order 53 r.3(2) read :-

"4. THAT by reason of the decision made by the Transport Control Board (the Respondent) the Applicant will suffer great financial loss. The deletion of its services between Suva to Bau Landing and return, Suva to Dravo Village and return and Suva to Nausori and return (and referred to under (a) to (f) in paragraph 3 hereof) from the said Road Service Licence by the Transport Control Board on the 29th November, 1983 as hereinafter mentioned, will mean a financial disaster for the Applicant. The remainder of the services shown in the said Road Service Licence and which have not been deleted by the Transport Control Board does not produce sufficient income so as to enable the Applicant to remain a viable commercial entity. The Applicant therefore, has sufficient interest to make an application for leave to apply for judicial review in these proceedings.

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18. THAT the grounds upon which the relief for Interim Injunction is sought is that unless the same is granted, the Applicant will suffer grave and irreparable harm leading to its liquidation and further it is in the wider interest of justice that subject to undertaking as to damages (which the Applicant is agreeable to give through Counsel) status quo be maintained. By granting an Interim Injunction, no financial or any other harm would be caused to the public or the Transport Control Board or to K.R. Latchan Brothers Limited."

Mr. Shankar's point, and it is certainly a fine one, was that paragraph 4 by its terms related solely to the judicial review application; and the contents of paragraph 18, which does relate to the application for an injunction, have not been confirmed as true and correct in the supporting affidavit of Nausori's Managing Director Mr. V.B. Lal. We see nothing in that point. The paragraphs in the Statement that are confirmed by the affidavit of Mr. Lal allege bias on the part of members of the Board in granting part of Nausori's licence to Latchans, and that it otherwise acted in breach of the rules of natural justice and contrary to express provisions of the Traffic Act, with the result that Nausori lost a substantial part of the business it previously enjoyed. It hardly requires confirmation by affidavit that if Latchans is allowed to operate under the licence granted, Nausori would suffer substantial loss. The circumstances cry out for relief by injunction.

Mr. Shankar's next submission concerned the allegation in the Statement "that at all material times the Applicant (Nausori) was the holder of a Road Service Licence No. 12/7/20 ...."

It is well established that it is the duty of one seeking an injunction ex parte to bring to the notice of the Court all facts material to the determination of his right to the injunction. If he does not put every material fact before the Court the injunction will be refused even though there is evidence enough to sustain one.

Mr. Shankar submitted that the passage referred to was untrue and failed to reveal the real position, in that Nausori is not the "holder" of licence 12/7/20. It is common ground that in fact the licence is held by the Mr. Lal already referred to as Trustee for Nausori. Nausori is certainly the "beneficial holder" of the licence, but in any event there was no failure to disclose material facts because the trustee relationship is referred to in exhibits annexed to Mr. Lal's affidavit; and furthermore the Board, aware of the relationship, dealt with the licence as though Nausori was "the holder". We therefore reject Mr. Shankar's second submission.

He then submitted that this was a case where Latchans should have been allowed the benefit of the licence granted it pending determination of the review proceedings. On this submission he relied on A.J. Burr Ltd. v. Blenheim Borough Council [1908] 2 N.Z.L.R. 1. That was a case where the Council sought to close down a butchers shop on the ground that the town planning consent it had given to its establishment as a non-conforming use 18 years earlier was invalid. The case has nothing to do with injunctions or their discharge and is no help whatsoever. There may be circumstances where justice would require an activity to continue pending determination of a review, particularly where it could not be recommenced once restrained, but we

do not see this as such a case. Latchans has not been prevented from engaging in a pre-existing profitable enterprise, as would Nausori if Latchans was not restrained.

Furthermore, if Latchans had been allowed to operate, and Nausori succeeds on the review proceedings, so that the licence issue comes before the Board for reconsideration Latchans could point to its years of successful operation as counting in its favour.

Mr. Shankar gave an undertaking that Latchans would not rely on past performance if and when the Board reconsiders the matter, but it seems to us that it would be a circumstance that could not be ignored whether specific reference was made to it or not.

It is also relevant that Kearsley J. has now completed the hearing of the substantive proceedings and his judgment is awaited. If Latchans is now permitted to take over the disputed routes there is the possibility that Kearsley J's judgment may require that they revert to Nausori in the near future with the possibility of some disruption of the service, which would not be in the public interest.

Although we propose to dismiss this appeal we recognise that Latchans is justified in holding a very real sense of grievance at the delays which have taken place in bringing this matter to a conclusion. We agree with Mr. Shankar that it would have been preferable had the interim injunction been for a term certain when a more urgent approach by all concerned may have resulted.

The appeal is dismissed with costs to Nausori  
as taxed.

  
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Vice President

  
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Judge of Appeal

  
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Judge of Appeal