IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. 11 OF 1989

Between:

PUBLIC SERVICE COMMISSION Appellant

- and -

MANUNIVAVALAGI DALITUICAMA KOROVULAVULA Respondent

Mr. Nand and Ms. Manuel for the Appellant
Mr. G.P. Shankar for the Respondent

Dates of Hearing: 15 August, 9 November, 1989, 9 March, 1990
Delivery of Judgment: 23 March, 1990

JUDGMENT OF THE COURT

This is an appeal by the Public Service Commission (hereinafter referred to as "the Commission") from the Ruling in the Court below made on 20 January, 1989 in proceedings for judicial review brought by the respondent against the Commission for wrongful and unlawful dismissal. Under the Ruling the Commission was required to produce to the Court for the Court's inspection a letter written to the Commission by the Permanent Secretary to the Minister for Communications, Works and Transport.

Objection on behalf of the Commission was taken in the Court below to the production of the letter but this was overruled and hence the appeal to this Court. The grounds of appeal are as follows:-

> *"1. That the learned Judge erred in that he did not consider whether the said document falls into a class of documents which are privileged from inspection and production.*

2. That the learned Judge erred in law in that he did not consider the criteria for ordering production and inspection of documents as set out in Order 24 rule 13 of the High Court Rules 1988 at all, or in the light of the judgment of the House of Lords in Air Canada v. Secretary of State for Trade (No.2) 1983 i ALL ER 910.

3. That the learned Judge erred in law in that he did not consider the decision of the House of Lords in Air Canada v Secretary of State for Trade (ante).

4. That the learned Judge erred in law and in fact in that there was no evidence on which the learned judge could find that an order for inspection of the said document was necessary, either for disposing fairly of the cause or matter, or for saving costs.

5. That the learned Judge erred in law and in fact in outright rejecting the Certificate dated 15th November 1988 given by the Minister for Communications Works and Transport."

For a proper understanding of the conclusions reached by this Court in the appeal it is necessary to set out a chronology of the main events in this case.

On 18 August, 1987 respondent was appointed on contract for 2 years to be the Controller of Road Transport in the Ministry of Communications, Works and Transport. This appointment was made by the Commission on behalf of Government.

As Controller of Road Transport respondent also served as Principal Licensing Authority. This is a statutory appointment by the Minister responsible for transport pursuant to Section 5(1) of the Traffic Act which states:

"5.-(1) The Minister may appoint a Principal Licensing Authority who shall be charged with the licensing of motor vehicles and drivers and matters incidental thereto".

Section 5(5) which is also apposite provides as follows"-

"5.-(5) In the exercise of its powers, duties and functions under this Act, the Principal Licensing Authority shall act in accordance with general or special directions given to it by the Minister."

It appears that from December, 1987 respondent and the Minister for Communications, Works and Transport (hereinafter referred to as "the Minister") were seriously at loggerheads with regard to decisional matters affecting the licensing of vehicles and motorists.

On 8 February, 1988 respondent's appointment as Principal Licensing Authority was terminated in a letter written to him by the Minister's Permanent Secretary.

On 24th March, 1988 respondent's contractual appointment as Controller of Road Transport was terminated by the Commission.

On 22 April, 1988 counsel for respondent sought and was granted leave under Order 53 rule 3 to apply for judicial review of the decision of the Commission for terminating respondent's appointment as Controller of Road Transport. A Statement in support of judicial review proceedings in this matter was filed of which paragraphs 3, 4 and 5 read as follows:-

> *"3. The relief sought by the applicant is an application for Judicial Review:-*
>
> *(a) An order of certiorari to remove into the High Court for the purpose of its being quashed a order or decision of the Public Service Commission whereby it summarily dismissed the applicant as Controller of Road Transport;*
>
> *(b) A declaration that the summary dismissal of the applicant as Controller of Road Transport by the Public Service Commission is wrong, unlawful, ineffective, and in breach of the principles of natural justice;*
>
> *(c) Damages;*
>
> *(d) Costs.*

4. Alternatively that this matter do continue as a private action for the reliefs prayed in paragraph 3(b)(c) and (d) hereof.

5. The grounds on which the reliefs are sought are:-

(a) That the Public Service Commission was wrong in fact and in law in summarily dismissing the applicant without giving him details of the reason for such dismissal, and/or without giving him details and particulars of charges and/or allegations made against him, and in so doing it failed to give the applicant opportunity to answer or explain the matters alleged against him;

(b) That the applicant was entitled to be informed of the details of charges or allegations made against him, and was also entitled to be provided with adequate or reasonable opportunity to explain, contradict or doing such allegations or charges against him. He has been completely deprived of those opportunities available to him under the broad principles of natural justice;

(c) The decision or order of the Public Service Commission to summarily dismiss the applicant in the absence of misconduct, incompetence, or failure to discharge his duties lawfully is unfair, wrong, and unreasonable."

On 6 May, 1988 having obtained the necessary leave counsel for respondent filed under Order 53 rule 5(1) an originating motion seeking judicial review, the contents of which are as follows:-

"Take notice that this Honourable Court will be moved before a Judge at the High Court, Government Buildings, Suva on the 19th day of May, 1988 at the hour of 9.00 o'clock in the fore noon or so soon thereafter as Counsel can be heard by the Counsel for the Applicant for an ORDER of Certiorari under the Order 53 of the High Court Rules 1988 that decisions or order of the Public Service Commission to summarily dismiss the applicant as Controller of Road Transport effective from 24th March, 1988, be removed in this Court for the purpose the same be quashed AND for a declaration and for damages and costs, and/or for other relief as set-forth in the Statement filed herein pursuant to Order 53 rule 3 of the High Court Rules 1988 (a copy whereof is annexed hereto) AND take notice that the applicant will use in evidence an affidavit sworn by him and filed and served herewith."

Order 53 rule 5(2) which may also be noted provides as follows:-

> *"5.-(2) The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a court and the object of the application is either to compel the court or an officer of the court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the court officer or registrar of the court and, where any objection to the conduct of the judge is to be made, on the judge."*

On 22 July, 1988 Summons for Directions was filed by counsel for respondent indicating that for all intents and purposes the application for judicial review was ready for hearing.

However, before a hearing was set down, counsel for respondent on 19 October, 1988 filed a summons and this was heard on 3 November, 1988 which in a procedural sense opened up Pandora's box. The summons reads as follows:-

> *"1.(a) That the applicant do have leave to amend his statement herein to seek additional relief on the additional grounds setforth hereunder:*
>
> *1. An order of certiorari to remove into the High Court for the purpose of its being quashed an order or decision of the Minister for Communication, Works and Transport whereby he wrongfully terminated the applicant's appointment as Principal Licensing Authority.*
>
> *2. For a declaration that the purported termination of the applicant's appointment as Controller of Road Transport by the Minister for Communication, Works and Transport is null and void, of no force or effect in that it was done wrongfully and in breach of the principles of natural justice.*

3. The grounds on which the reliefs are sought:

1. That the Minister for Communication, Works and Transport failed to exercise the principles of natural justice in that no opportunity was given to the applicant of being heard nor substance of any charge, complaint or otherwise allegation made known to him before his termination and/or removal from the office of Principal Licensing Authority.

2. That the Minister acted wrongfully, unreasonably, and in breach of principles of natural justice, and took extraneous matters into consideration, and his acts, and has not exercised his powers properly or correctly.

3. That the Respondent Public Service Commission do supply to the applicant all copies of all submissions, reports, complaints, or recommendations made by the Minister for Communication, Works and Transport or the Permanent Secretary or other officers of this Ministry to the Public Service Commission or to the Public Service Commission or to its Secretary within 7 days from the date of Order."

In the circumstances this Court feels incumbent to make a number of observations with regard to the amendments to respondent's Statement sought and agreed to by counsel for the Commission.

Order 20 rule 7(1) sets out the rationale for seeking amendments to documents in proceedings. It provides as follows:-

"7.-(1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

We do not think the amendments in question set out to achieve the purpose for which amendments should be allowed under Order 20 rule 7(1) or under Order 53 rule 6(2) for that matter.

The amendments sought were no doubt designed to bring in the Minister as a party to answer for his action in terminating respondent's appointment as Principal Licensing Authority. This raises a distinct and quite separate judicial review matter which appears to be well out of time, given the 3 months limitation period.

The application before the Court below primarily concerned the termination by the Commission of respondent's appointment as the Controller of Road Transport which is a salaried post in contradistinction to the post of Principal Licensing Authority, a statutory appointment under the Traffic Act which for all we know carries no additional salary.

The purported amendments to join the Minister as a party in judicial review proceedings against the Commission are therefore clearly misconceived and should not have been allowed.

Three grounds were purportedly put forward to support the judicial review proceedings against the Minister and these may be summarised as follows:-

(i) breaches of natural justice.

(ii) taking extraneous matters into consideration and acting unreasonably.

(iii) Most oddly under this head (grounds for relief) order is sought that the Commission supply multifarious assorted documents in correspondence between the Minister and the Commission regarding the respondent.

The last item (iii) is clearly an ill-conceived and inept attempt to circumvent the proper procedure for discovery of documents.

As an issue, discovery of documents should have been properly raised in accordance with the Rules of Court and not done as a belated afterthought in a general application to amend the respondent's Statement. Discovery of documents should have been objected to by counsel for the Commission at this stage of the proceedings so that it may be struck out in the Court below as being improperly made.

It is always a bounden duty of counsel in the interests of the proper administration of justice to ensure that proceedings in Court are carried out in proper manner and form as required by the Rules of Court and envisaged by our system of adversarial trial.

With regard to the hearing of judicial review proceedings against the Commission which have been greatly delayed unnecessarily by the parties themselves, it is not clear whether the Minister is a party to those proceedings as being a person directly affected within the intendment of Order 53 rule 5(2). However, if he is deemed to be a person directly affected, then he should have been served with the motion for judicial review with all the papers in support thereof to enable the Minister to file such affidavits as he may think necessary in reply to the allegations made against him in respondent's affidavits.

Given the unfortunate course which the judicial review proceedings against the Commission have taken in relation to discovery of documents and which has given rise to this appeal, we find ourselves strongly minded to direct that discovery of documents be struck out.

However, in deference to the work that has been put in by all concerned we will address ourselves to the subject matter of the appeal.

From the nature of the submissions in this case it is unnecessary for this Court to dwell on the grounds of appeal separately but to treat them as raising general principles of law.

The Minister has filed a Certificate claiming State immunity from disclosure and production for inspection by the Court of a letter dated 9 March, 1988 written by one R. Naidu, Acting Permanent Secretary for Works and Transport to the Secretary, Public Service Commission.

The Certificate sets out its main contentions for immunity in these words:-

> *"(a) Although it is conceded that the document is relevant to the present proceedings, it is, in my view, within a class of documents such that it would be injurious to the public interest to disclose or to produce for inspection or to have adduced in evidence; and*
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> *(b) The document falls within a class of documents relating to the appointment, transfer and dismissal of senior government officials. It relates to a post of major importance to the government service. Staffing of such posts is discussed and decided upon at the highest government levels. The document is thus a communication between very high level government officials commenting on staff policy at a senior level. Moreover, it records the views of a Minister and his Permanent Secretary and cannot properly be described as being routine."*

In relation to discovery of documents, particularly in relation to so-called immunity documents, we think the question necessarily turns on the concept of due administration of justice.

In this regard we adopt with respect the statement of Lord Denning M.R. in the Court of Appeal in *Air Canada v. Secretary of State (No.2) [1983] 1 All. E.R. 161* where at page 181 he said:-

> *"The 'due administration of justice' does not always depend on eliciting the truth. It often depends on the burden of proof. Many times it requires the complainant to prove his case without any discovery from the other side.*
>
> *Where a man is charged with a crime, no matter how minor it may be, the prosecution must prove the case against him without any disclosure from him of any documents that he has. When a public authority is accused of any abuse or misuse of its power, or any non-performance of its public duties (in proceedings for mandamus or certiorari or under RSC Ord 53), the accuser must make out his case without the help of any discovery save in most exceptional cases. No one has ever doubted the 'justice' of those proceedings. Now let us take the same accusation against a public authority but made in an action for a declaration. Does this different mode of procedure alter the 'justice' of the case? Ought not the rule of discovery to be the same whichever procedure is adopted? Then take legal professional privilege. A defendant may have made the most self-revealing statements to his lawyer. He may have given his whole case away to him. But 'justice' demands that this should not be disclosed to the other side. If the plaintiff fails to prove his case, for want of any admission by the defendant, no injustice is done to him. Even though the truth may not have been ascertained, no injustice is done. In these cases all that 'justice' requires is that there should be a fair determination of the case whatever the real truth may be. Likewise, when a plaintiff alleges that the defendant has done him some wrong, but has no evidence whatever to support it, he seeks to obtain it by making a 'fishing expedition'. He asks to see all the documents of the other side so as to see if he can get some evidence out of them. The court invariably refuses. It refuses because 'justice' requires that he should have some material to go on before he goes a-fishing.*
>
> *So I hold that when we speak of the 'due administration of justice' this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, the party must prove his case without any help from the other side. He must do it without discovery and without putting him into the box to answer questions."*

Similar sentiments were echoed in the same case in the House of Lords which is the highest level of judicial authority in the United Kingdom which in our Courts is of great persuasive authority.

At page 916 Lord Fraser stated as follows:

> *"It follows in my opinion that a party who seeks to compel his opponent, or an independent person, to disclose information must show that the information is likely to help his own case. It would be illogical to apply a different rule at the stage of inspection from that which applies at the stage of production. After all, the purpose of inspection by the court in many cases, including the present, would be to let the court see whether there is material in favour of disclosure which should be put in the scales to weigh against the material in favour of immunity. Inspection is with a view to the possibility of ordering production, and in my opinion inspection ought not to be ordered unless the court is persuaded that inspection is likely to satisfy it that it ought to take the further step of ordering production.*
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> *A great variety of expressions have been used in the reported cases to explain the considerations that ought to influence judges in deciding whether to order inspection. In Conway v Rimmer [1968] 1 All ER 874 at 888, [1968] AC 910 at 953 Lord Reid said:*
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> > *'If [the judge] decides that on balance the documents ought probably to be produced, I think that it would generally be best that he should see them before ordering production, and if he thinks that the Minister's reasons are not clearly expressed, he will have to see the documents before ordering production.'"*

And again at page 917:

> *The weight of the public interest against disclosure will vary according to the nature of the particular documents in question; for example, it will in general be stronger where the documents are Cabinet papers than when they are at a lower level. The weight of the public interest in favour of disclosure will vary even more widely, because it depends on the probable evidential value to the party seeking disclosure of the particular documents, in almost infinitely variable circumstances of individual cases. The most that*

can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be 'deprived of the means of ..... proper presentation' of his case."

"When the claim is a 'class' claim judges will often not be well qualified to estimate its strength, because they may not be fully aware of the importance of the class of documents to the public administration as a whole. Moreover, whether the claim is a 'class' claim or a 'contents' claim, the court will have to make its decision on whether to order production, after having inspected the documents privately, without having the assistance of argument from counsel. It should therefore, in my opinion, not be encouraged to 'take a peep' just on the off chance of finding something useful. It should inspect documents only where it has definite grounds for expecting to find material of real importance to the party seeking disclosure."

Lord Wilberforce at page 919 had this to say:

"On this point I agree with the Court of Appeal. In a contest purely between one litigant and another, such as the present, the task of the court is to do, and be seen to be doing, justice between the parties, a duty reflected by the word 'fairly' in the rule. There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter; yet, if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done. It is in aid of justice in this sense that discovery may be ordered, and it is so ordered on the application of one of the parties who must make out his case for it. If he is not able to do so, that is an end of the matter. There is no independent power in the court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance."

The question was approached from a slightly different perspective by Lord Edmund-Davies at page 921 as follows:

> *"The narrow issues presently calling for decision are thus set out in the appellants' printed case:*
>
> > *'(i) The circumstances in which the court should examine documents privately before deciding whether to order their production; and in particular (ii) whether the party seeking such examination discharges the burden of showing that documents are necessary for disposing fairly of the cause by showing that they are likely to give the court substantial assistance in determining the issues; or whether he must go further and show that they are likely to assist his own case.'*
>
> *My Lords, I proceed to state the obvious. Under our Supreme Court practice, discovery of documents between parties to an action with pleadings (as in the present case) is restricted to documents 'relating to matters in question in the action' (RSC Ord 24, r 1(1), and no order for their inspection by the other party or to the court may be made 'unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs' (Ord 24, r 13(1))). It is common sense that the litigant seeking an order for discovery is interested, not in abstract justice, but in gaining support for the case he is presenting, and the sole task of the court is to decide whether he should get it. Applying that test, any document which, it is reasonable to suppose, contains information which <u>may</u> enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences, must be disclosed."*

The respondent's case in the judicial review proceedings against the Commission hinges on two legal contentions:

(1) That respondent was denied natural justice in circumstances where he thought he had a legitimate expectation to be given an opportunity to be heard in his own behalf by the Commission before considering whether his dismissal would be justified; and

(2) That respondent's dismissal by the Commission was unreasonable and unfair in the absence of misconduct, incompetence or failure to discharge his duties lawfully as to amount to an abuse of power.

On those contentions it was for respondent to satisfy the Court that letter in question would either "advance his own case or damage that of his adversary."

It is beyond question that since December, 1987 respondent and the Minister were seriously at loggerheads over decisional matters affecting the licensing of vehicles and motorists. Their working relationship apparently deteriorated so much as to become impossible. This is a classic case of "an irresistible force meeting an immovable object" when something had to give. In this case the powers that be decided that it would be the respondent who should move.

From the nature of this case it does not appear to us that the production of the letter would help advance the case before the Court one way or the other. In other words, it has not been demonstrated that the production of the letter is essential for the doing of justice between the parties. All the material facts necessary for a proper adjudication on the merits of the case have been canvassed in the affidavits filed and others may be filed as necessary.

The onus is on the respondent to satisfy the Court that the production of the letter was for the due administration of justice necessary given the whole circumstances of the case. Only when respondent has discharged this onus to the satisfaction of the Court may production of the letter lawfully be ordered. In the words of Lord Wilberforce:

> *"There is no independent power in the Court to say that, nevertheless, it would like to inspect the documents, with a view to possible production, for its own assistance."*

As was also succinctly explained by Lord Fraser:

"In my opinion inspection ought not to be ordered unless the Court is persuaded that inspection is likely to satisfy it that it ought to take the further step of ordering production.

.....It should inspect documents only where it has definite grounds for expecting to find material of real importance to the party seeking disclosure."

It appears to us that the learned trial Judge had not directed his mind to the legal principles that should first be decided on questions of inspection and/or production of documents in the instant case.

That being so, it is not necessary for us to consider whether the letter in question falls into a class of documents which is privileged from inspection and production.

All in all we are satisfied that the learned trial Judge's order for production of the letter for his inspection cannot under the circumstances of this case be sustained in law.

Accordingly the appeal is allowed and the order for production of the letter is set aside. There will be no order as to costs.

.....
(Sir Timoci Tuivaga)
President, Fiji Court of Appeal

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(Sir Ronald Kermode)
Justice of Appeal

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(Sir Moti Tikaram)
Justice of Appeal