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FIJI COURT OF APPEAL

IN SUVA

CIVIL JURISDICTION

CIVIL APPEAL NO 24 OF 1991

BETWEEN: SUNBEAM TRANSPORT LIMITED

Appellant

AND: TRANSPORT CONTROL BOARD

First Respondent

AND: DHARMENDRA PRASAD ( s/o Devi Prasad)

Second Respondent

AND: SUMER SINGH ( s/o Mahadeo ) t/a VATUKOULA EXPRESS  
SERVICE

Third Respondent

Mr S. M. Koya for the Appellant

Mr. R. Matebalavu for the First Respondent

No Appearance for the Second and Third Respondents

Date of hearing : 19th November 1992

Date of delivery of judgement : 11th November 1993

**Kapi JA.**

On the 8th July 1981, the Second Respondent was granted a road service licence, RSL 12/9/46 to operate bus services for the route Vatukoula-Suva and Suva-Vatukoula via King's Road. This licence expired on the 8th July 1986. The Second Respondent applied for a renewal of the licence. After hearing all the parties, the Board refused the application to renew the licence on the 9th October 1986. The Appellant who was also an applicant to the licence was also refused.

The Second Respondent made a further application and was refused and this resulted in a judicial review proceedings in the High Court. It is not necessary to set out the details of these proceedings as they are not relevant to the present appeal.

On the 8th October, 1988, the Second Respondent made a fresh application for a licence for the route in question under s 64 of the Act. The First Respondent did not take any action under s 65 of the Act. Instead, the Board granted a temporary licence to the Second Respondent, RSL 12/9/98 on the 1st November 1988 under s 74 of the Act. The judicial review proceedings in the High Court by the Appellant challenged the validity of the decision by the First Respondent. The Appellant sought the following relevant relief from the High Court:

- (a) An order for certiorari to quash the decision made by the First Respondent on the grant of RSL 12/9/98 under s 74 of the Traffic Act Cap. 176 (hereinafter referred to as the Act).
- (b) A declaration that the First Respondent unlawfully granted RSL 12/9/98 under s 74 of the Act.

(c) For damages suffered by reason of the grant of RSL 12/9/98 and operation of the service during the relevant period.

The application for judicial review was dismissed by the High Court. The Appellant has appealed against the decision of the High Court.

As to the appeal against dismissal of the application for certiorari, this is now academic as RSL 12/9/98 has already expired. The licence was granted on the 1st November 1988 and pursuant to s 74(2) of the Act, it expired on the 1st February 1989.

The remaining claims for a declaration and damages by the Appellant are pending and are dependant upon the determination of the central issue in this appeal, and that is, whether, the grant of RSL 12/9/98 by the First Respondent to the Third Respondent was lawful?

The determination of these issues ultimately depends upon the proper construction and application of s 74 of the Act. It is in the following terms:

"74. (1) Where the Board considers that the public interest necessitates the immediate establishment of a new service or the immediate amendment of an existing road service license, the Board may issue a new road service licence for such service or may

amend such existing road service licence without complying with the provisions of section 65.

(2) A new road licence issued under this section shall expire 3 months after the date of issue:

Provided that a temporary licence issued under the provisions of the proviso to subsection (3) of section 63 may be granted for such period as the Board may determine and the provisions of the next succeeding subsection shall not apply to such temporary licence.

(3) Where the Board issues under this section a new road service licence, it shall as soon as practicable thereafter publish a notice in a newspaper published and circulating in Fiji stating that a new road service licence has been granted under this section, specifying the service and the date upon which the licence will expire and stating that application may be made under the provisions of section 65, not later than the expiry of 4 weeks from the date of such notice, for a road service licence to take effect after the expiry of the licence granted under this section.

(4) Where the Board amends under this section an existing road service licence, it shall, as soon as practicable, deal with the matter as if no amendment had been made under the provisions of subsection (1).

(5) As soon as the Board has dealt with the matter in pursuance of the provisions of subsection (4), the amendment made under subsection (1) shall cease to have effect."

The parties have formulated the following issues to be determined in relation to s. 74:

1. What is the interpretation to be given to the words "new service" appearing in Section 74(1) of the Traffic Act Cap. 176?
2. What interpretation should be assigned to the words "public interest" appearing in Section 74(1) of the Traffic Act Cap. 176?
3. Whether there is need for written application to be made under the Traffic Act for a temporary licence to be issued under Section 74 of the Traffic Act Cap. 176, unless it is granted by the Board on it's own motion under Section 72 of the Act?
4. Whether in the light of the provisions of Section 73 of the Traffic Act, dealing with temporary amendments to road service licence, one can read into Section 74 an authority in the Board to act on it's own volition and proceed to grant a temporary licence under Section 74(1)?

Section 74 comes within Part V, Division 3 of the Act. This division deals specifically with road service and contract carriage licences. In this appeal, we are concerned with road service licences. Before turning to the proper construction of s 74 of the Act, it may be helpful to give a brief description of the road service licensing scheme.

The Transport Control Board (hereinafter referred to as the Board) is given the power to grant these licences ( s 63 ). The Act prescribes the form in which an application for a road service licence or for the renewal, transfer or amendment may be made ( s 64 ). Section 65 prescribes the procedure and the manner in which the Board may deal with an application under s 64 of the Act. These include such matters as notice of the application in a newspaper, invitation to make representations or objections in writing against the application and invitation to others to put in an application if they wish to. Section 66 deals with matters which may be taken into account by the Board in determining the applications. Section 68 deals with the power of the Board to revoke, vary or transfer licences. Section 69 deals with duration of licences. Section 70 deals with renewal of licences. Section 71 deals with transfer of licences. Section 72 deals with amendment of licences. Section 73 deals with a temporary amendment of a licence.

It is clear from this brief survey that the Act provides for an elaborate scheme for application for, renewal, transfer, amendment and revocation of a road service licence. These provisions are intended to give all interested parties a fair hearing in the granting, renewal, transfer, amendment and revocation of a road service licence.

I need to examine ss. 72 and 73 closely. During a currency of a road service licence, such a licence may be amended:

1. By the Board of it's own motion, or
2. Upon application of the licensee.

Where the Board intends of it's own motion to amend, it shall give due notice to the licensee in accordance with s. 65 of the Act with necessary modifications (S. 72(4) of the Act). The Board may then exercise it's powers under s 72(1) and (2) of the Act. This gives the licensee an opportunity to make representations before the Board exercises it's powers.

Where the licence makes an application under s. 64 of the Act, then it is dealt with in accordance with s. 65 of the Act. Where such application is pending, the secretary to the Board is empowered to make a temporary amendment by either deletion or addition of a vehicle at the request of the applicant. Such an amendment is valid until the Board next meets. S. 73(1) of the Act. The Board may authorise other persons to make amendments with regard to fares, time-tables and routes. S. 73(2).

The amendments that may be made by the Board in either case (that is acting on it's own motion or by application of the licensee) are based on it's opinion as "are necessary in the public interest" (s. 72(1) of the Act). Exercise of power by the Board under this section in principle is no different to the power given under section 74 in that it is based on "public interest".

I now consider the terms of s 74 of the Act. The Board is empowered under this provision to grant:

- (a) An immediate establishment of a new service, or
- (b) An immediate amendment of an existing road service licence.

The Board may proceed to exercise these powers if it "considers that the public interest necessitates" it. As I have pointed out earlier, this is the same basis upon which the Board may act to amend a license under s. 72 of the Act. The difference in s. 74 is that the need to exercise this power is immediate and may be invoked without any application under s. 64 of the Act. In addition, this power also applies to granting of a new licence.

#### The meaning of "new service."

The Board may do one of two things. It may grant a temporary road service licence to establish a "new service" or amend an existing road service licence (74(1)). Where there is an existing road service licence for a particular route, any improvement on this service may be done by way of amendment of the existing road service licence. In this context, the words "new service" must mean that a new licence may be granted to another person or another company in respect of the same route to provide additional services. Where there is no existing licence then a new licence is granted to provide a new service.

#### What is the meaning of "public interest?"

Public interest is to be interpreted within the context of Part V of the Act. It relates to the interest of the general public who may use the particular route for purposes of transportation. It is the interest of this class of people that the Board must



consider in the exercise of its powers under s 74 of the Act. The primary consideration is the interests of the public rather than the applicants or operators of services. This emphasis comes from the words "*public interest necessitates the immediate establishment of.....or the immediate amendment of.....*"

What is in the public interest is not easy to define. It is a subjective matter and is to be determined at the particular time the Board is exercising its powers. Without giving any exhaustive definition, it would include consideration of the need to establish a new service or amendment of an existing road service licence in the interest of the class of people referred to above. In respect of a new service, the relevant questions to ask would be: What are the requirements of transport by the public on this route? Is there a licensed operator serving the interests of the public on this route? If there is, is there a need for a new licence in the interest of the public? In respect of amendment of a licence, the relevant questions to ask would be: Is the existing licence run efficiently and adequately in the interest of the public? Can the present services be improved in the interest of the public? This is not exhaustive but simply an indication of the nature of the considerations which the Board may consider in relation to what is in the public interest.

The establishment of a new service or an amendment of an existing licence must be characterised by the "immediate" need for it. That is to say the "immediate establishment of a new service" or "immediate amendment of an existing road service licence". This "immediate need" may arise out of an emergency or a natural disaster. Again it is not necessary to exhaustively enumerate the circumstances that would necessitate this "immediate need". This can be determined at the time the

relevant circumstances arise. This is the distinguishing feature of s 74 from s. 72 of the Act as far as the public interest is concerned.

This power is clearly intended for an immediate need necessitated by the interest of the public and requires quick action without being held up in procedures required by s 65 of the Act.

The legislature, however, was not unmindful of the rights of other applicants and existing licensees. Firstly, where a new licence is granted, it is valid for 3 months only (s. 74(2)). It is of a temporary nature. If there are others interested in the particular route in the long run, they may apply and get the opportunity to get a permanent license after the 3 months has expired. It is required that notice be published in a newspaper circulating in Fiji specifying the service and the date of expiry of the temporary license and then applications are invited to be submitted in accordance with s 65 of the Act. (s 74(3)). All interested parties are then given an opportunity to make representations for the route.

Secondly, where an amendment is made to an existing licence, the Board shall deal with the matter as if the amendment was not made (s. 74(4)). Exactly what this means is not clearly spelt out. In the context of all of the provisions relating to amendment of an existing licence, where the Board amends a licence under s. 74(1) it cannot simply deal with the matter again without notifying the licensee. In order to comply with s. 74(4), the Board would need to give notice to the licensee and deal with the matter in accordance with s 72(4) of the Act. This will give the licensee an opportunity to be heard. When the Board makes the decision, this will replace the temporary amendment made initially under s. 74(1).

How may the power of the Board be invoked under s 74 of the Act?

There are two heads of power granted under this provision. The power to amend an existing licence and the power to grant a new licence.

First, let me consider the manner in which the power to amend an existing licence may be invoked. Basically section 72 lays down the manner in which the power of amendment of an existing licence may be invoked. It may be invoked by an application of the licensee or upon the motion of the Board itself. The power given to the Board to amend under s. 74 of the Act is no different. The only difference is that there is an immediate need. Section 72 and s. 74 must be read together. If the Board can act of it's own motion under s. 72, surely it can do so under s. 74. If the Board is to have any power to act on it's own motion, it must be for the circumstances set out under s. 74. Having regard to the very wide discretion given to the Board and the consideration of the public interest which may necessitate the immediate amendment of an existing road service licence, I conclude that the Legislature intended that the Board may act on it's own motion. That is a consistent interpretation of ss. 72 and 74.

Can the Board act of it's own motion to grant a new licence? This power is granted in the same provision as the power to amend an existing licence. Once it is decided that the Board has the power to act on it's own motion under s. 74, then it follows that the same power may be exercised in relation to granting of a new licence.

The question then arises as to what happens when there is an application before the Board under s 64 of the Act? Can it be said that the Board is bound to deal with the matter under s 65 of the Act or can the Board in the exercise of it's discretion

proceed to deal with the matter under s 74 of the Act? In my view, the discretion of the Board under s 74 of the Act is not subject to an application under s 64 of the Act. The exercise of discretion is subject only to the interest of the public and the immediate need to establish a new service or an immediate need to amend an existing licence. Where the Board considers that there is such immediate need, the Board may act and invoke the power under s 74 of the Act.

As far as s 74 is concerned, the matter may come to the attention of the Board in any form and this would include an application under s 64 or s 72 of the Act. Its primary concern is the consideration of the interests of the public in the immediate future. This interpretation is consistent with the purpose for which the Board is empowered to act immediately.

How does this work out in practical terms? Where the Board decides to act under s 74, it should communicate with such operators which may have the capacity to provide for the immediate need in question. It cannot simply act in a vacuum and expect any operator to provide the services. For instance it could not simply amend an existing licence to increase number of vehicles in any route if the operator does not have such vehicles. The same consideration may be given to the grant of a new licence. This is common sense and the Board should bear this in mind in the exercise of its powers. However, one thing is clear, the Board may act on its own motion to put into effect the powers given under s. 74 of the Act.

Application of these principles to this case.

The trial judge stated the principles and applied them in the following terms:

*"Under Section 74 the T.C.B. can act on it's own volition and on it's own knowledge that the public interest demands of a new road licence. In the instant case, T.C.B. has acted on the application of the Second Respondent made on 18.10.88 under Section 74 which it is empowered to do.*

*It is not right to state that the T.C.B. has thus acted outside it's jurisdiction. The only legal requirement under Section 74 is that the Board ought to be satisfied that amendment or the issuance of the road service licence is granted in the public interest. The degree of public interest required for so doing depends on the T.C.B. and the source of the knowledge of the public interest can be from any source such as the letters that have been sent to the T.C.B. appreciating the Vatukoula Express Bus Service.*

*Section 74 of the Act serves the need of the general public for transport with immediate effect and without delay by granting a*

temporary permit and then call for applications for the same route from the competitors if any and they would thereafter follow the procedures as laid down in Section 65. If that is what was intended by the Parliament the object of an immediate relief contemplated under Section 74 for a new road licence or an amendment would be lost. It is quite logical to think by drawing analogies in the grant of temporary water connections, electricity, buildings, the normal procedure is to a great extent suspended to serve the immediate need, may be of an individual or a section of a community. The situation created under Section 74 is exactly similar limited to a period as short as 3 months. Further extensions on making the grant permanent would be strictly as according to provisions of Section 65. In point of fact Section 65 does not surface materially on the issue before us.

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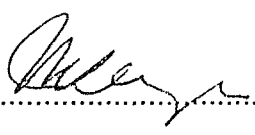
The applicant Sunbeam had no right to a hearing at the time the T.C.B. made a decision under Section 74. Subsequently the Sunbeam had the opportunity to make representations at

*a meeting fixed by the Board pursuant to the  
publication of the notice under Section 65."*

With respect, the trial judge correctly stated the principles and applied them to the circumstances of this case. There is no question of any impropriety or illegality in the actions of the Board in determining this matter under s 74 of the Act.

There was no challenge either at the judicial review proceedings or on this appeal that the licence was not granted on the basis of the public interest nor was there any challenge on the question of the immediate need for the new licence granted in this case.

For these reasons, I would dismiss the appeal with costs.



Sir Mari Kapi CBE

Justice of Appeal