IN THE FIJI COURT OF APPEAL 306

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0012 OF 1994
(Judicial Review No. 39 of 1991)

BETWEEN:

K.R. LATCHAN BROTHERS LIMITED Applicant

and

1. TRANSPORT CONTROL BOARD
2. TUI DAVUILEVU BUSES LIMITED Respondents

*Mr G.P. Shankar* for the Applicant
*Mr V. Kapadia* for 2nd Respondent

*Date of Hearing*: 26th May, 1994
*Delivery of Decision*: 27th May, 1994

# DECISION OF THE COURT

## ON APPLICATION FOR LEAVE TO APPEAL AGAINST AN INTERLOCUTORY ORDER

This is an application made pursuant to the provisions of Section 12(2)(f) and Section 20 of the Court of Appeal Act by K.R. Latchan Brothers Limited (`the Applicant') for leave to appeal against an interlocutory order made in the High Court in Judicial Review No. 39 of 1991. The order in question was made

by Byrne J. on 29th October, 1993 whereby he formally granted leave to Tui Davuilevu Buses Limited (`the Respondent') to subpoena witnesses to adduce oral evidence. As this was clearly an interlocutory order and as K.R. Latchan Brothers Limited wished to appeal against the order, an application for leave to appeal was filed in the High Court on 21st February, 1994, as required by Section 12(2)(f) of the Court of Appeal Act.

On 21st March,1994 Byrne J. struck out the application for leave on the ground that there was no proof of service of the application. He fixed 1st and 2nd of June, 1994 as the hearing dates of the Judicial Review Application. The Applicant then on 11th April, 1993 applied to a single Judge of Appeal to exercise his concurrent jurisdiction to grant leave to appeal. The hearing was fixed for 22nd April, 1994 at 9.30 am before Thompson J. There was no appearance on behalf of the Applicant at 9.30 am on the hearing date. Mr H. Nagin, who represented the Respondent, consented to the matter being stood down till 10.15 am. When the Court resumed at 10.15 am there was again no appearance on behalf of the Applicant. After hearing argument from Mr Nagin, Thompson J. refused the application and gave the following reasons for doing so -

> *"The granting of leave to appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law. The learned judge has given full reasons for the order he has made. There is no suggestion of impropriety in the appellant's affidavit. There is an allegation of misconception of the law, but if there was a*

*misconception of the law, it is not a clear case of that. That matter can be made a ground of appeal in any appeal against the final judgment of the High Court, if the appellant is unsuccessful in the proceedings there."*

Being aggrieved with the decision of Thompson J. the Applicant has exercised its right under Section 20 of the Court of Appeal Act to seek determination of its application by a Court as duly constituted for the hearing and determining of appeals.

In the Notice of Motion filed in this Court on 18th May, 1994 the Applicant in fact seeks two other orders namely -

*".....*
*(b) Leave to appeal out of time (if necessary)*
*(c) Stay of all proceedings before the High Court pending the hearing and determination of the substantive appeal."*

The grounds on which the application is made are stated as follows:

*"(1) That the learned Judge of the High Court was wrong in allowing the Respondent to call and adduce oral evidence on the hearingof application for Jidicial Review. The learned Judge was wrong instriking out the applicant's application for leave to appeal when Counsel for Respondent apeared and stated that he was not served. The learned Judge should have gien the appellant opportunity to prove service or alternatively to properly serve it on the Respondent. The learned Justice of Appeal was wrong in not holding tht the appeal raised important question of law and leave ought tohave been granted, even if the learned Judge thought that Fiji Court of Appeal rules were not strictly complied with on the making of application to the High Court.*

*(2) The learned Judge of the Court of Appeal and the High Court Judge failed to hold that -*

*(a) the Respondent was not entitled to call oral evidence on hearing of Judicial Review, except to call deponents to an affidavit for cross examination which is granted in exceptional case;*

*(b) the Respondent has been guilty of considerable delay in the making of application for leave to apply for Judicial Review, and also inordinate and unreasonable delay in the prosecution of the same;*

*(c) that Judicial Review is not an appropriate proceedings for hearing of oral evidence, and the Respondent ought to have commenced correct action having regard to the disputed facts;*

*(d) In any event the decision Respondent seeks to impugn by certiorari was not made recently, and it indirectly seeks to quash more than decision and/or operation carried on by the appellant for over 10 years."*

As far as we are concerned the only ground of the proposed appeal that has any relevance to the application before us is ground (1) which reads -

*"That the learned Judge was wrong in allowing Tui Davuilevu Buses Ltd to adduce oral evidence having regard to the provisions of Order 53 of the High Court Rules 1988 and the law and practice relating to Judicial Review."*

It is the Applicant's contention that a very important point of law is involved in the proposed appeal and, therefore, leave should be granted. Counsel for Applicant, Mr G.P. Shankar, argues that the learned primary Judge exceeded the limitations imposed in various decided cases by allowing Tui Davuilevu Buses Limited (the original Applicant for Judicial Review) "to call witnesses who are not even deponents to affidavit". He submits that in doing so the Judge departed from established practice and was therefore in serious error.

We do not agree that the intended question for the Court of Appeal involves a point of law of any great significance. The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in *Ashmore v Corp of Lloyd's* [1992] 2 All E R 486 -

> *"Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."*

Furthermore, and of particular relevance to the present matter, what the Judge did appears to be prima facie in conformity with the High Court Rules. Order 53 r. 8(1) provides:

> *"(1) The Court may hear any interlocutory application in proceedings on an application for judicial review.*
>
> *In this paragraph `interlocutory application' includes an application for an order under .... Order 38 rule 2(3) ....."*

The application of K.R. Latchan Brothers Limited "that subpoenas issued by the Applicant to adduce oral evidence be set aside" was plainly an interlocutory application in terms of Order 53 r. 8(1) and accordingly Order 38 r. 2(3) applied. That provides:

> *"(3) In any cause or matter begun by originating summons ..... evidence may be given by affidavit unless ..... the Court otherwise directs ....."*

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It appears that this is what occurred in the present case and that Byrne J. directed evidence to be given otherwise than by affidavit.

Whether in the end that is regarded as correct or not by no stretch of imagination can it be said that the interlocutory order made by Byrne J. was "plainly" wrong. Consequently we hold that no useful purpose will be served in granting leave. Although in dealing with this application before us we are not sitting in an appellate capacity, we have no hesitation in saying that we agree with the reasons given by His Lordship Mr Justice Thompson for refusing leave. We note that the Judicial Review proceedings were initiated in October, 1991 and no progress has been made in the hearing of the Application, since Byrne J.'s interlocutory order of 29th October, 1993. It is in everyone's interest that the matter be proceeded with without any further delay.

This application for leave to appeal is refused with costs to the Respondent. We need not deal with the other orders sought as they have now become irrelevant.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Savage
Judge of Appeal

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