IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 44 OF 1993
(High Court Judicial Review No.8 of 1989)

BETWEEN

SUNBEAM TRANSPORT LIMITED — APPELLANT

v.

PACIFIC TRANSPORT LIMITED
TRANSPORT CONTROL BOARD — RESPONDENTS

Mr H.K. Nagin for the Appellant
Mr F.S. Lateef for the 1st Respondent
Mr A. Rabo for the 2nd Respondent

Date and Place of Hearing : 4 August, 1995, Suva
Date of Delivery of Judgment : 14 August, 1995

JUDGMENT

The appeal in these proceedings is against a decision of Fatiaki J.given on 10 November 1993 in the High Court in Suva. His Lordship rejected an application by the appellant ("Sunbeam") for judicial review of a decision of the second respondent ("the TCB") given on 8 November 1993. By that decision the TCB had granted an application for a road service licence to operate an express bus service from Ba to Suva and return daily, which had been made by the first respondent ("Pacific") under section 64 of the Traffic Act (Cap. 176)("the Act"). Argument was presented to us by Mr Nagin and Mr Lateef. Mr Rabo informed us that he did not wish to present any argument; the TCB would comply with any order made by the Court.

The grounds of appeal are as follows:-

"1. *__THE__ Learned Trial Judge erred in law and in fact in not holding that the Transport Control Board had acted in breach of the Rules of Natural Justice.*

2. *__THE__ Learned Trial Judge erred in law and in fact in not holding that the Transport Control Board's conduct in this case could be construed as tainted with bias.*

3. *__THE__ Learned Trial Judge erred in law and in fact in not sufficiently considering the issue of Pacific Transport Limited's Counsel conceding that there was no need for this service and that no evidence before the Transport Control Board to substantiate need (sic).*

4. *__THE__ Learned Trial Judge erred in law and in fact in not holding that the Transport Control Board was __FUNCTUS OFFICIO__ when it first refused Pacific Transport Limited's application on 3rd November, 1988."*

The evidence before the learned trial judge comprised affidavits sworn by directors of Sunbeam and Pacific and by the acting Secretary of the TCB. None of the deponents was cross-examined. Numerous documents were exhibited to the affidavits, in particular many pages of minutes and draft minutes of meetings of the TCB and documents prepared to assist the TCB with its deliberations.

During the period immediately preceding the making of the decision to grant the licence the TCB had been considering, and making decisions in respect of, a large number of applications for road service licences. Some of the applications

were for bus services right round Viti Levu; the others were for bus services between Ba and Suva and return using the Queen's Road only, except for the short part of the King's Road between Ba and Lautoka. Applications for round Viti Levu services had been made by Sunbeam, Pacific and others; one of the applications for the Ba/Suva/Ba route had been made by Pacific. Although Sunbeam had not made an application for that route, it nevertheless opposed the application for it made by Pacific.

Pacific made clear to the TCB that it was making its application for the Ba/Suva/Ba service only because the other applicants for that route were contending that there was need for an additional service. Pacific already operated a number of services between Suva and Lautoka and return on the Queen's Road and contended that there was no need for an additional service. However, if the TCB considered that there was need, then it wished to operate the additional service.

The TCB arranged for passenger loading checks to be made of existing bus services on the Queen's Road. On 31 October 1988 and 1 November 1988 it heard the applicants and the objectors. On 3 November 1988 it decided by resolution not to grant any of the applications for an additional Queen's Road service. However, on 8 November 1988 it cancelled that decision and approved Pacific's application. No reasons for doing so were recorded in the draft minutes.

One of the persons heard by the TCB on 1 November 1988 was Sunbeam's solicitor. He is recorded in the TCB's minutes as "reiterating that there was no need" for the additional Queen's Road service. On 3 November 1988 the TCB made decisions about a number of the applications with which it was dealing. Some were refused and some deferred; none was granted.

On 3 November 1988 the TCB asked Pacific's solicitor to attend before it. No other applicant for a licence was present or represented. The TCB asked whether Pacific would be willing to operate a round Viti Levu service in accordance with a schedule different from that which it had proposed in its application for the round Viti Levu route. Its solicitor requested that the suggestion be put in writing. The Secretary of the TCB then sent a letter dated 3 November 1988 to Pacific asking whether it "would be prepared" to run such a service at times specified in the letter and indicating that it considered that a licence for the route should be granted to Pacific. A reply by 7 November 1988 was requested. On 7 November 1988 Pacific replied that its application for a round Viti Levu service had been adjourned to 16 December 1988 and that it was "of the view that it may not be proper for the Board to grant any trips without hearing all the objections listed on our application as well as [other applications]."

On 8 November 1988 the TCB granted Sunbeam a licence for the round Viti Levu route and Pacific a licence for the Ba/Suva/Ba service via the Queen's Road. It also granted a licence to another bus owner to operate a service from Suva to Lautoka and return via the King's Road.

A matter discussed briefly by the learned trial judge was the question of Sunbeam's standing to seek judicial review as it was not in competition with Pacific on the Queen's Road. His Lordship observed that the matter had not been raised by Pacific and decided to take the matter no further. For the same reason we will not consider it.

We turn now to the grounds of appeal. As the fourth ground goes to the issue of the power of the TCB to make its second decision in respect of Pacific's application for the Queen's Road service, we think it desirable to deal with it first. On 3 November 1988 the TCB passed a resolution by which *inter alia* it refused Pacific's application for the Ba/Suva/Ba route. On 8 November it decided to "cancel" that refusal and instead to approve the application. The issue raised is whether, having passed its resolution refusing the application, it had exhausted its power to deal with the application. His Lordship came to the conclusion that, as it had not notified Pacific or any of the objectors of its decision and had not published it, it retained the power to consider the application further and make a further decision in respect of it.

Section 56 of the Act sets out the TCB's functions. They include the duty to "consider applications for [road service] licences and deal with such applications in accordance with the provisions of [Part V of the Act]".

Section 65(4) provides that the TCB "in its discretion, [may] grant or refuse any application" for a road service licence. Section 65(6) requires the Secretary of the TCB to issue a road service licence if it has been granted by the TCB and if the appropriate fee is paid. Section 66(2) specifies matters to which the Board is to have regard in dealing with any application for a road service licence. They include not only whether there is a need for a bus service and the public interest but also "the applicant's reliability, financial stability and facilities at his disposal for carrying out the proposed services". Section 68 contains provision for the revocation, variation and suspension of road service licences in specified circumstances. Section 55(3) requires all matters dealt with by the TCB to be decided by resolution at a meeting at which a quorum of the Board is present.

From the evidence it appears that the resolution passed on 3 November 1988 refusing Pacific's application for the Queen's Road service was a valid exercise of its function of dealing with that application. The respondents have not suggested otherwise. There is no evidence why the TCB passed the further resolution on 8 November granting the application; in particular there is no

evidence that the resolution passed on 3 November had been induced by fraud or resulted from any factual error or mistake that needed to be corrected. The Act does not contain any provision expressly authorising the TCB to revoke any of its decisions and to deal further with applications that have been granted or refused.

The circumstances in which bodies such as the TCB may change their decisions in the absence of statutory provision authorising or forbidding it have been the subject of discussion in several cases in the English Courts. They have been concerned with decisions made to alter or revoke previous decisions and to refuse things granted by the previous decisions. In Re 56 Denton Road, Twickenham [1953] Ch. 51 the High Court held that the War Damage Commission, having notified the owner of war-damaged premises of its decision to pay him compensation, had no power to vary or revoke the decision. On the other hand, in Rootkin v. Kent County Council [1981] 1 WLR 1186 the Court of Appeal decided that the Council had power to revoke its decision to pay the parents of a child reasonable expenses of travelling to school when it discovered that facts which it had believed to exist entitling the parents to the payment did not in fact exist. We have been unable, however, to find any case in which a court has considered whether a body such as the TCB which has made a decision to refuse an application made to it but has not itself acted on the decision or informed anyone else of it can vary or revoke it in the absence of fraud or of any error of fact

going to the issue of legal entitlement. That does not cause us any surprise as in most such cases the fact that the first decision has been varied or revoked is not known to anyone outside the body which made it. In the present case it has become known because extensive litigation by various bus operators has led to the minutes of the TCB's meetings becoming known to many who would otherwise have been unlikely to have seen them.

Counsel for Pacific has referred us to text-books on meetings and to the discussions in them of the question whether a resolution passed at one meeting can be revoked at the same or a later meeting. However, the meetings with which the learned authors are concerned are meetings of bodies such as councils, clubs, shareholders of companies and citizens' groups. Their purpose is very different from that of the TCB's meetings. The TCB's meetings are held in order to enable it to perform its statutory functions in the context of the Act. We have not found the text-books to be of any assistance to us in deciding the issue raised in the fourth ground of appeal.

We come back necessarily to the provisions of the Act and the nature of the TCB's functions. In respect of applications for road service licences its function is to inquire into their merits and then to decide whether to grant them or to refuse them and, if they are granted, to what conditions the licences should be subject. There can be no doubt, in our view,

that once a decision has been promulgated the TCB is *functus officio,* as was the Registrar of Trade Unions in Fiji Public Service Association v. The Registrar of Trade Unions and Fiji Air Traffic Control Officers' Association (Civil Appeal No. 51 of 1991; judgment delivered on 20 August 1993). It cannot change the decision, unless it was obtained by fraud or possibly unless it was made on the basis of facts that did not exist. Even then it should give the parties an opportunity of being heard. We consider that, as a matter of good practice, it should not change decisions which it has made, unless there are strong reasons for doing so. It should ***fully*** consider an application ***before*** deciding whether to grant or refuse it. However, like His Lordship, we consider that the TCB does not lack the power to change a decision before it has been promulgated. Its task is not completed until it has done that. Mr Nagin submitted that, in the absence of evidence of the TCB's reasons for changing its decision in respect of Pacific's application, it should be taken not to have had good reasons for doing so. However, that is not a ground of the appeal. In any event, we do not accept that the argument has any substance. Mr Nagin could have cross-examined the acting Secretary of the TCB on his affidavit but did not do so. In our view, in the absence of evidence that it did not have good reason for changing its initial decision, the *omnia praesumuntur* rule should be applied, that it is to say that the TCB had good reasons and acted properly. Accordingly the appeal does not succeed on the fourth ground.

The issue raised by the first ground of appeal was expressed in the appellant's statement filed in the High Court pursuant to Order 53 rule 3(2) as relating to failure by the TCB "to give the Application (sic) a hearing or a proper hearing before deciding to approve" Pacific's application. His Lordship noted that the discussions with Pacific's solicitor and the correspondence which followed had related to a different application from that granted on 8 November 1988.

Mr Nagin, however, submitted that, although this might on its face appear to be so, it was not in fact so. He referred to the fact that the TCB had decided to decline Pacific's application in respect of the Ba/Suva/Ba route on 3 November 1988 but, after seeing its solicitor privately and making what appeared to be an offer of a "round Viti Levu" licence, it had granted the Ba/Suva/Ba application on 8 November 1988, that is the day after it received Pacific's reply to its "round Viti Levu" offer. He submitted, in effect, that this led inevitably to the inference that the TCB had received information from Pacific, or had made some arrangement with Pacific, in the absence of Sunbeam and that was a reach of the *audi alteram partem* rule. We are not prepared to draw that inference and certainly do not consider it a necessary inference in the circumstances here.

We note the learned trial judge said that, when he first read the complaint at the *ex parte* stage, he considered

that at the very least there had been a failure on the part of the TCB to maintain the appearance of doing "even justice" between the parties; but he went on to say that upon reading the affidavit filed on behalf of Pacific he had not the slightest doubt that there was no substance to the complaint. We share that view. The only direct evidence upon the matter is contained in the affidavit and it is a complete denial of any matter relating to the Ba/Suva/Ba application being raised. Sunbeam did not require the deponent of the affidavit to be proudced for cross-examination. In the result his evidence is uncontradicted and should be accepted. We add, however, that in our view it was undesirable and in appropriate for the TCB, at that time and in the particular circumstances, to have a meeting with the solicitor for Pacific in the absence of the solicitors for the other parties involved in any of the matters relating to Pacific that had been before the TCB at its recent hearing.

We can find no error of law or fact in His Lordship's reasoning in declining to hold that the TCB acted in breach of the rules of natural justice by not giving Sunbeam an opportunity to be heard further.

The second ground concerns an issue not expressly raised in the Order 53 rule 3(2) statement in which there was simply a reference to breach of the rules of natural justice. It should have been raised with appropriate particularity in the statement. However, there is nothing to indicate that the

respondents were prejudiced by that in the High Court. The issue was dealt with by the learned trial judge; we are satisfied that it is properly before us. There was evidence before His Lordship of the discussion which the TCB had with Pacific's solicitor and of the correspondence which followed. The appellant says that that conduct of the TCB demonstrated bias in favour of Pacific. His Lordship did not accept that the discussion and correspondence, being on an unrelated matter, disclosed any favouritism towards Pacific in respect of its application for the Queen's Road service. He noted that there was "not a shred of evidence" to support an assertion made by Counsel for the appellant that the application was granted in order to appease Pacific for the failure of its objection to Sunbeam's application for a service on a different route. He decided that he could not accept, on the facts before him, that right-minded persons fully acquainted with the facts would think it likely or probable that the TCB would, or did, favour Pacific's application for the Queen's Road service at the expense of the other competing applicants.

For the nature and purpose of the discussion and the letters which followed to be evaluated it is necessary to have regard to Pacific's application for the round Viti Levu service which was before the TCB. It appears at page 33 of the appeal book. It was for a service commencing at 6 a.m. in Suva and returning there at 6.55 p.m. What the TCB was proposing in its letters was that Pacific should provide a service which commenced

at Lautoka at 6 a.m. and returned there in the evening. That would have involved Pacific having a bus based in Lautoka for the service, whereas its application envisaged using one based in Suva. The TCB had gathered a good deal of material to enable it to assess the need for services on the route at particular times. It was not improper for it to ask Pacific whether it would be willing to change its application to suit what the TCB assessed to be the need. Pacific had a very long history of the operation of bus services between Suva and Lautoka; the TCB would have been able from its experience of Pacific's operation of those services to assess "its reliability, financial stability and facilities at its disposal" section 66(2) of the Act). There would have been nothing wrong in the TCB taking the view that it would prefer Pacific to any other operator if it were willing to operate the service at the times the TCB considered would meet the needs of the public. Nevertheless, we think that it would have been preferable for it to have asked all the applicants for a service on that route if they would be willing to operate to the schedule which it proposed to Pacific. That would have prevented there being any semblance of favouritism in respect of the round Viti Levu route. Certainly it should not have couched its letters to Pacific and its solicitor in terms of a wish to grant Pacific a service. It was most improper for it to do so as, if Pacific had applied to operate the service to the proposed schedule, its application to do so would have had to be advertised and objections to its heard. Pacific correctly pointed that out to the TCB.

Nevertheless, like His Lordship, we consider that there is no evidence of favouritism, that is to say actual bias, in respect of Pacific's application for the Queen's Road service. We are also satisfied that, whether the "real likelihood" test (R v. Camborne Justices, ex p.Pearce [1955] 1 QB 41) or the "reasonable suspicion" test (Metropolitan Properties Co. (F.G.C.) v. Lannon [1969] 1 QB 577) should be applied, the TCB's conduct would not have caused a reasonable man fully appraised of the facts to apprehend that there was a substantial possibility of bias or to suspect bias in its dealing with that application. The decision made on 3 November 1988 to refuse all the applications for the Ba/Suva/Ba service was exactly what Pacific wanted. To be granted a licence to run the service was, for Pacific, a poor alternative, better only than approval of the application of another operator for the service. Accordingly we find that the learned trial judge did not err in law or in fact in not holding that the TCB's decision was tainted by bias.

The third ground of appeal appears to us to be entirely without merit. The fact that Pacific and Sunbeam both considered that there was no need for an additional Queen's Road bus service is not conclusive that that was so. Other applicants had contended to the TCB that there was need. The TCB had caused passenger loadings to be checked. Further, by the nature of its functions, it could rely to a considerable extent on its own experience and observations. Whether there was a need was a matter entirely for the TCB to assess (see section 66 (2) of the

Act). There is no evidence to suggest that it made that decision improperly. The third ground cannot, therefore, be upheld.

Accordingly the appeal is to be dismissed with costs. We would add that, even if the appellant had succeeded on any of the grounds of its appeal, it would have been necessary to consider whether an order should be made to quash the TCB's order. Nearly seven years have now elapsed since it was made. Although we recognise that there were reasons beyond the control of the appellant for some of the delay in its having the matter heard in the High Court, the time that has now elapsed is so long that we doubt strongly whether it would have been reasonable for us to exercise our discretion to grant the remedy sought.

DECISION

The appeal is dismissed.
The appellant is to pay the respondents their costs of the appeal.

Mr Justice I. R. Thompson
Judge of Appeal

Mr Justice Savage
Judge of Appeal

Mr Justice P G Hillyer
Judge of Appeal

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