

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0083 OF 2004S
(High Court Judicial Review HBJ 19/2004S)

BETWEEN:

FIJI TAXI UNION

Appellant

AND:

LAND TRANSPORT AUTHORITY

Respondent

Coram: Eichelbaum, JA

Gallen, JA

Scott, JA

Date of Hearing: 21 July 2005

Counsel: Mr. H. Nagin for the Appellant
Mr. V. Vosarogo for the Respondent

Date of Judgment: 29 July 2005

JUDGMENT OF THE COURT

[1] As anyone who has driven on Fiji's roads is only too well aware, we have a very serious vehicle exhaust smoke problem. Excessive emissions are bad for the environment and most unhealthy.

[2] As part of an effort to tackle the problem the Respondent [the Authority] in about September 2004 started using diesel exhaust smoke meters imported from

Australia. When the meters were thought to indicate excessive emissions, defect orders were issued. The use of a vehicle in breach of such an order is an offence.

[3] In September 2004 the Appellant moved for Judicial Review of the Authority's decision to use the meters. It sought a declaration that they were not authorised by law and an injunction to prevent their further use.

[4] The Appellant's principal submission was that no provision had been made for the use of the meters either by a statute or regulation and accordingly their use was unauthorised. The decision to use the meters was also said to be unreasonable.

[5] A supporting affidavit filed by the Appellant's General Secretary exhibited a copy of a defect order issued on 23 September 2004. It may be seen from the exhibit that the specified defect was "visible smoke (black)". The reverse of the defect order states: "this vehicle must not be used on any public street until the defects are repaired and cleared by the Authorised Officer". The Order also appears to have attached to it a meter reading headed "Exhaust Smoke Opacity Analysis". The result is given as 91.5%, beneath which has been added in handwriting the words "Reading should be 80% or below". A second exhibit, a copy of the Sunday Sun dated 28 September 2004, carried an article under the heading "Buses fail test". It stated: "Checks conducted by the Land Transport Authority on buses found that over 98% of the buses had over 80% smoke emission. This is against the LTA Regulations".

[6] A second affidavit was also filed on behalf of the Appellant by a carrier operator Jaswant Pratap. Mr. Pratap deposed that his vehicle was in good order and was not emitting smoke "when run normally". He exhibited a defect order which had been issued to him after his vehicle had been tested with one of the meters. The defect order states that the vehicle was emitting "excessive smoke from its tail pipe".

[7] Mr. Naisa Tuinaceva filed an affidavit on behalf of the Authority explaining and justifying the use of the meters. He agreed that vehicles observed to be emitting visible smoke had been stopped and then tested “for road side audit using the meter”. The purpose of using the meters was to carry out an “exhaust smoke opacity analysis”. Persons conducting the tests had been fully trained in the use of the meters “to eliminate irregularity in testing procedures reading and application of the analysis and are authorised to issue defect notices”. The meters themselves were “built to world standards demanded by numerous statutory tests in other countries”. In Mr. Tuinaceva’s opinion “there is no need for certification as the meter is being used solely for control purposes and not for criminalising an act or omission to act”. Neither the defect order nor the contents of the newspaper article was denied.

[8] In October 2004 the High Court at Suva (Winter J) found in favour of the Authority. The judge described the meter as being:

“merely an aid in assessment for the authorised officer to form an opinion that the vehicle may have safe use and environmental defects.”

He concluded that:

“The Land Transport Authority’s decision to use [the meters] as an aid to assess vehicle safety or environmental defects is not ultra vires and is a reasonable, rational and logical decision for it to make in pursuit of its obligation to control the safe and environmentally sound use of motor vehicles.”

This is an appeal from that conclusion.

[9] The Authority was established by the Land Transport Act 35/1998. Very wide powers are given to it by section 9 to “regulate and control all means of land

transport". Section 113 (1) gives the Minister the power to make regulations to give effect to the provisions of the Act. In exercise of that power the Minister has made two sets of regulations which are particularly relevant to the appeal. They are:

- (i) Land Transport (Vehicle Registration and Construction) Regulations (LN 59/00 – the Vehicle Regulations); and
- (ii) Land Transport (Traffic) Regulations 2000 (LN 64/00 – the Traffic Regulations).

[10] The only mention of smoke is in regulation 47 of the Traffic Regulations. This regulation stipulates that:

“A driver of a motor vehicle on a public street must not cause or permit visible smoke to be projected from the exhaust pipe or from any other part of the machinery of the motor vehicle for a period in excess of 10 seconds.”

[11] In order for a prosecution for a breach of regulation 47 to succeed all that is required is that the court be satisfied, on the evidence before it, that visible smoke was indeed emitted by the vehicle in question for a period of time exceeding 10 seconds. No equipment of any kind is necessarily needed for that requirement to be satisfied. The accepted evidence may, for example, be no more than: “ I followed the bus up the whole of Edinburgh Drive and it belched out black smoke at me all the way”. The first question, therefore, is what additional information do these meters provide?

[12] Mr. Tuinaceva’s affidavit exhibited a training manual designed for the use of personnel operating the meter. The manual states that the meter is:

“A partial flow smoke meter (opacimeter) suitable for measuring the smoke exhaust of a diesel engine. The instrument is designed according to ISO 3173 directive, CUNA NC 005/11 EEC 72/306 directive. The Smoke – Tec can perform statutory tests according to the above specifications and also continuous reading of the sampled exhaust.

Key features [include]

- Opacity measurement based on visible light absorption
- Spectral response similar to the photopic response of human eye.”

[13] Once the meter has measured the smoke emitted from the vehicle being tested, the result can be printed out by pressing a print key. It seems that the meter reading attached to the first affidavit is a test result printed out by the meter.

[14] Although there was no technical evidence before us, it is apparent from the manual that the meter is designed to measure the colour and opacity of the smoke emitted. It does not appear to measure the length of time during which the smoking occurs.

[15] The obvious first problem about using these meters is that in the absence of laid down standards against which the meter readings are to be compared, the readings convey no information beyond themselves. Thus, for example, in the meter reading referred to in paragraph 5 above the figure 91.5% cannot be presumed to represent anything more than the figure itself. It certainly cannot be taken to mean 91.5% too much, 91.5% too little or 91.5% of anything at all. Furthermore, from what we were told by Mr. Vosarogo, it seems that the figure of 80% used by the Authority as an upper limit was merely a figure adopted from that in use in Australia. It has no statutory basis in Fiji where, apart from anything else, the quality of diesel may well be different and accordingly may require different standards to be applied. As the manual states, the meter is:

“a compliance tool to confirm that diesel vehicle emissions comply with regulations.”

In our view there must be a regulation in existence in Fiji clearly and precisely indicating what does or does not amount to compliance and in the absence of such a regulation the meter readings are simply uninformative.

[16] The second difficulty is that the meters have been used as part of a process leading to defect orders being issued. Breaches of the Traffic Regulations do not, however, provide grounds for the issuance of such orders, as was conceded by Mr. Vosarogo. Defect orders may only be issued where breaches of the Vehicle Regulations are discovered.

[17] While Part 10 of the Vehicle Regulations deals with fuel and exhaust systems there is no definition in those regulations of what constitutes the limit of the local safety emissions referred to in regulation 37 (1) and neither were we referred to any safety emissions and design standards relating to the gaseous emissions referred to in regulation 37(5). Without these defined standards it is not possible to find non compliance with regulation 35 (1) which states that :

“A motor vehicle or trailer to be used in a public street must comply with the requirements of this part.”

[18] Regulation 106 (2) provides that if the inspector:

“is of the opinion that the defect or defects are such that the vehicle is unfit for safe use or protection of the environment [a defect order must be issued]”.

[19] At first sight this wording may give the impression of greater subjectivity than we are satisfied was intended. Regulation 113 (2) makes provision for minimum standards “relative to road safety and the environment” and for the “standard of fuel and fuel systems to be used by motor vehicles and emissions standards for motor vehicles.” On the evidence it is apparent inspecting officers are forming an opinion that vehicles are “unfit for ... protection of the environment” simply on the basis they believe the meter is saying that. However, in the absence of prescribed standards and acceptably precise indications of their breach, an opinion formed in this way cannot warrant the issuance of a defect order.

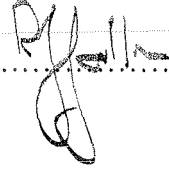
[20] The Land Transport Act and the Regulations thereto are relatively new pieces of legislation. They are complicated and convoluted. We believe that the Authority’s determination to reduce gaseous and smoke emissions is to be applauded. The greater use of precise measuring equipment is obviously sensible. In the present case, however, we are satisfied that these meters do not yet have the necessary regulatory foundation similar to that in existence overseas, to allow them legally to be used. It follows that the decision to use them must be set aside.

RESULT

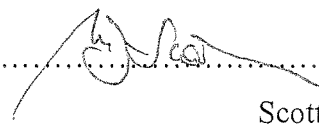
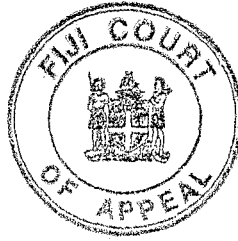
1. Appeal allowed with costs fixed at \$500.
2. The decision of the Land Transport Authority to use electronic smoke detection machines, taken in about September 2004 is quashed.

~~Proceedings~~

Eichelbaum JA



Gallen JA



Scott JA

Solicitors

Messrs. Sherani, Suva for the Appellant

Land Transport Authority Legal Services for the Respondent