IN THE COURT OF APPEAL

SUVA, FIJI

(Miscellaneous Action No. 22 of 2007)

BETWEEN	:	**COSMIC HOLDINGS COMPANY LIMITED**
		APPELLANT
AND	:	**SHER ALI KHAN TRANSPORT COMPANY LIMITED**
		1st RESPONDENT
AND	:	**LAND TRANSPORT AUTHORITY**
		2nd RESPONDENT
BEFORE THE HONOURABLE JUSTICE OF APPEAL	:	**Mr. JUSTICE JOHN E. BYRNE**
COUNSEL	:	**M. K SAHU KHAN (for the Appellant)**
	:	**Ms A. NEELTA (on instruction from YASH LAW) (for the 1st Respondent)**
	:	**K. QORO and A. VAKALOLOMA (for the 2nd Respondent)**
Date of Hearings and Submissions	:	**9th, 24th August, 18th September and 2nd Oct 2007**
Date of Ruling	:	**30th JULY 2009, 9.00 am.**

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

1. Before the court is a Notice of Motion dated the 25th of July 2007 seeking an order that leave to appeal out of time be granted to the appellant against the Extempore Ruling of Madam Justice Phillips on the 1st of June 2007.

2. On that day Her Ladyship heard a Summons dated the 6th of October 2006 seeking injunctive relief to ***inter alia*** restrain the first respondent from operating bus services on Vunisamaloa/ Korovutu/Vaqia/Andra and Field 28/ Tivoro Lane/ Rarawai Muslim School and Varadoli Back Road. These, to those who may not know, are sub-urban areas of Lautoka.

3. The matters in dispute between the appellant (plaintiff) and the first respondent (1st defendant) were the road route licences issued to the 1st respondent by the 2nd respondent and on which the 1st respondent relies.

4. The 1st respondent applied for additional trips on these routes which were already serviced by the appellant.

5. The 2nd respondent (original 2nd defendant) dealt with the application and on the 29th of July 2004, duly approved it.

6. The appellant appealed against the decision of the 2nd respondent to the Land Transport Appeals Tribunal which in a ruling of the 29th of July 2005 nullified the decision of the 2nd respondent.

7. The first respondent did not appeal to the High Court against the decision of the Land Transport Appeals Tribunal.

8. The first respondent, despite the decision of the Land Transport Appeals Tribunal continued to operate on the same routes which caused the appellant to seek injunctive relief against the respondents in the High Court.

9. Phillips, J refused to grant relief for four reasons:

(i) The appellant's undertaking as to damages was inadequate in that it did not comply with the requirements set down by this Court in **Natural Waters of Viti Limited v. Crystal Clear Mineral Water (Fiji)Ltd. ABU 11A/2004S and Air Pacific Limited v. Sun Air (Pacific)Ltd and Others ABU 0066/2006S.**

(ii) The High Court was not the proper forum for resolution of Disputes concerning licences issued and routes serviced. This was the function of the Land Transport Tribunal.

(iii) In terms of ***American Cyanamid*** v. ***Ethicon Limited (1975) A.C.396*** the appellant had not shown why damages would not be an adequate remedy.

(iv) The balance of convenience favoured the first respondent.

10. **REASONS FOR LATE APPLICATION FOR LEAVE TO APPEAL**

On the 8th of June 2007 the appellant filed a Notice of Motion for leave to appeal against the decision of Phillips, J. The motion was set down for hearing on the 17th of August 2007 at the Lautoka High Court. In an affidavit filed by Naveed Nadeem Sahu Khan a partner in the firm of the Appellant's solicitors it is stated that Mr Sahu Khan inadvertently overlooked the provisions of Section 12(2)(f)(ii) of the Court of Appeal Act Cap.12 under which no leave to appeal is required where an injunction is granted or refused.

11. Before discussing the submissions, I have received I should say that these are only from the 1st respondent because, as usual in such cases, the 2nd respondent adopts a neutral stance.

12. Except for saying that the reasons given for delay were not by the appellant itself but by its solicitor, the first respondent does not make any further objection. This is strictly true but I am satisfied that Naveed Sahu Khan is the most appropriate person to inform the court of the reasons for the delay and I accept the reasons he gives.

13. In the High Court the Learned Judge stated that the appellant's undertaking as to damages was inadequate in that it did not comply with two fairly recent authorities **Natural Waters of Viti Limited v. Crystal Clear Mineral Waters (Fiji) Ltd ABU 11/2004S and Air Pacific Limited v. Sun Air pacific Ltd ABU0011/2006 S**

She quoted the statement on page 12 of the judgment in the latter:

> ***"As an important point of practice we wish to repeat however that where a party gives an undertaking to pay damages, there must be adequate information to allow an assessment of the worth of the undertaking".***

14. In the Natural Waters case, the Court said on page 12: "Applicants for interim injunctions who offer an undertaking as to damages should always proffer sufficient evidence of their financial position. The court needs this information in order to assess the balance of convenience and whether damages would be an adequate remedy".

15. I agree generally with those statements of the law but each case has to be considered on its own facts. The fact which seems to me decisive of this motion is that in my view the Learned Judge did not pay enough attention to the fact that the first respondent has been at all relevant times operating illegally. This was recognized by Jale Masibalavu, a Public Service Officer of the Land Transport Authority at Ba sworn on the 18th of January 2007.

16. In paragraph 18 of his Affidavit Mr. Masibalavu states that after the Authority found out that the first respondent was operating illegally on the route it was warned of this but the warning was ignored. The Authority had a memo from the first respondent dated 11th January 2007 stating the drivers of the 1st respondent would take no notice of the Land Transport Authority directive but ***"only listen to their boss".***

17. The Learned Judge appears to have disregarded this when she said at paragraph 5 of her ruling, dealing with the balance of convenience, that to interrupt the first respondent in the conduct of what was now obviously an established business along the disputed routes would cause much greater inconvenience to the 1st respondent since it would have to start again to establish its business in the event of it succeeding at trial. She considered that the risk of injustice to the 1st respondent if interlocutory relief was granted would be greater than that to the appellant if an injunction were not granted. In short, she said that the balance of convenience required that the ***status quo*** be maintained.

18. Before dealing with Her Ladyship's reasons with which I disagree, it is desirable to go back a little further in time to the decision of the Land Transport Authority Tribunal of the 29th July 2005. The Tribunal was constituted by the late Sir Vijay Singh one of Fiji's most experienced lawyers.

19. In paragraph 1 of his decision he says:

"Although the ownership of Cosmic has changed hands, the company has for long operated bus services to various well-established sugar cane area settlements between Koronubu Road and Ba River. Except for a short foray into Tevoro Lane near the junctions at Andhra Road its routes do not cross to the left (or north) of Koronubu Road. It is the only operator in its principal area of operation, and, by all accounts, its owners enjoy excellent relations with the community they serve".

20. In paragraph 22 Sir Vijay noted that the first respondent had applied for a number of additional trips into the appellant's areas of operation. He said that Sher Ali had relied on unsubstantiated claims of need for additional bus services while completely ignoring the result of LTA's load checks that showed that loading of the appellant's buses was generally poor. He found that the application was frivolous and vexatious. He also found that Sher Ali was an intruder stealing a march on an existing operator who was providing satisfactory service. He said: "The bus industry is not a game of poker; cunning and stealth have no place in it". For these reasons, among others, Sir Vijay said at paragraph 34 of his decision:

> ***"It goes without saying that any purported 'permit' that LTA's management might have issued to Sher Ali to operate in the Andhra area is a nullity, and the result of a serious misunderstanding of the LTA's Board's decision. Accordingly, I invite the Authority's Chief Executive to look into this matter and put the position beyond doubt or dispute".***

21. Given the fact that Sir Vijay's decision was before Her Ladyship, I find it hard to understand how she could condone an operation by the First Respondent which was clearly illegal and which showed a deliberate disregard for the authority of the Land Transport Authority Tribunal. I do not share her view that the balance of convenience requires that the ***status quo*** be maintained.

22. **THE BALANCE OF CONVENIENCE**

This expression was first coined by Lord Diplock in American Cyanamid (Supra)and it has not gone without criticism despite the authority of any judgment of Lord Diplock. For example in *Francome v. Mirror Group Newspapers Ltd. (1984) 1 W.L.R 892 Sir John Donaldson M.R.* **described it as "an unfortunate expression. Our business is justice, not convenience".** In *Cayne v. Global Natural Resources P.L.C (1984) 1 All.E.R 225* May L.J describes the expression: "Balance of Convenience" as useful shorthand:

> ***"but in truth.....the balance that one is seeking to make is more fundamental, more weighty, than mere 'convenience' .....Although the phrase may well be substantially less elegant, 'the balance of the risk of doing an injustice' better describes the process involved".***

23. There can be little doubt that in using the expression Lord Diplock meant that the court should take what it considered was the most suitable course on an application for injunction but one which was the least likely to cause an injustice to any of the parties.

24. In the instant case I have no doubt that justice requires that the intruder, the first respondent, should not be allowed to operate what is clearly illegally any longer.

25. In *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien"N.V and* others *1987AC 24 The House of Lords* held that although the power of the High Court to grant injunctions was very wide it was limited, save for two exceptions:

> **(i) where one party to an action could show that the other party had either invaded, or threatened to invade, a legal or equitable right of the former for the enforcement of which the latter was amenable to the jurisdiction of the court, and;**
>
> **(ii) where one party to an action had behaved, or threatened to behave, in an unconscionable manner; that in the circumstances the plaintiffs had failed to show either that the defendants' conduct towards the plaintiffs was amenable to the jurisdiction of the court, or that it was unconscionable in the sense that it interfered with the due process of the High Court's jurisdiction, and that, accordingly, the injunctions granted would be discharged.**

26. There is no doubt in my mind that on the present material the behaviour of the first respondent is unconscionable and it ill becomes any court by implication or otherwise to condone it.

27. In ***Attorney-General v. Chaudry (1971) 1 W.L.R.1614 at p1624 Lord Denning M.R*** said:

"There are many statutes which provide penalties for breach of them – penalties which are enforceable by means of a fine – or even imprisonment –but this has never stood in the way of the High Court granting an injunction. Many a time people have found it profitable to pay a fine and go on breaking the law. In all such cases the High Court has been ready to grant an injunction. As *Sellers L.J. said in Attorney-General v. Harris (1961) 1 Q.B 74, 86*:

"It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law."

28. I respectfully agree.

29. **CONCLUSIONS**

The principles governing extensions of time are well known and I will not repeat them here. I consider that in this case the length of the delay is reasonable as are the reasons for the delay. I do not consider that the respondent who is a usurper and intruder will suffer any prejudice if I grant the application – after all, if anybody has been prejudiced it must surely be the appellant by the actions of the first respondent. I also consider that the appellant has good prospects but, of course I make no definite finding as to that.

30. The result is that I make the following orders in terms of the Notice of Motion:

i) that leave to appeal against the ruling of Phillips, J on the 1st of June 2007 be granted out of time;

ii) that until the determination of the Appeal or further Order of the Court all proceedings in the High Court in this matter be stayed and all orders made on the 1st day of June 2007 and execution thereof be stayed. Costs are to be in the Cause.

Dated this 30th day of July 2009.

FIJI COURT OF APPEAL

JOHN E. BYRNE

JUDGE OF APPEAL