

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Civil Appeal No. ABU 0005 of 2009]
(On appeal from the High Court of
Fiji at Suva in matter for Judicial
Review HBJ No. 13 of 2008)

BETWEEN : DIGICEL FIJI LIMITED
(1st Appellant)

AND : DIRECTOR OF TOWN AND COUNTRY
PLANNING (2nd Appellant)

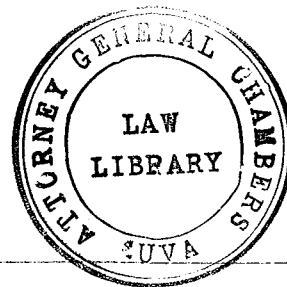
AND : SHIREEN LATEEF AND FOUR OTHERS
(Respondents)

CORAM : BYRNE, AP
CALANCHINI, JA

COUNSEL : H. Nagin for the 1st Appellant
: Ms S. Levaci and Ms K. Naidu for the 2nd Appellant
: P. Yaqona and B. Lateef for the Respondents

DATE OF HEARING: 17th March, 20th May 2010

DATE OF JUDGMENT: 13th August, 2010



JUDGMENT OF THE COURT

- [1.0] Rudyard Kipling began his poem the "Dawn Wind" with these lines:
***"At two o'clock in the morning, if you open your window and listen,
You will hear the feet of the Wind that is going to call the sun."***
- [2.0] At two o'clock on any morning if some of the owners of residential properties of the pleasant Fiji suburb of Flagstaff in Albert Lee Place open their windows and listen they too may hear the feet of the Wind that is going to call the sun but if they look across the greensward in front of their homes close to Flagstaff Park Reserve they will see not only the green turf in front of their homes but also a telephone tower 25 metres high inside the park reserve and not very far from their residences.
- [3.0] This is a tower which was erected by the first appellant with the consent of the second appellant. The site on which it is erected covers 156 square metres.
- [4.0] On the 20th of January 2009 Jiten Singh, J in the High Court at Suva held that the structure was illegal because the respondents were given no opportunity to be heard or express their views on the proposal to build the tower.
- [5.0] The Judge held that the second appellant, whose prior consent was required for any development within a municipality, did not call for objections as required by law.
- [6.0] The grounds upon which the respondents applied for Judicial Review are set out in the affidavit of Lilieta Naiveli, the second respondent, sworn on 26th March 2008 in paragraph 17 as follows:

"(a) Ultra-vires: The Respondent exceeded his powers and made an error of law by consenting to the development plan of the

mobile based station to be located within an area zone for recreational purposes;

(b) Unreasonableness: The Respondent was unreasonable in consenting to the development permission for the erection of a mobile based station close to residential areas and without undertaking public consultations on the social and economic effect of such structure within the vicinity of the subject area;

(c) Natural Justice (Opportunity to be heard): The Respondent breached the rules of natural justice in not affording the Applicants and other affected residents in the area an opportunity to be heard before consenting to the development plan by Digicel to erect the mobile based station in an area zoned for recreational purposes."

[7.0] Affidavits were also sworn by Maraia Ubitau, the Director of Town and Country Planning sworn on 12th May 2008 and Mathew Pritchard, Roll Out Manager of the First Appellant (hereinafter called 'Digicel'), sworn on 11th July 2008.

[8.0] The tower in issue is within the town planning scheme for the City of Suva. Once a town planning scheme has been approved, the permission of the local authority is required for any development to be carried out on any land within the town planning area. The local authority must ensure that the requirements of the scheme are observed. This is because of the statutory duty imposed on the authority by Section 25 of the Town Planning Act Cap. 139 which provides:

“When a scheme has been finally approved by the Director as aforesaid it shall be the duty of the local authority to observe and to enforce the observance of the requirements of the scheme in respect of all developments of any description thereafter undertaken within the area to which the scheme applies, whether by the local authority or by any person, and, save with the consent in writing of the Director, the local authority shall not thereafter undertake or permit any alteration or modification of any existing buildings or works if such modification or alteration would tend to prevent or delay their being brought into conformity with the requirements of the approved scheme.”

- [9.0] There was no dispute before Singh, J that the General Provisions 1999 of the Town Planning Act apply to this case.
- [10] The second appellant submitted to Singh, J that the first appellant, named in the High Court as the Interested Party, had applied to the Suva City Council for approval to erect the tower under Section 25 of the Act. Since the application related to a tower over nine (9) metres in height, the Suva City Council had to obtain the consent of the Director of Town and Country Planning before it could permit the interested party to erect the tower. The Director gave her consent. Permission was then given by the Council to the first appellant. The Director submitted that she had the authority to grant such consent.
- [11] The respondents (applicants before Singh, J) submitted that the area in question was a recreation space and part of a civic zone. As such they submitted that such space could only be used for outdoor public or private recreational purposes and it would include any structures necessary for the enjoyment of this use, and not for other purposes. They also submitted that the erection of a telecommunication tower was a deviation from the zone

scheme and therefore was a relaxation of the scheme. Therefore they submitted that provisions 6 and 7 of the General Provisions 1999 applied so that a Local Authority subject to the approval of the Director could consent to the relaxation of any requirements laid down in the General Provisions.

[12] Provision 7 requires the Local Authority to advertise in the Gazette and a newspaper any proposed relaxation. Provisions 6 and 7 are as follows:

“Provision 6: Relaxations from General Provisions

- (1) The Local Authority may, subject to the approval of the Director; consent to a relaxation of any of the requirements laid down in these General Provisions and so long as the use or development is in accordance with the terms of such consent no offence against these provisions shall be deemed to be committed by such use or development.
 - (2) Such consent, which shall be in writing, may be granted only when it is considered that the proposed development in respect of which the relaxation is sought would not conflict with the overall principles of the Scheme.
 - (3) Any such consent may be for a limited period named therein and subject to such conditions or restrictions as to use or otherwise as the Director and the Local Authority may think fit.”
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Provisions 7: Notification of Relaxations

Where the Local Authority with the consent of the Director proposes to exercise the discretionary power vested in it under Provision 6 of these General Provisions:

- (a) It shall publicly notify at the applicant's expense, its intention so to do by an advertisement published in Fiji Islands Government Gazette and in two issues of a paper circulating in the district at an interval of not less than seven days.
 - (b) Every owner or occupier of property within the area covered by a Scheme shall have a right of objection to the proposed exemption, and may, by notice in writing addressed to the Local Authority, give notice of such objection and the grounds thereof at any time within 30 days after the first public notification of the Local Authority's intention.
 - (c) Before arriving at a decision, the Local Authority shall take into account any objections submitted to it and may afford objectors the right to be heard at a special meeting of the Local Authority to be called for the purpose. Provided that where the relaxation of the requirements of these General Provisions is of such a minor nature as to appear to cause no inconvenience or detriment to owners of the affected land the Local Authority and the Director may dispense with the requirements of sub-clauses (a), (b) and (c) provided that the Local Authority shall seek the comments of owners of properties likely to be affected by the relaxations."
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[13] It was not disputed in the High Court and in this Court that the tower is 25 metres high. As such Schedule G to provision 9 is relevant. Under the heading "Public Utilities" the Schedule provides:

"Government or Local Authority Public Utility Service Structures i.e. Water, Electricity, Drainage, Sewerage and Telecommunications, not greater than 30 feet (9 metres) in height have Permitted Development Rights in all Zones; all other such service developments are 'Conditional Developments' and requires the prior approval of the Director."

[14] It will be noted, and as Singh, J found, that the above provision is confined to public utilities belonging to the State or a Local Authority. It does not extend to such utilities belonging to individuals or corporations and that any structure over 9 metres in height must have the prior approval of the Director.

[15] The second appellant submitted to Singh, J and to this Court that a structure of 9 metres or less is a permitted development; a structure over 9 metres is a conditional development which needs the second appellant's approval. The second appellant gave such approval.

[16] The issue before the High Court was whether the Director had absolute discretion to grant approval for the erection of a tower over 9 metres high. Singh, J held that she did not. He found that the tower was an eyesore; that it affected the value of the respondents' properties and that Provision 7 gave the respondents the opportunity to be heard even if the local authority did not agree with their objections.

- [17] The Judge said that this was particularly so when the respondents had erected their residences well before the tower came into existence. The appellants claimed that the presence of the tower poses no physical danger to the residences of the respondents. The Judge rejected this submission. He said that one could not deny the visual impact of such a structure especially if it was close by. There was a question of aesthetics to be considered.
- [18] He held that the departure from the Regulation 9 metres to 25 metres height of the tower was a substantial departure and therefore was a relaxation of the requirements laid down in the provisions. He therefore held that the respondents had the right to express objections and the Local Authority had to consider those objections.
- [19] The appellants appealed against that judgment. We find it unnecessary to discuss in any detail the grounds of appeal by the appellants because we are satisfied on the law that the respondents had a right to be heard before this tower was erected for reasons which we shall give shortly. Before doing that however, we mention a preliminary objection by the respondents to the naming of the Director of Town and Country Planning as an Appellant. It was submitted by the second appellant that she had a right to be heard as a co-appellant because of her position as Supervisor of Town Planning and as the person responsible to the Minister for the implementation of the Town Planning Act.
- [20] It was submitted by the respondents that the Director should have only a limited right of argument before this Court in that at all times she had to be seen as a neutral and not an active participant in the litigation. This, it was said, was the rule when decisions of Tribunals were questioned in the Courts.
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- [21] We do not accept this submission. In our view the Director was entitled to give reasons for her approval of the tower and if necessary engage in argument to support those reasons.
- [22] That said, we consider that the appeal must fail for the reasons generally given in the High Court by Singh, J. It was argued by the appellants that, as this was an appeal from a judgment on Judicial Review it was not the province of the Court to delve into the merits of the case. It was said that the Court's duty was only to ascertain the manner in which the decision was made. In this case, proper procedure was followed and the decision of the second appellant was no so unreasonable as to warrant the interference of the Courts.
- [23] We do not accept this submission. The Court cannot close its eyes to the fact that on the Judge's assessment, the tower was and is an eyesore and the general ambience of the area where the respondents live has been adversely affected. It would be a sorry day for the law if residents of an area in which they chose to erect their homes because of its pleasant atmosphere or character could be ridden over roughshod by a corporation whose only purpose is commercial without having any right in law to protest against the destruction or diminution of their right of enjoyment of their homes and the area.
- [24] In our judgment, contrary to the submissions of the appellants, the Suva City Council did not have an absolute discretion to permit relaxation of the scheme. This had to be with the Director's consent as stated in General Provision 6 (1) which consent as a matter of law could not be unreasonably withheld. General Provision 7(c) requires the Local Authority to take into

account any objections submitted to it and may afford objectors the right to be heard at a special meeting of that Authority to be called for the purpose. To hold otherwise would in our judgment make nonsense of the *Audi-alteram partem* rule, one of the basic principles of democracy.

[25] We do not dispute the Director's power to approve construction of the tower. We reject the right she claims not to comply with the General Provisions by failing to direct the Suva City Council to attend to public notification.

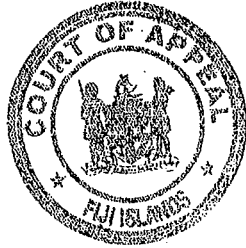
[26] The First Appellant submits that it was entitled to erect the tower because of Sub section 3 of Section 7 of the Act which empowers the Director to give her consent.

[27] We do not agree. In our judgment this section deals with planning issues arising before approval of the scheme, whereas in the instant case there was an existing scheme in place.

[28] In our view the Director cannot rely upon an illegality by someone below her to justify her decision. We hold that her decision was illegal because the condition precedent of the Suva City Council was illegal.

[29] For these reasons we uphold the decision of Singh, J and dismiss the appeal. The appellants must pay the respondents' costs which we fix at \$6,000.00.

Dated at Suva this 13th day of August 2010.



John E. Byrne
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JOHN E. BYRNE, AP

W. Calanchini
.....
WILLIAM D. CALANCHINI, JA