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

CIVIL APPEAL NO. ABU 75 OF 2018
(On appeal from the decision of the High Court of Lautoka in Civil Appeal No. HBA 01 of 2018)
(On Appeal from the Land Transport Appeals Tribunal Nos. 61 and 68 of 2014 and 9 of 2015)

BETWEEN : **SUNBEAM TRANSPORT LIMITED**
Appellant

AND : **LAND TRANSPORT AUTHORITY**
1st Respondent

AND **PACIFIC TRANSPORT LIMITED**
2nd Respondent

AND **PARADISE TRANSPORT LIMITED**
3rd Respondent

CIVIL APPEAL NO.ABU 113 of 2018
(On appeal from the decision of the High Court of Lautoka in Civil Appeal No. HBA 01 of 2018) (On Appeal from the Land Transport Appeals Tribunal in Appeals Nos. 61 and 68 of 2014 and 9 of 2015)

BETWEEN : **PACIFIC TRANSPORT LIMITED**
Appellant

AND : **LAND TRANSPORT AUTHORITY**
1st Respondent

AND : **SUNBEAM TRANSPORT LIMITED**
2nd Respondent

AND : **PARADISE TRANSPORT LIMITED**
3rd Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Dayaratne JA

Counsel : **Mr. V. Kapadia for the Appellant in No. 75 of 2018**
Ms. N. Choo for the 1st Respondent
Mr. R. Prakash with Ms. K. Maharaj for the 2nd Respondent
Mr. R. Singh for the 3rd Respondent

Mr. Prakash with Ms. K. Maharaj for the Appellant in ABU No. 113 of 2018
Ms. N. Choo for the 1st Respondent
Mr. V. Kapadia for the 2nd Respondent
Mr. R. Singh for the 3rd Respondent

Date of Hearing : **21 May 2019**

Date of Judgment : **7 June 2019**

JUDGMENT

Basnayake JA

[1] Two appeals were amalgamated for the reason that the relief claimed is identical. Both theses appeals were filed to have the Ruling (pgs. 8 to 19 and 217 to 228 of the Record of the High Court (RHC)) of the learned High Court Judge (29 March 2018) set aside. The grounds urged in both appeals are identical (pgs. 1 to 4 and 6 to 7 of the RHC).

Grounds of Appeal

[2] *"1. That the Learned Judge has erred in law in not holding that, since the 1st Respondent had not served the Appeal on all interested parties who participated in Tribunal Appeal Nos. 61 and 68 of 2014 and 9 of 2015, namely, Kadar Buksh Limited, Khans Buses Limited, Valley Comfort Transport Limited, Shankar Singh Transport Limited, Taunovo Bus Company Limited, Maharaj Buses Limited and Sunset Express Limited and the Tribunal as required by the High Court Rules the Appeal filed by the 1st Respondent was filed in breach of the mandatory requirements for service of the Appeal set out in order 55 Rule 4(a) & (b) of the High Court Rules and therefore the Appeal should have been dismissed and struck out.*

2. That the Learned Judge has erred in law in referring to Order 2 of the High Court Rules in paragraph 25 of his Ruling but not making any findings or making orders on whether Order 2 of the High Court Rules would cure the defect in not serving all of the parties with the Notice of Appeal as required by Order 55 Rule 4. Nor did he apply Order 2 R(2) of the High Court Rules when the High Court of Fiji ruled in the cases of ***Satish Chand vs. Land Transport Authority & Anr.*** *in Civil Appeal No. HBA 01 of 2016,* ***Ashwani Vjiay Kumari vs Land Transport Authority Northwest Transport Company Limited*** *in Civil Appeal No. HBA 09 of 2017 and* ***Rajendra Prasad vs Land Transport Limited*** *in High Court of Labasa Civil Appeal No. 50 of 2004 that the Appeals from the Tribunal be dismissed for non compliance with Order 55 Rule 4 of the High Court Rules."*

[3] The 1st respondent in both these appeals is the Land Transport Authority (LTA). One Kadar Buksh Limited (KBL) had applied for a Road Route Licence from LTA. The LTA on 12 December 2014 has approved KBL's application. Against this decision, three appeals were filed before the Land Transport Appeals Tribunal (LTAT) bearing numbers 61 of 2014, 68 of 2014 and 9 of 2015. The first two appeals were filed by Sunbeam Transport Limited and Pacific Transport Limited. They are the two appellants before this court. The third respondent was the appellant in case No. 9 of 2015 before LTAT. The LTAT by its order dated 16 December 2015 set aside the decision of the LTA dated 12 December 2014 approving the application of Kadar Buksh Limited (pgs. 42-48 RHC).

[4] The parties before the LTAT are as follows:-

- Sunbeam Transport Limited (No. 61 of 2014)
- Pacific Transport Limited (No. 68 of 2014)
- Paradise Transport limited (No. 9 of 2015) And
- Land Transport Authority
- Kader Buksh Limited
- Valley Comfort Transport Limited
- Shanker Singh Transport Limited

- Taunovo Bus Company Limited
- Maharaj Buses Limited
- Sunset Express Limited

[5] All these parties were represented before the LTAT excepting the Valley Comfort Transport Limited and Maharaj Buses Limited. The 1st respondent (LTA) filed a notice of appeal together with grounds of appeal in the High Court on 13 January 2016 (pgs. 31 to 33 RHC) seeking to have the LTAT judgment dated 16 December 2015 set aside. To this appeal the 1st respondent made the following as parties, namely, Sunbeam Transport Limited, Pacific Transport Limited and Paradise Transport Limited. The first two parties are the two appellants to this appeal. The other party is the 3rd respondent in both appeals.

The Ruling

[6] The two appellants (Sunbeam Transport Limited and Pacific Transport Limited) sought among other reliefs to strike out the Notice of Appeal on the ground that the 1st respondent (LTA) failed to serve the notice of appeal on all the parties as required by Order 55 of the High Court Rules 1988. The learned Judge having considered O. 55 r. 4 and O. 2 r. 1 held that, "*The appeal is against a decision of the Tribunal made in consolidated proceedings. Not all the parties involved in the consolidated proceedings will be directly affected by this appeal. The parties that will be affected by this appeal have been made respondents. Thus the striking out application filed by the appellants was dismissed*".

[7] The learned Judge states in the judgment (paragraph 25 at pg. 17 RHC) as follows; *"The appellant (LTA) further submits that: the court can easily cure any alleged defect by just ordering that the Authority filing a notice of motion relating to appeal and serving the same on all parties as required under O.55, r.4 HCR".* In paragraph 27 the learned Judge states that, *"Technicalities should not stand in the way of justice. By filing a notice of appeal, instead of filing the appeal by way of originating motion as required by O.55, the respondents (appellants) would not be prejudiced".*

Submissions of the learned counsel for the appellants

[8] Oral submissions were made in court mainly by Mr. V. Kapadia for the appellant in the appeal No. 75 of 2018 and the 2nd respondent in the appeal No. 113 of 2018. The learned counsel for the appellant in the case of appeal No. 113 of 2018 and the learned counsel appearing for the 3rd respondent in both the appeals associated themselves with the submissions made by Mr. Kapadia. Ms. Choo made oral submissions for the 1st respondent. Apart from oral submissions, written submissions too have been filed by all the parties.

[9] The learned counsel Mr. Kapadia submitted that the rule made in Order 55 rule 4 is mandatory and noncompliance is fatal. The learned counsel submitted that leaving out parties to proceedings by LTA was deliberate. This is evident from the affidavit filed on behalf of the 1st respondent (paragraph 10 pg. 68 RHC) stating that, *"We are not seeking orders against the interested parties and did not feel the need to add them and incur further costs".* (Also paragraph 9 at pg. 91).

[10] The learned counsel further submitted that the decision of the LTA was in favour of Kadar Buksh Limited (KBL). The appellants in their appeal to the LTAT made KBL a party. By its judgment, the LTAT set aside the decision of the LTA thus directly affecting the interests of KBL. KBL did not appeal against the judgment of the LTAT. It was LTA that made an appeal against the judgment. LTA while appealing against the judgment of LTAT chose not to make KBL a party respondent. Several other parties too were not made respondents to their (LTA) appeal before the High Court.

[11] The learned counsel submitted that the parties do not have the freedom in appeal to bring before them the parties of their choice. The parties are obliged to comply with rules. The specific rule is found in O.55 r. 4. By not making the several parties that were before the Tribunal the learned Judge should not have allowed the LTA to proceed with the appeal and the appeal of the appellant should be allowed and the appeal of the 1st respondent in

the High Court should be struck out. The learned counsel pointed out that it is not a mere technicality that could be cured, but a blatant violation of law.

Submissions of the learned counsel for the 1st respondent (LTA)

[12] The learned counsel submitted that the appeal grounds filed by the LTA against the judgment of the Tribunal does not challenge the cancellation of the bus route to Kadar Buksh Limited or other bus operators who were a party to the Tribunal proceedings. Therefore there is no requirement to serve notices of appeal on all the parties. Notices were thus served only on those who were directly affected. The learned counsel submitted in the written submissions (dated 13 May 2019 in paragraph 22 pg. 11) filed that the learned Judge by relying on O.2, r. 2 cured the defect of Order 55 Rule 3 and 4 when it allowed the appeal in the current form, citing technicalities should not stand in the way of justice.

Analysis

[13] **Order 55 rule 4 of the High Court rules 1988**

Basically this appeal is on O.55 r. 4. Of the High Court Rules.

> 4. (1) ***The persons to be served with notice of the motion by which an appeal to which this Order applies is brought are the following:-***
> *(a) Not reproduced.*
> *(b)* ***If the appeal is against an order; determination, award or other decision of a tribunal, …and every party to the proceedings (other than the appellant) in which the decision appealed against was given.***
> *(2)* ***The appeal notice must be served, and the appeal entered within 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought.***

[14] The appeal filed by the 1st respondent before the High Court in case No. HBA 01 of 2018 was against the judgment of the LTAT dated 16 December 2015. To this appeal the LTA admittedly did not make every party that were before the LTAT. The learned Judge of the High Court in paragraph 28 states that, "the parties that will be affected by this appeal have been made respondents". The objection of the appellants to strike out the notice of appeal was therefore refused by the learned Judge.

[15] O.55 r. 4 (1) (b) specifically spells out the words, "*every party to the proceedings*". The rule excuses only the appellant from being noticed. "Every party" does not include the appellant. It is the appellant who is required to give notice to every party to the proceedings. The rule does not state "every affected party". The rule further requires the appellant to serve notices and to enter the appeal within 28 days from the date of the order or the judgment against which the appeal is brought. I am of the view that the learned Judge has erred in interpreting O. 55 r. 4 (1) (b) to mean "affected parties".

[16] Another matter to consider in this appeal is the application of Order 2 rule 2 of the High Court Rules. Reference is made with regard to this rule in the 2nd ground of appeal. The appeal ground states that, "The learned Judge erred in law in referring to Order 2 of the High Court Rules in paragraph 25 of his ruling but did not make any findings or orders on whether Order 2 of the High Court Rules would cure the defect in not serving all the parties with notice of appeal. I have reproduced what the learned Judge stated in paragraph 25 in my judgment in paragraph 7 above. The learned Judge has allowed the 1st respondent (LTA) to file a motion setting out directions for the appeal within 28 days from the date of the ruling.

[17] I will reproduce O.2 r 1 (1), (2) & (3) which are as follows:

O.2 r.1

1-(1*) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of the Rules, whether in respect of* ***time, place, manner, form or content or in any other respect,*** *the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

(2) Subject to paragraph (3), the court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in these proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The court shall not wholly set aside any proceedings or the writ other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed (emphasis added).

[18] Rule 2 specifically refers to anything done or left undone in respect of ***time, place, manner, form or content or in any other respect.*** This rule has no effect on what is required under O. 55 r. 4. Rule 4 is concerning persons to be served with notices. I am of the view that it is only in matters that come under r.2 that can be rectified by way of amendments and not errors mentioned under r.4. If r.2 is to be interpreted as having an overarching effect, it will render all other rules redundant.

[19] Not serving notices as required by r.4 is fatal to any application. I am of the view that the learned Judge has erred by dismissing the applications of the appellants to strike out the appeal filed by the 1st respondent (LTA). For the foregoing reasons this appeal is allowed. The grounds of appeal are answered in favour of the appellants. Ruling of the learned High Court Judge dated 29 March 2018 is set aside and the appeal of the 1st respondent in the High Court is ordered to be struck out with costs in a sum of $5000.00 in all, payable by the 1st respondent to the appellants in equal share. The appellants are also entitled to costs assessed before the High Court.

Lecamwasam JA

[20] I agree with the reasoning and conclusions of Basnayake JA.

Dayaratne JA

[21] I agree with the reasons given and the conclusions contained in the judgment of Basnayake JA.

Orders of the court are:

1. *Appeal allowed*
2. *Judgment dated 23 March 2018 set aside.*
3. *The appeal of the 1st respondent in the High Court is struck out.*
4. *Costs in a sum of $5,000.00 in all payable by the 1st respondent to the two appellants in equal share.*
5. *The appellants are also entitled to costs assessed before the High Court.*

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL