

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

**CIVIL APPEAL NO. ABU 026 of 2019**  
Suva Civil Action No. HBC 48 of 2006

**BETWEEN** : 1. RAJENDRA DEO PRASAD  
2. NORTHEN BUSES LIMITED

*Appellants*

**AND** : 1. LAND TRANSPORT AUTHORITY  
2. JEAN MICHEL COUSTEAU FIJI IS. RESORT  
3. PARMESH SHARMA  
4. ANJINISH JOKHAN  
5. MERE SAMISONI  
6. FRANK ROBANKADAVU

*Respondents*

**Coram** : Almeida Guneratne, AP  
Basnayake, JA  
Lecamwasam, JA

**Counsel** : Mr R K Naidu for the Appellants  
Ms M Fong the 2<sup>nd</sup> Respondent  
Ms U Chand for the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents

**Date of Hearing** : 19 May, 2021

**Date of Judgment** : 28 May, 2021

## JUDGMENT

### Almeida Guneratne, AP

#### Essential Background facts

- [1] The Appellants applied to the 1<sup>st</sup> Respondent (LTA) for a Road Contract Licence (RCL) to provide a Charter bus service for the 2<sup>nd</sup> Respondent and paid the prescribed fee.
- [2] The application was pending for some time when at some point of time, consideration of the said application was placed on the agenda of a meeting of the LTA but had been deferred.
- [3] A competitor of the Appellants (Vishnu Holdings) for a RCL apparently had complained to the LTA that the Appellants were acting in breach of the Regulations of the LTA Act which had led to the suspension of the 1<sup>st</sup> Appellant's Road Service Licence (RSL) or RRL (Road Route Licence).
- [4] According to the material on Record the 3<sup>rd</sup> Respondent who happened to be a member of the 1<sup>st</sup> Respondent had had a personal and/or financial interest in the said Vishnu Holdings Limited. Although he had been present at the meeting of the LTA to consider the Appellants application for a RCL, he had recused himself subsequently.
- [5] Time having passed by, the 2<sup>nd</sup> Respondent had cancelled the contract which it had entered into with the Appellants in as much as the Appellants were not able to obtain the RCL.
- [6] It is also an undisputed fact that to date the Appellants application for the RCL is pending.
- [7] On the aforesaid essential facts the Appellants (the nature of their business and the relationship between them, *inter se*, also not being in dispute apparently the reason why they had joined in one action):
  - (a) against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents basing their causes of action.

- (i) On the tort of misfeasance in public office (paragraphs 34 – 39 in the Amended Statement of Claim).
  - (ii) On an alleged breach of duty to act fairly and reasonably when dealing with the 2<sup>nd</sup> Appellant's application for the RCL (paragraphs 40-43 of the Amended Statement of Claim).
  - (iii) On unlawful interference with the contractual relations of the Appellants with the 2<sup>nd</sup> Respondent and the Appellants business.  
(Paragraphs 44-50 of the Amended Statement of Claim).
- (b) against the 2<sup>nd</sup> Respondent based on the claim that the 2<sup>nd</sup> Respondent breached its agreement with the Appellants by prematurely terminating the agreement and entering into a contract with Vishnu Holdings Limited.
- [8] On the basis of the 2<sup>nd</sup> Appellant's claim as recounted above, while the Appellants jointly claimed damages (for alleged financial loss), the 1<sup>st</sup> Appellant's claim staked independently was for the suspension of his RRL for the periods stated in Paragraph 1.13 of the Appellants written submissions and in the amended statement of claim which Appellant's Counsel re-iterated at the hearing.
- [9] The 2<sup>nd</sup> Respondent's defence had been that (in essence) they terminated the contract entered into with the Appellants because the Appellants had failed to obtain the RCL and therefore the said contract had become unenforceable. (pages 45-47 of the Copy Record, as per the 2<sup>nd</sup> Respondent's Amended Statement of Defence).

#### **The Cause of action pleaded against the 2<sup>nd</sup> Respondent**

- [10] At this point I felt it expedient in the first instance to consider and deal with the cause of action pleaded by the Appellants against the 2<sup>nd</sup> Respondent in which regard I first looked at the Grounds of Appeal urged (pages 1 to 4 of the Copy Record).



- (1) *The learned trial Judge erred in law by failing to give comprehensive reasons dealing with all significant/critical evidence in his judgment which his Lordship ought to have, given the inordinate delay between the date of the trial and delivery of the judgment.*
- (2) *The learned trial Judge erred in law in holding that the Appellants failed to establish the tort of misfeasance against the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents.*
- (3) *The learned trial Judge erred in law in failing to hold that the 1<sup>st</sup> Respondent was negligent, unfair and careless in failing to hear and determine the 2<sup>nd</sup> Appellants application for Road Contract Licence without unreasonable delay despite the weight of evidence clearly indicating fault/delay on the part of the 1<sup>st</sup> Respondent and despite the Pre Trial Conference minutes clearly stating that:*

  - (i) *At the meeting of 14 July 2005 the 1<sup>st</sup> Respondent through the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondent refused to hear the Appellants application and deferred the same without any proper basis or any justified reasons.*
  - (ii) *The 2<sup>nd</sup> Appellant's Application for a Road Contract Licence to operate a charter bus service for Costeau Resort is still pending as the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents have failed and/or neglected to hear and determine the same to date.*
  - (iii) *It was a duty of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents when exercising their statutory powers in relation to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to exercise them in a fair and dispassionate manner and without malice.*
  - (iv) *The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents were at all material times under a duty to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants to act fairly, impartially and with reasonable care when dealing with the 2<sup>nd</sup> Appellants application for Road Contract Licence and to hear and determine the application without unreasonable delay.*
- (4) *The learned trial Judge's reason for judgment on the Appellants cause of action in negligence against the 1<sup>st</sup> Respondent is deficient and does not adequately address and determine the issue between the Appellants and the 1<sup>st</sup> Respondent.*
- (5) *The learned trial Judge in his judgment disposed of the merits of the Appellants claim in negligence against the 1<sup>st</sup> Respondent in a mere sentence without setting out and analyzing the evidence of the Appellants and the 1<sup>st</sup> Respondents witnesses.*
- (6) *The learned trial Judge erred in law by upholding that immunity provided in Section 21 of the Land Transport Act applied to the 1<sup>st</sup> Respondent when determining the Appellants claim in negligence against the 1<sup>st</sup> Respondent.*

- (7) *The learned trial Judge erred in law in failing to hold that the 1<sup>st</sup> and/or the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents unlawfully interfered with the contractual relations between the Appellants and the 2<sup>nd</sup> Respondent and with the Appellants business.*
- (8) *The learned trial judge erred in law in failing to hold that the 2<sup>nd</sup> Respondent breached its agreement with the Appellants by prematurely terminating the agreement between them and by entering into a contract with Vishnu Holdings Limited."*

[11] There is not word which has reference to the 2<sup>nd</sup> Respondent's liability to have been sued along with the 1<sup>st</sup>, 3<sup>rd</sup> to 6<sup>th</sup> Respondents.

[12] The learned High Court Judge after trial quite pertinently noted at paragraphs [89] to [91] of his judgment which I condone *in toto*:

*"[89] The plaintiffs claim that the 2<sup>nd</sup> defendant breached its agreement with the plaintiffs by prematurely terminating the agreement between them around 9 January 2006 and entering into a contract with Vishnu Holdings Limited,*

*[90] It is admitted fact that Plaintiffs did not have RCL to conduct chartered bus service to the 2<sup>nd</sup> Defendant. The Plaintiffs had applied for a RCL but did not get it. In the circumstances the operations of the Plaintiffs providing chartered bus service to the 2<sup>nd</sup> Defendant is illegal and void and against the public policy and claim for damages fails.*

*[91] It is not in dispute that the plaintiffs were providing charter bus service to the 2<sup>nd</sup> defendant without having a RCL."*

[13] How could the 2<sup>nd</sup> Respondent have proceeded with a Contract which the Appellants had no legal basis to have proceeded with?

[14] If so, could the 2<sup>nd</sup> Respondent have been faulted for entering into a contract with a third party (Vishnu Holdings Limited?).

### **Frustration of Contract**

[15] In the result, the matter as between the Appellants and the 2<sup>nd</sup> Respondent was a clear text book instance of a frustration of contract which does not require any exercise in semantics

to ascertain how that doctrine applies for which reason I do not think it necessary to cite precedents.

**The Final Orders of the High Court in that regard**

[16] The learned Judge made his final Orders thus:

*"a. Plaintiff's writ of summons is struck off and the statement of claim dismissed.*

*b. Each party to bear their own costs."*

[17] I have a reservation on Order b. Why should the 2<sup>nd</sup> Respondent be asked to bear its own costs?

[18] The 2<sup>nd</sup> Respondent (2<sup>nd</sup> Defendant) who was brought to Court had to even file pleadings. Although subsequently the 2<sup>nd</sup> Respondent had pursued a passive role, even at the appeal stage, it presumably would have had to incur some costs.

[19] Accordingly, while agreeing with His Lordship's judgment in striking off the summons I vary the said Order b to the extent that, the Appellants pay costs of the proceedings in the High Court to the 2<sup>nd</sup> Respondent in a sum of \$1,500.00 within 21 days of this judgment.

**The Appellants Claim against the 1<sup>st</sup>, 3<sup>rd</sup> to 6<sup>th</sup> Respondents**

[20] I have earlier referred to the grounds of appeal urged by the Appellants in that regard. (*supra*, paragraph [10]).

[21] I shall now take those grounds cumulatively and deal with them.

[22] The learned High Court Judge discerned the elements of the tort of misfeasance proceeding as he did in examining some precedents at paragraphs [42] and [43] of his judgment.



**Analysis and Application of the elements of Misfeasance/Non feasance by the learned Judge**

- [23] At paragraph 43(6) of his judgment, the learned Judge extracted which I see as the decisive criterion that grounds a cause of action based on misfeasance. That is,

*“6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also know that the defendant was a public officer or entity and his loss was caused by the wrongful act.”*

- [24] Having done so, the learned Judge invoked the provisions relating to immunity from civil liability contained in Section 21 of the LTA Act. (paragraph [45] of his judgment).

**My own assessment of the invocation of Section 21**

- [25] To begin with, the section affords protection to the Chairman, member or employee of the Authority (Corporate body) against personal liability for “any act done” “in good faith”.

**What was the act done? (as complained by the Appellants?)**

- [26] It is that the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents delayed the processing of the Appellants application for a RCL as when the 2<sup>nd</sup> Respondent cancelled the contract it had entered into with Appellants.

**Was there “bad faith” in the said delay?**

- [27] Even if this Court is to be reluctant in inferring “bad faith”, the bottom line is the Appellants contract with the 2<sup>nd</sup> Respondent resulted in its cancellation. This is the loss the Appellants are complaining of. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents may not be liable personally but the 1<sup>st</sup> Respondent Authority, in my view, must be held liable for the loss the Appellants suffered,

“the wrongful act” being the procrastination on the part of the 1<sup>st</sup>, 3<sup>rd</sup> to 6<sup>th</sup> Respondents in not processing the Appellants application for a RCL which has not been determined to date either way.

- [28] The material on Record does show that the Appellants are supposed to have breached the 1<sup>st</sup> Appellant’s RRL Conditions in “picking up” passengers, (with no evidence to sustain the same and with no investigation and a determination thereon).
- [29] Be that as it may, even if this Court were to by-pass all that, what is the explanation the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents offered as to why they had procrastinated from as way back as September, 2004 in not making a final decision whether to grant or not the RCL which the Appellants sought which as learned Counsel for the Appellants argued still remain undetermined.
- [30] The immunity for non feissance was abolished in 1961 in the UK since when highway authorities have been made equally liable for the exercise or non-exercise of their powers and for neglect of their duties, subject to a statutory defence of showing that they have used reasonable care in all the circumstances. (vide: *Wade & Forsythe, Administrative Law* (11<sup>th</sup> ed.), page 659.
- [31] In Fiji, the immunity of highway authorities remains but in a qualified sense as pointed out earlier by me in this Judgment. (*supra*, paragraph [27]).
- [32] Since I have said that I shall deal with the grounds of appeal urged cumulatively (*supra*, paragraph [21]), I express my thinking as follows.
- [33] The actions of the 1<sup>st</sup>, 3<sup>rd</sup> to 6<sup>th</sup> Respondents being, in pursuance of the exercise of statutory power discretion no doubt being implied, if there had been a failure to exercise such discretionary power, if sufficiently negligent, may involve a breach of a duty of care and consequent liability. (vide: *Wade & Forsythe, supra* at page 657).



- [34] Indeed the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents as the test of reasonableness demands ought to have foreseen that the delay in failing to make a determination on the application for a RCL could very well have led to the cancellation of the Appellants contract with the 2<sup>nd</sup> Respondent.
- [35] The said Respondents being holders of statutory power, indeed, involving regulatory powers, such powers needed to be exercised fairly, reasonably and in conformity with the principles of natural justice.
- [36] I cannot say that the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents satisfied those tenets,
- [37] In the result, I allow the Appellants appeal on Grounds 1 and 2 (as urged) in their initial Notice of Appeal (while reflecting on the fact that I did not see a reason to deal and respond to the supplementary Notice of Appeal).
- [38] In making my said determination I gave my mind to some established principles and/or directives in the realm of tort law as impacting on public law.

### **The doctrine of Public Trust**

- [39] It is an established doctrine that public (statutory) authorities hold power in trust for the public. That power though implying the exercise of discretion in arriving at a decision must be exercised reasonably and fairly. (vide: *The Wednesbury principle*) [1948] 1 KB 223.
- [40] Given the demonstrable failure on the part of the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents to process and make a decision on the Appellants application for a RCL I am of the view that, the said Respondents had failed to act fairly and in conformity with the tenets of natural justice timely.

- [41] In law, having the Rule of Law at stake, there can never be an unfettered discretion in the exercise of statutory power. (vide: **Premachandra v Jayawickrama** (1994) Sri Lanka LR 90 (Supreme Court).

#### **The principle of Legitimate Expectation**

- [42] The Appellants application for a RCL was made in September, 2004 (and still has not been determined). If the RCL was to be denied, then the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents had a duty to inform the Appellants with reasons for denying the same (which is an imperative requirement of natural justice as established in current jurisprudence). That was not done.
- [43] A combination of the Public Trust Doctrine and the principle of legitimate expectations thus brings into focus the Appellants expectation to the RCL which they applied for. As has been said, “Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and government becomes a choice between chaos and coercion” (vide: *Wade & Forsythe*, (supra) page 451.
- [44] How could and where could such trust lie when from September, 2004, an application for a RCL, the 1<sup>st</sup> Respondent (along with the 3<sup>rd</sup> to 6<sup>th</sup> Respondents) failed to make a determination on?

#### **Determination and Conclusion**

- [45] On the basis of the aforesaid reasons I am inclined to allow the Appellants appeal on the said grounds of appeal (3) to (6) as well.

#### **The consequential issues that remained to be addressed**

- [46] The first is the 3<sup>rd</sup> Respondent’s antecedent connections with Vishnu Holdings Limited. In view of my upholding grounds of appeal (1) to (6) it would have been unnecessary, and indeed redundant to have gone into that question.

[47] In the result what remained to be addressed is what consequential orders that needed to be made in terms of damages, interest thereon and Costs.

**In Re: Award of Damages, Interest and Costs**

[48] Having looked at the Amended Statement of Claim of the Appellants against the 1<sup>st</sup> and 3<sup>rd</sup> to 6<sup>th</sup> Respondents and the quantum of damages claimed by the 1<sup>st</sup> Appellant on the RRL issue and the 2<sup>nd</sup> Appellant on the RCL issue, in the light of the evidence led on behalf of the Appellants, while allowing the Appellants appeal on the said grounds of appeal (No.1 to No.6), I make order remitting the matter to the High Court to make an appropriate Order as to the quantum of damages to be awarded with interest thereon in terms of relevant legal provisions and Costs.

[49] Consequently, I proceed to propose my final Orders in this appeal as follows.

**Basnavake, JA**

[50] I agree with the judgment of Almeida Guneratne, AP.

**Lecamwasam, JA**

[51] I agree with the reasons, the conclusions and orders made by His Lordship the Acting President, Justice Almeida Guneratne.

**Orders of Court**

- 1. The Appeal against the 2<sup>nd</sup> Respondent is dismissed with costs payable in the High Court proceedings fixed at \$1,500.00 within 21 days of this Judgment.*
- 2. The Appeal against the 1<sup>st</sup> and 3<sup>rd</sup> to the 6<sup>th</sup> Respondents is allowed on Grounds of Appeal No.1 to (6) urged in the original Notice of Appeal.*



3. *The matter is remitted to the High Court for purposes of determining the matters stated in paragraph [48] above.*
4. *As far as the present appeal is concerned, I make Order against the 1<sup>st</sup> Respondent to pay as Costs of this Appeal \$5,000.00 to the Appellants within 21 days of this Judgment.*
5. *Orders 1 and 4 are to take effect contemporaneously.*



*Almeida Guneratne*

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**Hon. Justice Almeida Guneratne**  
**ACTING PRESIDENT, COURT OF APPEAL**

*E. Basnayake*

.....  
**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**

*S. Lecamwasam*

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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**