

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 48 of 2006

BETWEEN : RAJENDRA DEO PRASAD trading as NORTHERN BUSES LIMITED, bus operator of Labasa. 1ST PLAINTIFF

AND : NORTHERN BUSES LIMITED of Labasa. 2ND PLAINTIFF

AND : LAND TRANSPORT AUTHORITY 1ST DEFENDANT

AND : JEAN MICHEL COUSTEAU FIJI ISLANDS RESORT (a firm) of Suvitsavu. 2ND DEFENDANT

AND : PARMESH SHARMA of Suva. 3RD DEFENDANT

AND : ANJNISH JOKHAN of Suva. 4TH DEFENDANT

AND : MERE SAMISONI of Suva. 5TH DEFENDANT

AND : FRANK ROBANA KADAVU 6TH DEFENDANT

Counsel : Mr. Ritesh Naidu for Plaintiff
: Ms Dauvere. L. and Ms. Kinivuwai.F for 1st and 3rd to 6th
Defendants
: Mr. K. Jamandas and Mr.K. Singh for 2nd Defendant

Date of Judgment : 11th December, 2018.

JUDGMENT

INTRODUCTION

1. The Plaintiffs are claiming from 2nd Defendants damages for the breach of contract. The contract was to provide chartered bus service. At the time of entering in to contract, Plaintiffs did not have licence to provide such services and had applied for such a licence. This application for licence was deferred by 1st Defendant and they did not grant the licence. The members of the board of the 1st Defendant at that time are the 3rd to 6th Defendants. The Plaintiffs are claiming damages against them as inter alia for misfeasance, negligence, unlawful interference with contractual relationship and interference with business, discrimination.

FACTS

2. Following Facts are Agreed in the minutes of the Pre Trial Conference filed in the Copy Pleadings.
3. The pre-trial conference minutes filed on 19 August 2009 admitted several facts and they are as follows;
4. The 1st Plaintiff is a bus operator. The 1st Plaintiff has been in the bus industry for the past several years.
5. The 2nd Plaintiff is a duly incorporated company under the laws of Fiji having its registered office at Lot 14, Vakamasisuasua Industrial Subdivision, Nasekula, Labasa and is capable of suing and being sued.
6. The 2nd Plaintiff carries on business as owner and operator of public transport services such as bus.
7. The 1st Plaintiff is the Managing Director of the 2nd Plaintiff.
8. The 1st Plaintiff is and has been at all material times the holder of Road Service Licence Numbers 12/23/24 and 12/23/55.
9. The Plaintiffs have a fleet of buses and at all material times the Plaintiffs provided charter bus service to the 2nd Defendant.
10. The 1st Defendant is a body corporate established under the Land Transport Act 1998 and may sue and be sued in its corporate name and style.

11. The 2nd Defendant is a firm in Savusavu and the general nature of its business is Tourist Operations, Resort and Accommodation House. The 2nd Defendant operates Cousteau Resort in Savusavu.
12. The 3rd, 4th, 5th and 6th Defendants were at all material times appointed members of the Land Transport Authority with powers, functions and duties provided under the Land Transport Act and regulations. In carrying out their duties the 3rd, 4th, 5th and 6th Defendants were carrying out a public office at all material times.
13. At all material times the 3rd Defendant was a General Manager of Merchant Finance & Investment Company Ltd.
14. That Bus Operators in Vanua Levu have been operating and continue to operate charter bus service without a special licence to permit.
15. In accordance with the practice prevalent in Vanualevu, the Plaintiffs entered into an oral agreement with the 2nd Defendant around early 2004 to provide to the 2nd Defendant charter bus service for Cousteau Resort guests and staff for a reward. The Plaintiffs provided charter bus service to Cousteau Resort since around early 2004. This oral agreement was later incorporate partly in writing in the form of two letters dated 21 February, 2005 and 30 October, 2005.
16. On 11 August, 2004, the 1st Defendant wrote to the 1st Plaintiff advising him that it had received complaints from the Plaintiffs competitor Vishnu Holdings Limited regarding the trips the 1st Plaintiff's buses were making to Cousteau Resort.
17. On 18th August, 2004, the 1st Defendant wrote to Vishnu Holdings Limited stated that the 2nd Defendant was satisfied with the bus services provided by the 1st Plaintiff. The letter also purported to say that the 1st Defendant was investigating the matter (i.e about the bus services the 1st Plaintiff was providing) and that it would take necessary action.
18. The 1st Defendant through it servants and or agents advised the Plaintiffs to make an application to the 1st Defendant for a Road contract licence to operate charter bus service for Cousteau Resort.
19. On or about 06 September, 2004, the 2nd Plaintiff made an application to the 1st Defendant for a Road Contract Licence to operate a charter bus service for Cousteau Resort. The 2nd Plaintiff paid the prescribed fee for the application and advertisement costs as prescribed by the Land Transport Regulations. The 2nd Plaintiff also provided the 1st Defendant with a copy of its contract for charter bus service with the 2nd Defendant.

20. By letter dated 21 October, 2004, the 1st Defendant asked the 1st Plaintiff to appear before the 1st Defendant on 09 November, 2004 to show cause why the 1st Plaintiff's permit RRL 12/23/34 and 12/23/55 should not be cancelled varied or suspended in terms of Regulation 12 of the Public Service Vehicle Regulation.
21. The 1st Defendant dealt with the matter (stated at paragraph 17 above) on 09 November, 2004 and by its letter of 20 December, 2004 advised the 1st Plaintiff of the suspension of his road service for six month from the date of delivery of the letter on 21 January 2005, on the grounds that the 1st Plaintiff had consistently failed to comply with the terms of his permits 12/23/34 and 12/23/55 to the detriment of other public service operators.
22. The 1st Plaintiff appealed against the suspension of his permit and also applied for a stay pending the determination of his appeal. The Land Transport Appeal Tribunal set aside the suspension on 28 April, 2005 and it handed over its written ruling on 30 June, 2005.
23. On 21 February, 2005 the 1st Plaintiff and 2nd Defendant signed an agreement as follows:

"February 21, 2005

Agreement to provide Bus Services

"This agreement confirms that Northern Buses Limited will provide Bus Transport for the guests and staff of Jean-Michel Cousteau Fiji Islands Resort."

.....
Rajendra Deo Prasad
Northern Buses Ltd

.....
Grey Taylor
Jean-Michel
Cousteau Fiji Islands Resort

24. On 04 May, 2005 the Plaintiffs through their former solicitors GP Shankar & Co. wrote to the 1st Defendant requesting the 1st Defendant to hear the application lodged by the 2nd Plaintiff on or about 06 September, 2004 for Road Contract Licence to operate charter bus service for Cousteau Resort. The 1st Defendant did not respond.
25. On 14 July, 2005 the 1st Defendant held a meeting at the Labasa Town Council Conference Room. The 3rd, 4th, 5th and 6th Defendants were present at the meeting. On the agenda was the 1st and 2nd Plaintiffs applications.

First Plaintiff's Application

- (a) Opposed application for Transfer of Road Route Licence 12/23/34 and 12/23/55.
- (b) Opposed application for new Road Permit (Road Route Licence)
 - (i) Route: Raranibuluhulu/Raranikawai/ Qelehimu/Koroyatu/Labasa
 - (ii) Route: Labasa/Malau/Labasa

Second Plaintiff's Application

- (c) Opposed application for Road Permit (Road Contract Licence)
 - (i) Route: Labasa/Savusavu/Labasa
 - (ii) Route: Nukubalavu/Cousteau Resort via Naqere
26. At the meeting of 14 July 2005 the 1st Defendant through the 3rd, 4th, 5th and 6th Defendants refused to hear the Plaintiff's application and deferred the same without any proper basis or any justified reasons.
27. According to the 1st Defendant Minutes of the Meeting of 14 July, 2005, the 1st Defendant through the 3rd, 4th, 5th and 6th Defendants suspended the 1st Plaintiff's Road Permit 12/23/55 in a Private Meeting.
28. By letter dated 21 July, 2005 the 1st Defendant formally advised the 1st Plaintiff that it had suspended the 1st Plaintiff's express service Labasa/Savusavu Road Route Licence 12/23/55 with effect from 22 July, 2005. The letter further stipulated that the suspension was for a period until the 1st Plaintiff's case was dealt with by the 1st Defendant or three months from the date of the letter.
29. The 1st Plaintiff's former solicitor responded to the 1st Defendant's letter on 22 July, 2005 stated that the suspension was wrong in law and Unconstitutional.
30. By letter dated 22 July, 2005 the 1st Defendant advised the 1st Plaintiff to resume his operation on the Labasa/Savusavu Express Trip Route RRL 12/23/55 immediately. The letter further stipulated that the 1st Defendant would inform the 1st Plaintiff's competitor Parmod Enterprises Limited to withdraw from the said route.
31. On 30 October, 2005 the 1st Plaintiff and 2nd Defendant signed the following memo:

"30th October, 2005
Northern Buses Ltd

Lot 14, Vakamaistuasua Subdivision
Nasekula
Labasa
Fiji

Dear Rajendra,

I refer to our agreement dated Feb 21, 2005; we hereby to confirm that we have a contract in place, payable in arrears at the end of each month, for the provision of transport services for Resort guests and staff.

The trips are exclusively for the Resort and do not involve transport of members of the public.

You have asked for a letter committing us for five years. I would be happy to continue asking using your services for a period exceeding five years subject to the standard and pricing of those services continuing to be competitive.

I trust the LTA will provide whatever documentation you need to continue to provide service to the Resort.

If I can offer you any additional assistance, I would be pleased to help.

Yours truly,

Grey Taylor
Resort Director"

32. The 2nd Plaintiff's Application for a Road Contract Licence to operate a charter bus service for Costeau Resort is still pending as the 1st, 3rd, 4th, 5th and 6th Defendants have failed and neglected to hear and determine the same to date.
33. As a result of the failure by the 1st, 3rd, 4th, 5th and 6th Defendants to hear and determine the 2nd Plaintiff's application, one of its competitor Vishnu Holdings Limited approached the 2nd Defendant and entered into a contract with the 2nd Defendant to provide charter bus service to the 2nd Defendant. Vishnu Holdings Limited however does not have Road Contract Licence to provide a charter bus service.
34. The 2nd Defendant as a result terminated its contract with the Plaintiff's for the hire of their buses from 09 January, 2006.

35. The 2nd Defendant is currently using the charter bus services of Vishnu Holdings Ltd. Vishnu Holdings Limited also does not have a road contract licence.
36. It was a duty of the 3rd, 4th, 5th and 6th Defendants when exercising their statutory powers in relation to the 1st and 2nd Plaintiff to exercise them in a fair and dispassionate manner and without malice.
37. The 1st, 3rd, 4th, 5th and 6th Defendants were at all material times under a duty to the 1st and 2nd Plaintiffs to act fairly, impartially and with reasonable care when dealing with the 2nd Plaintiff's application for Road Contract Licence and to hear and determine the application without unreasonable delay.
38. At all material times the 2nd Defendant had direct knowledge that the 1st and 2nd Plaintiffs did not have a Road Contract Licence to provide charter bus service. Despite this the 2nd Defendant agreed for the 1st and 2nd Plaintiff to provide charter bus service to Cousteau Resort.
39. It was a term and condition of the agreement that the 2nd Defendant would continue to use the 1st Plaintiff's charter bus service for a period exceeding five years.

ANALYSIS

40. The Plaintiff had claimed damages against 2nd Defendant on the alleged breach of contract to provide charter bus service which will be dealt later, in this judgment.
41. The Plaintiffs have pleaded 4 causes of action in amended statement of defence filed on 09 May, 2008) against the 1st, 3rd, 4th, 5th and 6th Defendants and they are
 - (i) Have committed the tort of **misfeasance** in public office (paragraphs 34 – 39 of the amended statement of claim);
 - (ii) Owed a **duty to the Plaintiff to act fairly and with reasonable care** when dealing with the 2nd Plaintiff's application for Road Contract Licence. They failed in their duty (paragraphs 40 – 43 of the amended statement of claim);
 - (iii) **Unlawfully interfered with the contractual relations** between the Plaintiffs and the 2nd Defendant (paragraphs 44 – 46 of the amended statement of claim);
 - (iv) **Unlawfully interfered with the Plaintiffs business** (paragraphs 47 – 50 of the amended statement of claim).

42. The Plaintiff's claim against the 1st, 3rd, 4th, 5th and 6th Defendants is based on the tort of misfeasance. The Plaintiff's claim that the 1st, 3rd, 4th, 5th and 6th Defendants whilst carrying out a public office acted in abuse of their respective offices and failed to carry out their duties and thereby committed misfeasance in a public office.

The elements of the tort of misfeasance are:

- (i) The holder of a public office;
- (ii) Acting in bad faith;
- (iii) Causes loss or damage to the Plaintiff.

43. In *Three Rivers DC v Bank of England* (1996) 3 All ER 558 (at pp. 632 – 633) Clarke J summarised his conclusions as to the ingredients of the tort of misfeasance in public office as follows (which was followed by the House of Lords in *Three Rivers District Council v Bank of England* [2000] 3 All ER 1 (at p.36).

"(1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in Northern Territory v Mengel (1995) 185 CLR 307, it has some similarities to them.

(2) Malice, in the sense of an intention to injure the Plaintiff or a person in a class of which the Plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously. See Mengel (1995) 185 CLR 370) per Deane J.

(3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that he act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position.

(4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstance in which he believes or suspects that his act will probably damage the plaintiff or such

a person, if he does not ascertain whether that is so or not or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage.

(5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort.

(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."

44. The 1st Defendant Land Transport Authority is a body corporate established under section 6(2) of the Land Transport Act, 1998 and can be sued in its corporate name.
45. The members of the Land Transport Authority Board are protected from personal civil liability in terms of Section 21 of LTA which states:

"Protection against personal liability

21. A person who is or has been –

(a) A **Chairman, member or employee of the Authority;**

(b) A police officer assisting the Authority in accordance with section 20,

shall not be personally liable for any civil proceedings or demand for any act done or contract entered into, in good faith, by or on behalf of the Authority" (emphasis added).

46. This is a statutory protection for personal liability of acts done in good faith. So the Plaintiffs needs to prove that acts they allegedly done by the 1st Defendant and its Board members were done in bad faith.
47. The tort of misfeasance is capable of being committed only by a person or body who fulfils some public functions. (**Tampion v Andersen** [1973] VR 715 at 720). A public officer is a person employed to perform a statutory power or duty in which the public has an interest: **E v K** [1995] 2 NZLR 239 at 249.

48. Grimson v Victorian Workcover Authority [1995] 1 VR 209 at 226 per MacDonal J. It was held a local body when exercising a public function such as those relating to town planning can be liable for misfeasance. Dunlop v Woollahra Municipal Council [1982] AC 158 at 172; [1981] 1 ALL ER 1202 at 1210 (PC)."
49. 1st Defendant, is involved in the are of land transport and the appointments to the board are made by the relevant Minister. So 1st Defendant is a statutory body exercising work of public office and the 3rd, 4th, 5th and 6th Defendants are holders of a public office, duly appointed by the Minister.
50. *Paragraph 36 (a) of amended statement of claim states,*
- "(a) The 3rd Defendant is and was a General Manager of Merchant Finance & Investment Company Ltd. The 1st and 2nd Plaintiffs competitors Vishnu Holdings Limited and Parmod Enterprises Limited (both objected to the 1st Plaintiff's application) are clients of Merchant Finance & Investment Company Ltd who is the finance provider for Vishnu Holdings Limited and Parmod Enterprises Limited. The 3rd Defendant being the General Manager of the finance provider had a pecuniary interest in the matter. The 3rd Defendant would naturally serve the interest of Vishnu Holdings Limited and Parmod Enterprises Limited in order to safeguard his interest and the financial interest/position of Merchant Finance & Investment Company Ltd."*
51. It is admitted that the 3rd defendant was a general manager of Merchant Finance & Investment Company Limited (MFICL). The 3rd defendant gave evidence that he was a board member of the Land Transport Authority from 2004 to 2006. He could not recall why the 2nd plaintiff's application for a road contract licence was deferred. When he gave evidence in court more than 10 years lapsed, hence it is difficult to recollect.
52. Vishnu Holdings Limited and Parmod Enterprises both objected to the 2nd plaintiff's application for a Road Contract Licence. (RCL) Public Meeting of the LTA held in Labasa on 14 July 2005 which is Exhibit P8 and P 9).
53. Vishnu Holdings Limited and Parmod Enterprises Limited are the plaintiff's competitors. They are also the clients of MFICL. It is proved that MFICL has bills of sale over some buses owned by Parmod Enterprises Limited. The bills of sale are dated 17 December 2003, 21 May 2004, 12 October 2004, 18 December 2004, 02 August 2005 and 28 August 2006. The search further contains "Annexure A" referred to in the loan contract agreement dated 29

March 2006 between Parmod Enterprises Limited and MFICL which lists 25 buses over which MFICL has security.

54. The Plaintiff's argument is that 3rd defendant being the general manager of the finance provider had a pecuniary interest in the matter. He contends that in need to ensure that MFICL did not lose its clients Parmod Enterprises and Vishnu Holdings Limited and in order see that this happened, he had to make decision against the plaintiffs and in favour of Vishnu Holdings Limited and Parmod Enterprises Limited.
55. This is a far fetched argument. A financial institution have people from all walks of life as their customers and they would have been provided with loans or financial instruments and that cannot be used against a board member's decision for bias in another entity such as Land Transport Authority without proof of actual bias. 3rd Defendant was only one member and there were other members of the Board and there is no evidence that such members had any pecuniary interest. The decision of the board to defer an application of Plaintiff was not made by one person but from the entire board.
56. The 1st plaintiff Rajendra Deo Prasad's evidence states, that the 3rd defendant had asked the 1st plaintiff to obtain finance for his buses from MFICL. This is denied by the 3rd Defendant. I do not accept the Plaintiff's position.
57. It is common thing in banking, that customers are attracted by interest rates and most of the corporate customers are dealing with more than one financial institution and purchase of vehicle is not a significant issue to create bias.
58. Paragraph 36 (c) and (d) of amended statement of claim states:

(c) The 1st, 3rd, 4th, 5th and 6th Defendants acted in bad faith by permitting or allowing Vishnu Holdings Limited to provide a charter bus service to the 2nd Defendant despite the fact that Vishnu Holdings Limited did not have a Road Contract Licence to provide a charter bus service. On the contrary the 1st, 3rd, 4th, 5th and 6th Defendants suspended the 1st Plaintiff's road service licence/permit, and issued TINS against the 1st Plaintiff and his drivers for providing charter bus services to the 2nd Defendant without a Road Contract Licence.

(d) The 3rd, 4th, 5th and 6th Defendants deferred the 2nd Plaintiff's application for a Road Contract Licence indefinitely. The 2nd Plaintiff's application has not been heard and determined to date. As a result the 2nd Plaintiff's competitor Vishnu Holdings Limited approached the 2nd Defendant and entered into a contract with the 2nd Defendant to provide charter bus service to the 2nd Defendant. The 1st Defendant has not questioned, investigated

and or taken any action against Vishnu Holdings Limited for providing charter bus service to the 2nd Defendant without a Road Contract Licence despite having direct knowledge that Vishnu Holdings Limited is providing such services to the 2nd Defendant. The power exercised by the 3rd, 4th, 5th and 6th Defendants in refusing to hear the 2nd Plaintiff's application was with malice towards the Plaintiff in the sense of an intent to injure the 2nd Plaintiff in its business.

59. The particulars pleaded in paragraphs 36(c) and (d) of the amended statement of claim are not disputed by the parties. Vishnu Holdings Limited made complaints to the LTA regarding the transport service of the 1st plaintiff's buses provided to 2nd Defendant. As a result of these complaints the 1st defendant through the 3rd, 4th, 5th and 6th defendants took action against the 1st plaintiff, after an inquiry.
60. By letter dated 21 October, 2004 marked P19, the 1st Defendant asked the 1st Plaintiff to appear before the 1st Defendant on 09 November, 2004 to show cause why the 1st Plaintiff's Permits RRL 12/23/34 and 12/23/55 should not be cancelled varied or suspended in terms of Regulation 12 of the Public Service Vehicle Regulation.
61. The 1st Defendant dealt with the Regulation 12 inquiry, on 09 November, 2004 in a private meeting and by its letter of 20 December, 2004 advised the 1st Plaintiff of the suspension of his road service for six months from the date of delivery of the letter on 21 January, 2005 on the grounds that the 1st Plaintiff had consistently failed to comply with the terms of his permits 12/23/34 and 12/23/55 to the detriment of other public service operators.
62. The 1st, 3rd, 4th, 5th and 6th defendants deferred the 2nd Plaintiff's application for Road Contract Licence on (RCL) 14 July 2005.
63. The 2nd plaintiff's application for a RCL to operate a charter bus service for Cousteau Resort was not determined but this fact considering to the circumstances in which the said Defendants had acted, would not establish bad faith.
64. There is evidence that complaints were made regarding the manner in which Plaintiff provided chartered bus services to the 2nd Defendant. There were complaints that Plaintiff were in fact provided transport services to general public on the way to 2nd Defendant.
65. While providing chartered bus service without RCL there were complaints that Plaintiff were engaged in further illegal acts of picking passengers on its way. This is a legitimate consideration before grant of RCL and there was no bad faith proved.
66. PW 1 said he asked the 1st defendant to issue him a temporary licence under Section 66 of the Land Transport Act but the 1st defendant refused. Under

section 66 of the LTA the 1st defendant could issue the 1st plaintiff with a 3 months permit. Section 66 provides:

"66: (1) The Authority may issue a temporary road permit for a period of not more than 3 months and such permit authorises the carriage of persons on such routes or within such areas as may be specified in the permit and subject to such conditions as may be specified

(2) A temporary permit shall not be issued if, within the period of 12 months preceding the application, a similar temporary permit was issued in respect of the same route the subject of the new application

(3) A road permit may include conditions or restrictions relating to charter services which may be performed under the authority of the road permit.

(4) The Authority shall not issue a road permit if any road services included on the permit –

(a) is to be conducted with the use of a motor vehicle which is licensed as a carrier; and

(b) in the opinion of the Authority, competes unduly with a road service included on another road permit and conducted with the use of a motor vehicle which is licensed as an omnibus"

67. The 1st defendant also issued Traffic Infringement Notices (TIN) against the 1st plaintiff and his drivers for providing charter bus services to the 2nd defendant without a road contract licence.
68. The Plaintiff does not have RRL for the road used to provide chartered bus services whereas Vishnu Holding is having RRL to pick passengers on the road and they have complained of the passengers on the road are picked by the Plaintiffs.
69. In *Bourgoin S A v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 the Minister knowingly favoured local producers by making a decision. This case cannot be applied as there was clear intention to favour one party in making the decision.
70. In my judgment the Plaintiff did not prove that the 1st defendant and its board members acted with malice against the plaintiffs with an intent to injure the plaintiffs in their business.
71. They have not exercised their powers with malice. The reason to investigate Plaintiff's services to the 2nd Defendant was explained. If the complaints are true

it was Vishnu Holdings that would loose its revenue due to the loss of the Plaintiff's.

72. Paragraph 36 (e) of amended statement of claim:

(e) *Deliberately failing to afford the 1st Plaintiff procedural fairness by refusing to allow the 1st Plaintiff to answer the allegations made against him by Vishnu Holdings Limited concerning the trips the 1st Plaintiff made from and back to Cousteau Resort on 9, 10, 11, 12, 13, 14, 15, 16 and 18th July, 2004 and hearing evidence of other allegedly irregular picking of passengers but of which it had not giving the 1st Plaintiff prior notice and suspending the 1st Plaintiff's road service for 6 months when it knew or ought to have known that by doing so it was breaching provisions of Section 65 (4) of the Land Transport Act and Regulation 12 of the Land Transport (Public Service Vehicles) Regulations 2000.*

73. Section 65(4) of the Land Transport Act and Regulation 12 of the Land Transport (Public Service Vehicles) Regulations 2000. Section 65(4) of the Land Transport Act provides:

"A person who operates or permits to be operated a public service vehicle without or contrary to the conditions of a public service permit issued under this section commits an offence and is liable on conviction to the prescribed penalty"

74. Regulation 12 of the Land Transport (Public Service Vehicles) Regulations 2000 provides:

"12. (1) The Authority may cancel, vary or suspend a permit if a condition subject to which the permit was granted has not been complied with and the Authority is satisfied that the breach is serious, frequent or causes inconvenience or danger to the public.

(2) The Authority must, before cancelling, varying or suspending a permit, give the holder of the permit an opportunity to be heard.

(3) If the Authority varies or suspends a permit, it must give notice in writing to the holder that the permit has been varied or suspended as from the date on which the notice is delivered to the holder.

(4) if the Authority cancels a permit, it must give notice in writing to the holder of the permit and the permit is deemed to be cancelled on the date on which the notice is delivered to the holder.

(5) *If within 3 months after the approval of a permit the holder has not exercised the authority granted by the permit, the Authority may cancel the permit.*

(6) *If a permit is suspended under this regulation for more than 6 months, the Authority may cancel the vehicle licence in respect of the vehicle to which the permit relates.*

(7) *The failure of the holder of a permit to comply with section 35 of the Act is a ground for the cancellation of the permit."*

75. On 11 August 2004 the 1st defendant wrote to the 1st plaintiff advising him of the complaints made to it by the 1st plaintiff's competitor Vishnu Holdings Limited that the 1st plaintiff made illegal trips on 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th and 18th July 2004 in Savusavu. It was allegedly done, from and back to Cousteau Resort and had provided transport for passengers on certain specified places. The 1st defendant dealt with these complaints on 9th November 2004 (see Minutes of meeting of the 1st defendant, Exhibit P.13) and by its letter dated 20 December 2004 advised the 1st plaintiff of the suspension of his road service for 6 months from the date of the delivery of the letter on 12th January 2005 on the grounds that the 1st plaintiff had consistently failed to comply with the terms of his permits 12/23/34 and 12/23/35. Later this decision was successfully appealed due to procedural irregularity and that does not exonerate alleged acts of the Plaintiff, or bad faith by 1st Defendant.

76. *Paragraph 36 (f) and (g) of the amended statement of claim:*

(f) Improperly and wrongfully resolving at its meeting on 14th July, 2005 that the 1st Plaintiff's Road Route Licence 12/23/35 be suspended when that issue matter was not listed on the Agenda of 14th July, 2005. In reaching the decision to suspend 12/23/35 the 3rd, 4th, 5th and 6th Defendants acted with knowledge that they were acting in excess of their jurisdiction or without jurisdiction and ultra vires.

(g) In reaching the decision of 14th July, 2005 (whereby the 3rd, 4th, 5th and 6th Defendants failed/refused to hear and determine the 1st Plaintiff's application for road contract licence), the 3rd, 4th, 5th and 6th Defendants acted either with malice or with knowledge that they were acting ultra vires, perversely and negligently."

77. At the meeting held on 14 July 2005 the 1st, 3rd, 4th, 5th and 6th defendants suspended the 1st plaintiff's Road Route Licence 12/23/35 when the matter of suspension was not on the Agenda.

78. In my judgment the Plaintiffs have not established tort of misfeasance against 1st and 3rd to 6th Defendants. They are entitled to immunity contained in Section 21 as there is no bad faith proved.
79. The plaintiff's second cause of action is based in negligence. The next issue to be determined between the plaintiffs and the 1st, 3rd, 4th, 5th and 6th defendants is where the 1st, 3rd, 4th, 5th and 6th defendants were negligent, unfair and careless in failing to hear and determine the 2nd plaintiff application for Road Contract Licence as pleaded at paragraph 41 (a) to (f) of the amended statement of claim.
80. The plaintiffs say that the 1st, 3rd, 4th, 5th and 6th defendants owed a duty to the plaintiffs to act fairly, impartially and with reasonable care when dealing with the 2nd Plaintiff's application for a Road Contract Licence and to hear and determine the application without unreasonable delay. In breach of their duty, they negligently, unfairly and carelessly failed to hear and determine the 2nd plaintiff's application for a Road Contract Licence. The application has not been heard till to date.
81. A right of action for negligence or some other tort may exist where a public body fails to exercise statutory powers with reasonable care so as to avoid causing unnecessary injury: Davy v Septhorne Borough Council [1983] 3 ALL ER 278, (HL).
82. A public body which assumes control over some activity is placed under a duty to exercise its powers in respect of that activity properly and with reasonable care: Home Office v Dorset Yacht Co Ltd [1970] 2 ALL ER 294 at 304-309, 319-321, HL.
83. There is no dispute between the parties that the 1st, 3rd, 4th, 5th and 6th defendants were under a duty to the 1st and 2nd plaintiffs to act fairly, impartially and with reasonable care when dealing with the 2nd plaintiffs application for road route licence and to hear and determine the plaintiffs application without delay.
84. The particulars of negligence are pleaded in paragraph 41(a) to (f) of the amended statement of claim.
- (a) *Falling to hear and determine the 2nd Plaintiff's application for Road Contract Licence promptly and without unreasonable delay having regard to the urgency of the situation and ~~ca~~ facts and circumstances known to them*
 - (b) *Falling to hear and determine the 2nd Plaintiff's application for Road Contract Licence when it was listed for hearing and determination on 1e July, 2005 and or within reasonable time, and or at all*

- (c) *Deferring the 1 Plaintiff's application for Road Contract Licence indefinitely.*
- (d) *Refusing to hear and determine the 2 Plaintiff's application for Road Contract Licence despite numerous pleas and request by the 1st and 2nd Plaintiff's and their solicitors on 14th July, 2005 and thereafter.*
- (e) *Failing to take into consideration the fact that the 2nd Plaintiff's commercial interests were likely to be seriously injured/affected if its application for Road Contract Licence was not heard and determined.*
- (f) *Failing to permit the 1st and 2nd Plaintiff's to provide charter services to the 2nd Defendant and permitting Vishnu Holdings Limited to provide charter services to the 2nd Defendant without a Road Contract Licence.*

85. Immunity provided in Section 21 of the Land Transport Act, 1998 will apply unless the Plaintiffs are successful in establishing bad faith, which they failed to do.
86. The next issue to be determined between the plaintiffs and the 1st, 3rd, 4th, 5th and 6th defendants is whether the 1st, 3rd, 4th, 5th and 6th defendants unlawfully interfered with the contractual relations between the plaintiffs and the 2nd defendant as pleaded in paragraph 44(a) to (l) of the amended statement of claim and whether they interfered with the plaintiffs business as pleaded in paragraph 47 of the amended statement of claim. These are similar claims with overlapping facts and dealt together.
87. In Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530 it was held, in a cause of action of interference with contractual relations the plaintiffs must establish:
- (a) the existence of a contract between A and
 - (b) C has knowledge of that contract, but it is not necessary that C has knowledge of its precise terms;
 - (c) C interferes in some way with that contract;
 - (i) as to induce one party to break it; or
 - (ii) so as to interfere in some way with its performance without justification; and
 - (d) the party bringing suit must prove damage.
88. It was an illegal agreement that entered between Plaintiffs and 2nd Defendant, which I will deal later in this judgment. Hence the Plaintiff's this claim cannot sustain. Even if I am wrong on that in order for the Plaintiff to claim against 1st and 3rd to 6th Defendants personally bad faith needs to be established in terms of Section 21 of Land Transport Act 1998.

89. The plaintiffs claim that the 2nd 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 2nd 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 2nd 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 2nd defendant without having a RCL.
92. If that was the practice that cannot make it legal as illegal acts will not be made legal due to practice.
93. Vishnu Holding operating chartered bus service without RCL may be one example but that would not make illegal contract between Plaintiffs and 2nd Defendant legal.
94. It is also noted that Vishnu Holding is already providing transport services under RRL on the said route and had complained about Plaintiffs illegal activities.

CONCLUSION

95. The 1st and 3rd to 6th Defendants had not acted in abuse of their respective offices and there is no misfeasance in a public office as pleaded at paragraph 36 (a) to (g) of the amended statement of claim. Their deferring the Plaintiff's application RCL cannot be considered as negligent act. There is no proof of the said Defendants unlawfully interfered with a legally enforceable contract between the Plaintiff and 2nd Defendant. Said Defendants had not unlawfully interfered with the Plaintiffs' business or discriminated him. The contract between the 2nd Defendant and Plaintiffs was an illegal contract as the Plaintiff did not have road contract licence to provide such service. The fact that Plaintiff engaged Vishnu Holding another company without road contract licence cannot change the position of the illegality. The said agreement between the Plaintiffs and 2nd Defendant is void and contrary to the public policy. Both parties being aware of the illegal contract is not a reason to deviate from the accepted norm. The Plaintiff's claims against the 2nd Defendant is struck off due to illegality and granting damages to such a contract is against public policy.

FINAL ORDERS

- a. Plaintiff's writ of summons is struck off and the statement of claim dismissed.
- b. Each party to bear their own costs.

Dated at Suva this 11th day of December, 2018



[Handwritten Signature]
Justice Deepthi Amaratunga
High Court, Suva