

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBA 21 of 2013

BETWEEN: **RAJENDRA PRASAD** of Narewa, Sikituru, Nadi, Driver.

APPELLANT

A N D: **LAND TRANSPORT AUTHORITY** a corporate body
established under the LAND TRANSPORT ACT, 1998.

RESPONDENT

Appearances: Vakaloloma & Associate Lawyers for the Appellant
 No Appearance by the Respondent
Date of Hearing: 08 October 2013
Date of Ruling: 12 February 2020

R U L I N G

INTRODUCTION

1. This is an appeal from the decision of the Lands Transport Appeals Tribunal dated 30 September 2009. The appellant is Rajendra Prasad. On 27 November 2008, Prasad applied to the Land Transport Authority for a new minibus permit.
2. Prasad's proposed stand for his taxi was the Sagayam Road/Tukani Carpark in Nadi town. He was to service Nadi/Lautoka/Nadi via Queens Road. His proposed stopover base was to be Lautoka City.
3. There was one main objector to Prasad's application, namely the Shahabud Dean Transport Limited.

PROCEEDINGS AT LAND TRANSPORT AUTHORITY BOARD

4. On 30 September 2009, the Land Transport Authority Board declined Prasad's application on the ground that:

"the route applied for is sufficiently catered by the existing PSV operators".

5. Prasad then appealed to the Land Transport Appeals Tribunal.
6. The records of proceedings before the Land Transport Authority Board shows the following:

This is a new application and the applicant intends to operate his minibus permit from Sagayam Road in the Nadi Town base to Tukani Carpark in the Lautoka city base.

FACTS : AS PER Regulation 5.

(a) **Effect of Proposed Service**

There are four (4) minibus permits operating along the proposed route (Nadi/Lautoka/Nadi) plus the other 67 minibuses operating up to Suva and the omnibus operators competing for the same potential customers. Competition will benefit the customers as they will have a choice of a better service provider. It will create more competition amongst the service providers of this route.

(b) **Suitability of the service**

The two main transport providers for the proposed route are Pacific Transport Limited and Sunbeam Transport Limited beginning at 6.45am and finishing at 8pm daily except for Sunset Express Which resumes at 3.15am every Mondays. The route is a busy one and it remains the favourite highway to everyone in Fiji servicing every citizen and tourists also.

(c) **Suitability Fitness of the Applicant**

- *The applicant is 48 years of age, married with six children and resides in Sikituru, Nadi.*
- *He has been a farmer for the past 12 years and also a part-time driver.*
- *He is medically fit and has an adverse record of criminal intimidation in 1999.*
- *He does not have any TINS recorder against him.*

(d) **Financial Status**

- *He has a Colonial Bank balance of \$1,534.68 as at 12/10/08.*
- *Business forecast is attached with details of forecasted income from Minibus, Accounting Fees, Bank Charges, Servicing, fuel and Net income.*

(e) **Type of Vehicle:** EF 832

(f) **Applicant's comments:** *The applicant told members that he was married and had been driving his private vehicle for 6 years now. He knows the demand of the travelling public and at odd hours, he drops his passengers at their doorsteps and these are mainly hotel workers. Because of the demand, he had requested to be considered a permit issuance.*

(g) **Objectors Comments:** *Note: Mr Faizal Khan of Khan & Associates represented objectors listed in numbers 12, 13, 14, 15, 16.*

Mr. Faizal Khan in his objection presented that there are eight (8) bus companies operating between Nadi and Lautoka and some are semi express. He further stated that the load checks carried out showed average loadings of 23 to 28 per buses and in this corridor there are buses that leave between 5 to 10 minutes intervals.

He further stated that similar complaints for touting passengers were happening and picking of passengers in front of buses was also continuing, therefore the need cannot be fully established.

Mr. Khan also stated the contrary reports of LTA where Nadi General departs Nadi for Lautoka at 8.30pm, MR Khan Transport at 9.15pm, Pacific Transport (Express Bus) at 9.30pm and again at 12 midnight. The need aspect has to be fully established.

(h) **Observation**

1. *Departures of bus service to and from Nadi to Lautoka Bus Stand cease at 8pm and resumes again at 6.00am the following day except on Mondays which is at 3.15am by Sunset Express.*

(i) **COMMENTS**

- *Refer to load check report attached for passengers loading.*
- *He is a fit and a proper person to operate this business.*
- *He has sufficient funds to start his business.*

(j) **Need of Service**

The need for the travelling public is on a first come first serve rotational basis which might not coincide with the existing operators. This service would also be extended to picking up and dropping off passengers to their respective doorsteps after 8.00pm, to assist passengers whose destination is within 2km from the main highway. The population of the two centres keeps on increasing every year which shows urban drifts. With the increase in population size there is also an increase in developments occurring in both centres to cater for the employment sector.

(k) **Resolution:** *Refused on the ground that the route applied for is sufficiently catered by existing PSV operators.*

DECISION OF LTA APPEALS TRIBUNAL

7. On 01 March 2013, the LTA Appeals Tribunal upheld the decision of the LTA Board.
8. The record of Tribunal Proceedings shows the following:
 - 13) *The ground for the refusal of this application is that the route applied for is sufficiently catered by the existing PSV operators. The investigation report of the Regional Manager Western has found that there are four mini bus permits operating along the proposed route of Nadi/Lautoka/Nadi. The LTA board has found in its deliberation of this application that buses leave within every 5 to 10 minutes intervals.*
 - 14) *The appellant chose not to file his affidavit in response and only filed his final closing submission. He only raised some issues in his written submissions but failed to provide any material or substantive evidence and/or facts to satisfy the tribunal that there is a need for additional mini bus permit for the route he proposed to operate.*
 - 15) *In view of these finding, I am of the view that the board of the LTA has properly followed the required procedural steps and facts pursuant to sub regulation 5 (1) of the Land Transport (Public Service Vehicles) Regulation 2000 and its administrative policies before it reached its decision on this application for new minibuses permits.*
 - 16) *Upon considering foregoing reasons I hold that the Land Transport Authority had dully taken into consideration all those matters which it was required to consider in considering application for this minibuses permit. Accordingly, I dismiss the Appeal of the appellant and the cost of the application shall be cost in the cause.*

(my emphasis)

APPEAL TO THE HIGH COURT

9. On 14 March 2013, Prasad filed his Notice of Intention to Appeal at the High Court Registry in Lautoka. He later filed his Grounds of Appeal on 12 August 2013 which I reproduce below:
 1. *That the Learned, Land Transport Appeals Tribunal erred in law and in fact in entering Judgment against the Appellant on the false statement by the Respondent that route applied between Nadi and Lautoka is sufficiently catered by the existing PSV operators.*
 2. *That the Learned, Land Transport Appeals Tribunal erred in law and in fact in not considering, the fact that the Appellant had applied for minibuses permit on 27th of November, 2008, the same advertised on the 11th of December, 2008.*
 3. *That the Learned, Land Transport Appeals Tribunal erred in law and in fact in not considering the fact that why was it necessary for Respondent to grant 21 new*

minibus permit numbers being LM 179, LM 307, LM 313, LM 314, LM 316, LM 347, LM 362, LM 367, LM 368, LM 383, LM 388, LM 390, LM 404, LM 407, LM 409, LM 410, LM 413, LM 414, LM 415, LM 416, LM 417 between 2008 and 2012 to several other people while Appellants application was still pending.

- 4. That the Learned, Land Transport Appeals Tribunal erred in law and in fact in not considering that the Respondent was quite unfair and discriminatory in the light of the permits granted as referred to at paragraph 3 herein.*
- 5. That the Learned, Land Transport Appeals Tribunal erred in law and in fact when he failed to consider that Appellant had secured a contract with Sheraton Resort Fiji for 24 hours.*
- 6. That the Learned, Land Transport Appeals Tribunal erred in law and in fact when he failed to consider that out of all the PSV operators only Shahabud Dean Transport Ltd objected and did not made any appearance after filing affidavit of the interested party.*
- 7. That the Learned, Land Transport Appeals Tribunal erred in law and in fact in not considering that the Appellant counsel Mr. Haroon Ali Shah did not filed any documents for the Appellant due to his practising certificate been cancelled before he could do so, when Mr. Tunidau made his first appearance for the Appellant he was refused for any further time by the Tribunal to file affidavit or any other documents for and on behalf of the Appellant except to file submission in one hour time on the same day.*
- 8. That the Learned, Land Transport Appeals Tribunal erred in law and in fact that the matter did not go for hearing/trial, only Tribunals decision relayed on the submission filed by the both parties. Therefore the Appellant was not given a fair trial where he could have produced all evidence which would have changed the Learned Tribunals decisions.*
- 9. That the Learned Land Transport Appeals Tribunal erred in law and in fact in not asking/giving opportunity to the Appellant to produce evidence to substantiate his appeal and to prove the case against the Respondent when the onus clearly lies on the Appellant to prove his case.*
- 10. That the Learned, Land Transport Appeals Tribunal erred in law and in fact in coming to the conclusion.*

APPELLANT'S SUBMISSIONS

10. In his submissions filed on 30 October 2013, the Appellant's counsel summarizes the above grounds of appeal as follows:

..... in a nutshell, there are only two main issues which emanate from the grounds filed by the Appellant and I shall make submissions on those two issues, which will be under the heads of:

Firstly, the LTA Appeal Tribunal in making its decision it took irrelevant matters instead of relevant matters and

Secondly, the LTA Appeal Tribunal has demonstrated the likelihood of bias.

11. On the allegation that the LTA Tribunal took into account irrelevant matters, the Appellant submits:

Irrelevant Matter: there was no evidence to substantiate the objection raised by the objector (Shahabu Dean Transport Limited) such as the evidences from other PSV operators like Sunbeam Transport Limited and Pacific Transport to substantiate its objection that the route applied by the Appellant was catered for by these existing PSV operators and yet the LTA Appeal Tribunal took into consideration this irrelevant matters in reaching its decision;

12. The Appellant then submits that the Tribunal failed to take into account a Report by one Josefa Vosanibola which was compiled pursuant to section 5(1) of the Land Transport (PSV) Regulation 2000. The Appellant argues that, according to that Report, he (Appellant) has fulfilled all the requirements for a permit to service the route in question.

Relevant Matter: there was a Report submitted and attached by the Respondent in the Affidavit of Josefa Vosanibola, which the LTA Appeal Tribunal should have taken into consideration since it has been in accordance with section 5 (1) of the Land Transport (PSV) Regulation 2000 in which the Appellant has fulfilled its requirements.

13. The Appellant then highlights the following aspect of the Vosanibola Report:

The LTA Regional Manager Western's Report has never stated in anywhere in the report that the Appellant's service would obstruct or hinder the existing PSV operators; all it stated that the service will create more completion which will benefit the customers. In addition to that, the report stated that the Appellant was medically fit and proper person to operate such business and he has financial background to start his business, and more importantly that the travelling public is on first come first serve rational.

This is the relevant matters that the LTA Appeal Tribunal has not taken into consideration in reaching its decision and yet base its decision on the irrelevant matters as stated above.

14. Indeed, the Vosanibola Report, whilst it noted all the above, concluded that the route in question as already adequately serviced and refused the appellant's application on that basis.

15. On paragraphs 5) to 8) of an affidavit he swore on 03 November 2011, Vosanibola deposes as follows:

- 5) *An investigation was carried out pursuant to Regulation 5 of the Land Transport (Public Service Vehicle) Regulations 2000 dated 31st July 2009. The report shows that the route is serviced by Pacific Transport and Sunbeam Transport Limited beginning operations at 6am and finishing at 8pm. Sunset Express resumes at 3.15am on Mondays only. A copy of the report is annexed herewith as "JV3".*
- 6) *That a point check on passenger loading was carried out on the 30th of December 2008. The Point check was conducted from three points namely, Navutu in Lautoka, Qeleloa in Nadi, Melrose Bridge in Sigatoka. This is the point check for Public Service Vehicles travelling towards Suva which shows that there were a total of 123 trips for omnibuses. The passenger loading shows an average loading 39 passengers in omnibuses. For other Public Service Vehicles, there was an average loading of 6 passengers. There was still a tinge of illegal operators carrying an average of 7 passengers. For the Public Service Vehicles travelling towards Lautoka, a total of 158 trips of omnibuses carrying an average load of 35 passengers, other public service vehicles showed an average loading of 5 passengers and illegal operators showed an average of 8 passengers. A copy of the statistics on point checks is annexed herewith as "JV4".*
- 7) *That the Board deliberated on the application, objection and report on the 30th of September 2009. That the Board had deliberated on the application pursuant to Regulation 5 and noted the appellant's comments that he had been driving his private vehicle for 6 years. The Board also noted the Objectors comments that buses leave within 5 to 10 minutes intervals. A copy of the minutes for deliberation by the Land Transport Authority Board is annexed herewith as "JV5".*
- 8) *In light of the above, the appellant was issued with a refusal letter dated 19th May 2011 on the ground that the route applied for was sufficiently catered for by existing PSV operators. A copy of the letter is annexed herewith "JV6".*

16. The Appellant also submits that there was a real likelihood of bias on the part of the Tribunal as follows:

....the LTA Appeal Tribunal has demonstrated the real likelihood of bias in that:

1. *The LTA Appeal Tribunal was aware that there was an affidavit of the interested party prepared by Tirath Sharma Lawyers who was the former manager legal for the LTA.*
2. *The LTA Appeal Tribunal has aware that new permits for minibus were issued to other people between 2008 and 2012 whilst the Appellant application was still pending or under process at that point in time.*

17. In his affidavit sworn on 07 October 2013, the appellant annexes as new evidence some new survey material which he undertook after the LTA Appeal Tribunal decision. I refuse to accept this new evidence. The survey exercise he undertook, appears to be geared towards challenging the conclusion of the LTA Board (and later the Tribunal) that the route in question was adequately serviced.

THE LAW

18. Section 48 of the Land Transport Act allows appeals from the decision of the Appeals Tribunal only on points of law:

A decision of the Tribunal shall be subject to an appeal, only on points of law, to the High Court.'

19. Mr. Justice Jiten Singh in **Fiji Bus Operators 'Association v Land Transport Authority** [2002] FJHC 233; HBA0001J.2002S (1 November 2002) referred to the following remarks of Lord Denning in **INSTRUMATIC LTD. v. SUPABRASE LTD.** 1969 2 ALL E.R. 131 at page 132 in considering the meaning of the phrase "points of law".

'There are many tribunals from which an appeal lies only on a 'point of law'; and we always interpret the provision widely and liberally. In most of the cases the tribunal finds the primary facts (which cannot be challenged on appeal); and the question at issue is what is the proper inference from those facts. In such cases, if a tribunal draws an inference, which cannot reasonably be drawn, it errs on point of law, and its decision can be reviewed by the courts. That was settled, once and for all, in EDWARDS (Inspector of Taxes) v. BAIRSTOW 1955 3 ALL E.R. 48. In other cases the question is whether, given the primary facts, the tribunal rightly exercised its discretion. In such cases, if the tribunal exercises its discretion in a way which is plainly wrong, it errs on point of law, and its decision can be reviewed by the courts.'

20. Singh J also referred to the Supreme Court of Northern Territory (Australia) decision in **Wilson v. Lowery** 1893 110 F.L.R. 142.

'The authorities have been conveniently summarized ... We venture to repeat them:

1. *In the process of arriving at an ultimate conclusion a trial judge goes through a number of stages. The first stage is to find the preliminary facts. This may involve the evaluation of witnesses who gave conflicting accounts as to those facts. If the trial judge prefers one account to another, that decision is a question of fact to be determined by him and is not reviewable on appeal. It may be that*

the reason given for preferring one witness to another is patently wrong. Nevertheless, no appeal lies.

2. Regardless of the trial judge's reasons, if there is evidence which, if believed, would support the finding, there is no error of law.
3. If, on the other hand, there is no evidence to support a finding of fact which is crucial to an ultimate finding that the case fell within the words of the statute ... there is an error of law.
4. But, a finding of fact cannot be disturbed on the basis that it is 'perverse', or 'against the evidence or the weight of the evidence or contrary to the overwhelming weight of evidence'. Nor may this Court review a finding of fact merely because it is alleged to ignore the probative force of evidence which is all one way, even if no reasonable person could have arrived at the decision made, and even if the reasoning was demonstrably unsound: *Haines v. Leves* (1987) 8 N.S.W. L.R. 442 at 479-470.
5. The second stage is the drawing of inferences by the trial judge from the primary facts to arrive at secondary facts. This is subject to the same limitations that apply to primary facts.
6. If there are no primary facts upon which a secondary fact could be inferred, and the secondary fact is crucial to the ultimate finding as to whether or not the case fell within the words of the statute, there is an error of law. If there are primary facts upon which a secondary fact might be inferred, there is no error of law.
7. It is not sufficient that an appellate court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn. If a tribunal draws an inference which cannot reasonably be drawn, it errs in point of law and its decision can be reviewed by the courts: *Instrumatic Ltd. v. Supabrase Ltd.* [1969] 1 W.L.R. 519 at 521; [1969] 2 ALL E.R. 131 at 132, Lord Denning MR, with whom Edmund Davies LJ and Phillimore LJ agreed; *Edwards (Inspector of Taxes) v. Bairstow* [1956] A.C. 1.'

21. Section 47 of the Land Transport Act says:

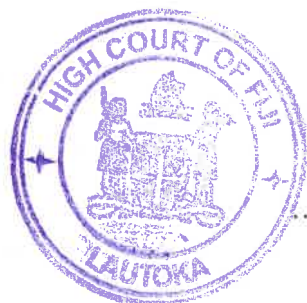
Determination of appeal

47 For the purposes of the hearing and determination of any appeal the Tribunal shall have regard to those matters which the Authority is required to have regard to in considering an application under this Act.

CONCLUSIONS

22. I am of the view that what the Appellant is challenging, essentially, is the finding of fact that the route in question is adequately serviced. This is not a point of law, but a question of fact, for which the Land Transport Authority had undertaken a survey.

23. For the above reason, I dismiss the appeal.



Anare Tuilevuka
JUDGE
Lautoka