

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

Appeal No. HBA 13 of 2017
(On an Appeal from LTAT No 223 of 2004)

IN THE MATTER of the Land Transport Act
1998

AND

IN THE MATTER of an Appeal by **SUNBEAM**
TRANSPORT LIMITED against the decision
of the **LAND TRANSPORT APPEALS**
TRIBUNAL delivered on 15th September 2017
granting a new Road Route License for daily
express bus service at 5.30 am from Suva and
2.30 pm from Lautoka to **PARADISE**
TRANSPORT LIMITED

BETWEEN : **SUNBEAM TRANSPORT LIMITED**
APPELLANT

AND : **PARADISE TRANSPORT LIMITED**
FIRST RESPONDENT

AND : **LAND TRANSPORT AUTHORITY**
SECOND RESPONDENT

AND : **ISLAND BUSES LIMITED**
VALLEY BUSES LIMITED
MR KHAN BUSES LIMITED
PACIFIC TRANSPORT LIMITED
SUNSET EXPRESS
INTERESTED PARTIES

Counsel : Mr. Viren Kapadia for the Appellant
Mr. Roopesh Singh for the First Respondent
Mr. Chand for the Second Respondent
No Appearance for or by any of the Interested Parties

Date of Hearing : 15 December 2020

Date of Judgment : 02 March 2021

J U D G M E N T

INTRODUCTION

1. This is an appeal from the decision of the Lands Transport Appeals Tribunal (“LTAT”) dated 15 September 2017. The appellant is Sunbeam Transport Limited (“Sunbeam”).
2. There are twelve grounds of appeal. In his written submissions, Mr. Kapadia has lumped some of these together for convenience.
3. The background to this case might be stated as follows. On 06 October 2003, Paradise Transport Limited (“PTL”) applied to the LTA for Road Route License (“RRL”) for a daily express trip via the Queens Road departing Suva at 5.30 a.m. in the morning and departing Lautoka at 2.30 p.m on the same day. Sunbeam objected to PTL’s application. The Interested Parties also objected.
4. On 08 March 2004, the LTA Regional Manager Western prepared a Report for the LTA in relation to PTL’s application.
5. The LTA heard PTL’s application and made a decision on 27 March 2004. The LTA’s reasons based on the above report were:
 - (i) that no need was established
 - (ii) the route was already adequately serviced
 - (iii) the proposed service would adversely affect other public service vehicle operators on the Suva/Lautoka/Suva route
6. On 07 April 2004, PTL appealed the LTA’s decision to the LTAT. The then LTAT, Sir Vijay R Singh, heard the appeal. According to Mr. Kapadia, Sir Vijay “engineered a decision” which, in essence, breached section 65 of the Land Transport Act. Sir Vijay’s decision was that, if PTL agreed to remove a then existing Sigatoka to Lautoka service which PTL was operating at the

time, Sir Vijay would then substitute that with a “stage service” instead of the express service applied for.

7. Sir Vijay’s decision was appealed by Sunbeam to the High Court. At the High Court, Mr. Justice Winter called for the LTAT records and after waiting for some time, he simply quashed the decision and on 19 January 2006, referred the matter back to the LTAT for a hearing *de novo*.
8. The *de novo* was finally placed before Mr. Amani Bale for hearing at some point in 2009. Mr. Bale had replaced Sir Vijay as LTAT, at some point. However, shortly after completing the *de novo* hearing, the political events of 2009 happened and Mr. Bale was not re-appointed as Tribunal. He had not written a Ruling.
9. The matter would languish for some ten years or so at the LTAT. Successive LTATs like Mr. Suraj Sharma and the then Learned Magistrate Mr. Rajasinghe had the matter called before them at some point or another. Finally, the appeal *de novo* was heard by the current LTAT, Mr. C. Lakshman in 2017.
10. On 15 September 2017, the LTAT approved PTL’s application. On 06 October 2017, Sunbeam appealed the Tribunal’s decision to this Court.
11. I must say at the outset that, in challenging the Learned Mr. Lakshman’s decision in this case, Mr. Kapadia has drawn attention to several of Mr. Lakshman’s other Rulings which were handed down around the same time as the one on appeal here. The point of all that – as Mr. Kapadia submits, is to highlight that the approach which the LTAT Mr. Lakshman has adopted in this case is so out of line with Mr. Lakshman’s own usual principled approach which is consistent in all his other Rulings. Of all his Rulings, this one sticks out like a sore thumb. Perhaps the peculiar history of this appeal and the fact that it had been a long drawn out one, may have something to do with it.

THE LAW

12. 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.'

13. 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.'

14. 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.*

15. 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.

ANALYSIS

16. In its decision, the LTAT first examined the statutory base of its functions and powers. It referred to section 40(2) which gives power to the LTAT to hear and determine appeals against LTA's licensing decisions. The LTAT then referred to the following Regulations:

- (i) Regs 34(1) and (2) of Land Transport (Vehicles Registration and Construction) Regulations 2000
- (ii) Section 46(2), (3)
- (iii) Section 47

17. The LTAT then concluded:

"Having considered all the material before it, the Tribunal finds that the LTA failed to properly evaluate and scrutinize the material that was before it. The decision of LTA as a result was procedurally unfair, unreasonable and flawed. For these reasons, the appeal succeeds"

18. There are twelve grounds of appeal. There is no need for me to set them out here. Suffice it to say that from the written submissions, Sunbeam's main points of grievance are as follows:

(i) **Express Service.**

PTL's proposed service was to be a return express service between Suva and Lautoka. An express service under section 65(3)(a)(ii) of the Land Transport Act is not allowed to pick/drop passengers at Navua/Deuba on the outward/inward journey from/to Suva/Lautoka. And yet, the advertisement which PTL had placed in the local newspapers as required showed that the proposed pick up points were to be at Korovisilou, Maro and Lomawai.

(ii) **Encroachment.**

PTL was never a Suva-Lautoka operator. PTL has always been a Sigatoka-Lautoka operator. Its application in this case was encroaching and a breach of paragraph 1(b) and (c) of the PSV Guidelines.

In granting PTL the license in question, the LTAT was in breach of the above provision. The departure from the Guideline however was not explained in clear and cogent terms – as required.

Encroachment into another bus operator's route is a key consideration in bus applications and the LTAT has ruled many times in other cases that encroachment will not be allowed (**Sunbeam, Pacific & Paradise v LTA & Ors** – Land Transport Appeals Tribunal Appeals Nos. 61 and 68 of 2014 and 09 of 2015).

(iii) **PTL Not Operational For Years.** For many years prior to 2017, PTL has never operated a bus service. However, the LTAT failed to take this into account. Regulation 5 of the PSV Regulations requires that this be taken into account.

PTL's other bus licenses had lapsed or were not renewed. The LTAT had overlooked or ignored these considerations. These should have been taken into account under Regulation 5 of the PSV Regulations.

(iv) **Need.**

Notably, the LTAT found that there was a need for such a service as the one applied for by PTL.

The Appellant argues that there was no evidence of need. The only evidence before the LTAT was a Report of the LTA's Regional Manager Western Mr. Uday Singh ("**Mr. Uday**").

Mr. Uday had noted that PTL had been unable to meet its daily commitment of servicing its approved routes. This stemmed largely from the fact that PTL did not have enough buses. Mr. Uday's report noted that PTL had been unable to service some of its routes and further recommended that PTL improve its fleet capacity before any new license is granted.

Mr. Singh highlights evidence from the records that PTL had addressed these concerns. It had obtained a loan approval from Merchant Finance & Investment Company Limited to purchase omni buses from Automart Limited. This is all set out in the Affidavit of Ramendra Kumar sworn on 06 September 2004 and marked content No. 12 of the Record.

Mr. Singh submits that the evidence is clear that PTL had maintained an interest in operating a daily express service in 2009 right through to 2017 and still does to this day (see affidavits of Kand Sami Pillay sworn on 01 July 2009 and another sworn on 09 November 2017).

Furthermore, the express service in question was already adequately serviced by Sunset and Sunbeam.

Sunset Express was already operating a daily express Suva-Lautoka service departing Suva at 3.45 a.m. and 6.00 a.m. and one operated by Sunbeam Express departing Lautoka for Suva daily at 1.30 p.m. and 2.15 p.m.

What the LTAT should have done was to refer the application back to the LTA for fresh reports based on 2017 conditions rather than on anything in the 2004 Report.

(v) **15-Minute Departure Time Difference.**

It appears also that the LTAT had formed the view that a 15-minute time difference on a Suva –Lautoka express bus service was sufficient. This, argues Mr. Kapadia, is perverse as it was not substantiated by evidence or Reports, particularly on the impact on Sunbeam.

The potential impact of allowing a 15-minute interval between two competing operators for the express Lautoka-Suva route was not considered. Regulation 5(1)(b) of the PSV Regulations was not properly considered.

Given the above two factors, what ideally, what the LTAT should have done was to refer PTL's application back to the LTA to consider fresh evidence. The ground reality had changed considerably at the time the LTAT was considering the application de novo in 2017. In addition, fresh evidence of PTL's capacity to provide an express service for the route and its fleet capacity had to be considered.

This compromises loading on Sunbeam's express service As buses are only allowed to enter the bus bay at Lautoka 15 minutes before departure and therefore a longer time is required.

ILLEGAL MINI VAN OPERATORS

19. Mr. Singh submits that Mr. Uday was aware that the Suva/Lautoka/Suva route was supplemented by illegal minivan operators as noted in his 2004 Management Report. The LTAT did take into account the presence of these illegal minivan operators in concluding that there was a need.
20. Mr. Singh further submits that PTL had conducted a survey in 2009 between 5.00 a.m. to 6.30 a.m. on a daily basis and found that passengers continued to use illegal mini vans, pirate taxis and even private cars and cargo trucks to meet their daily travel needs. The persistence of these illegal operators, and the fact that they continue to operate and service these routes at the times concerned, confirmed a continuing need for the Suva/Lautoka/Suva express service at the departure time applied for by Paradise.
21. Mr. Singh further submits at paragraph 4.2.8 to 4.2.13:

- 4.2.8 The presence of illegal operators poses a safety risk to the travelling public and go towards establishing that the route was not adequately serviced, and that a proper regulated bus service was required for this route. The courts have found that when faced with the fact that there may be such illegal operators, the Authority and Tribunal cannot be expected to bury its head in the sand and expect the problem to solve itself but to take such facts into consideration. *Fiji Bus Operators' Association v Land Transport Authority (supra)*.
- 4.2.9 The decision noted that no company operated at 5.30am, the time applied for by Paradise, with the first express service departing Suva at 6.45am. The Decision reasonably found that a service gap of 1 hour and 15 minutes was too long a time period to keep the travelling public waiting. To date, there continues to be no bus service departing from Suva at 5.30am.
- 4.2.10 Since the grant of the daily Suva/Lautoka/Suva express trip to Paradise other bus operators namely, Sunbeam, Sunset Express and Nadi General Transport Ltd have applied for similar trips indicating a need for this service. These applications have not been heard by the Authority pending outcome of this appeal. See Affidavit of Kand Sami Pillay dated 1st July 2009 and marked as document No. 6 of the Record.
- 4.2.11 The Tribunal found that a 15 minutes interval is an acceptable interval for the next operator and that the public should be at liberty to choose travel convenient to them. Courts have found that a specialized Tribunal with members who possess particular skills and knowledge has a distinct advantage over courts, and that their experience of past years may have shown a demand for such a service. *See Fiji Bus Operators' Association v Land Transport Authority (supra)*
- 4.2.12 Paradise operated the daily Suva/Lautoka/Suva express trip from approximately January 2005 until the end of January 2006 without complaints. See Affidavit of Kand Sami Pillay filed 1st July 2009 and document No. 6 of the Record.
- 4.2.13 For the reasons stated above, the Tribunal has shown that it had carefully considered the contents of the Management Report and other factors in concluding that the needs for a daily express Suva/Lautoka/Suva service departing at 5.30am existed, and thus no error of law can be construed.

OBSERVATIONS

22. The analysis which the LTAT undertook on pages 20 to 23 of Volume 1 copy Records appears to be very thorough.
23. In my view, had Sir Vijay given the same analysis in 2004 when the evidence was still "fresh" and relevant to the industry conditions prevailing at the time, it would have been extremely hard to impugn the LTAT decision.

24. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of any application, probable or less probable than it would be without the evidence.
25. Having said that, I do note that the Learned LTAT only took into account material that was raised in 2004. The LTAT did not take into account the 2017 conditions. The reason for that was because there was no new evidence tendered.
26. I do note that the issue as to whether the LTAT was to consider only the original evidence or any new evidence, in the appeal, was raised by Mr. Kapadia in 2013. The issue was dealt with by the then LTAT, Mr. Thushara Rajasinghe in a comprehensive Ruling dated 20 September 2013. After examining sections 40(2), 46(1) and (2), and of the Land Transport Act, and Regulation 5(1) of the Land Transport (Public Service Vehicles) Regulations 2000, and relying on the Fiji Court of Appeal's decision in Sunbeam Transport Ltd v Flying Prince Transport Ltd (2007) FJCA ABU0060, 2006S (23 March 2007), the then LTAT concluded that:

12. *The Fiji Court of Appeal observed and held in Sunbeam Transport Ltd v. Flying Prince Transport Ltd (2007) FJCA 25, ABU0060, 2006S (23 March 2007) that*

“For the purpose of hearing such an appeal, s.46 (1) confers on the Tribunal extensive powers including power to summon and examine witnesses on oath or affirmation, to call for production of books, and to admit any evidence, written or oral, whether or not admissible in criminal proceedings. Section 46 (2) authorized the Tribunal to dismiss the appeal or to make such orders as are just and reasonable including an order directing the Authority to issue a permit, etc. Generally, s.47 provides that the Tribunal is to have regard to those matters to which the Authority is also required to have regard. It is clear from these provisions that what is envisaged in an appeal at this second stage of proceedings is a complete rehearing in the full sense, or what is sometimes described as a re-hearing de novo, using any evidence including the material before the Authority on the original application”. (underlining mine)

13. *Having considered the above mentioned judicial precedence and the provisions of Land Transport Act I am satisfied that the Tribunal is allowed to gather, to accept and to consider the evidence and facts, that are presently existing apart from the evidence and facts which were existed at the time of the application.*
14. *In conclusion, I allow this application of the 5th Interested Party. Further, I make no order for cost.*

27. Clearly, it was open to the LTAT to take into account the evidence of 2004. This means that the LTAT may or may not take into account the 2004 evidence.
28. However, the primary material on which the LTAT's decision must be based is the evidence of the market and industry conditions which prevailed around the time the LTAT was deliberating in 2017.
29. In my view, the failure to take 2017 conditions into account is not an error of fact but an error of law. As the Fiji Court of Appeal said in **Sunbeam Transport Ltd v. Flying Prince Transport Ltd** (2007) FJCA 25, ABU0060, 2006S (23 March 2007), what sections 46 and 47 of the Land Transport Act envisage is:
-a complete rehearing in the full sense, or what is sometimes described as a re-hearing de novo, using any evidence including the material before the Authority on the original application*
30. Following from the above, the failure to conduct a complete re-hearing is an error of law. That in turn resulted in the LTAT's failure to have regards to fresh material evidence, and to take into account and be influenced by evidence which was no longer reliable as the primary material upon which a licensing decision is to be based.
31. The gist of Mr. Kapadia's submissions is to highlight that the market and industry conditions are highly dynamic in the Bus Industry. As demographics change, so does demand. These are just some of the highly dynamic factors. These are the things upon which the entire licensing regime under the LTA Act and Regulations are based. I accept that.
32. The view that a license is not a right but a privilege may be antiquated and outdated¹. Whether it is a right or a privilege, there is, in any event, a public interest at stake in the licensing regime of PSVs. In a situation such as that which has arisen in this case, it is that public interest which demands that evidence of the current market and industry conditions be taken into account as the primary material on which a decision should be based.

33. I agree that what the LTAT should have done was to exercise its power to summon and examine witnesses on oath or affirmation, to call for production of books, and to admit any evidence, written or oral to ascertain the 2017 market and industry conditions. Once it has ascertained that, the LTAT could have then either direct the LTA to issue a permit or refer the matter back to LTA.
34. I allow the appeal. The Order of the LTAT dated 15 September 2017 is wholly set aside.
35. I further direct that this matter should be referred back to the LTAT to consider whether to conduct a re-hearing de-novo or to direct that the application be considered afresh by the LTA.
36. Parties to bear their own costs.



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Anare Tuilevuka
JUDGE
Lautoka

02 March 2021

¹ In **Banks v. Transport Regulation Board** (Vic) (1968) 119 C.L.R. 222¹, Barwick C.J said:

I do not feel constrained by Nakkuda Ali v. Jayaratne (1951) AC 66 to hold either that certiorari is not available in this case or that the licence is a mere privilege and not property.