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. V. Chand with Mr. Raubi W. for the Second Respondent
Mr. R. Prakash for the Interested Parties

Date of Hearing : 05 March 2021
Date of Ruling : 12 March 2021

RULING

INTRODUCTION

1. The background to this case is set out in my Judgment dated 02 March 2021 (**Sunbeam Transport Ltd v Paradise Transport Ltd** [2021] FJHC 136; HBA13.2017 (2 March 2021)).

2. Two days after the above, on 04 March 2021, the Respondent/Applicant filed an *ex-parte* summons seeking the following orders:

   (a). that until the direction of the Land Transport Appeal Tribunal is made whether to re-hear the application by the First Respondent and in the event the Land Transport Appeal Tribunal directs to hear the same, a decision is made on the re-hearing or directs to transfer the same to the Second Respondent for a decision and until such decision is made by the Second Respondent the First Respondent be permitted to operate on the Road Route License Number 12/14/45.

   (b). in the alternative there be an order for stay of the decision to set aside the decision of the Land Transport Appeals Tribunal made on the 15 of September 2017 until such time as a decision is made by the Land Transport Appeal Tribunal on the Appeal by the First Respondent or a decision is made by the Second Respondent on the application by the First Respondent.

   (c). that the cost of this Application be costs in the cause.

   (d). any further or other orders this Honorable Court deems fit.

3. On the first call before me, I directed that the summons be served on the Appellant and the Land Transport Authority and then I stood down the hearing of the summons to the following day, 05 March 2021 at 3.30pm.

4. On 05 March 2021, Mr. Kapadia and Mr. Chand raised the preliminary point as to whether this Court has jurisdiction to hear the application. The argument is that the Court is now *functus officio*, having delivered the final judgement.

IS THE COURT FUNCTUS

5. Both Mr. Kapadia and Mr. Chand submit that this court has no jurisdiction to entertain this application. They argue that the jurisdiction of this Court to hear an appeal from the Land Transport Appeals Tribunal (**"LTAT"**) is set out in section 48 of the Land Transport Act. Section 48 states that *"a decision of the Tribunal shall be subject to an Appeal only on points of law to the High Court"*. Because the Act provides no procedure, Order 55 of the High Court Rules 1988 applies.

6. Order 55 Rule 7 sets out the powers of this Court when hearing an appeal. Order 55 Rule 7 (5) are powers given to the Court when hearing an appeal. Once an Order is made by this Court on appeal, Order 55 Rule 7 (5) ceases in operation because the Court is then *functus officio*.

7. The appellate jurisdiction being exercised here is in relation to a statutory appeal. That appeal is governed by the Land Transport Act, and consequentially, Order 55. The procedures are prescriptive in effect. They leave no room for discretion.

WHEN IS A DECISION FINAL?

8. A court is *functus officio* once it has delivered its final decision. All counsel have cited cases supporting this position. A Court is said to finally dispose of a matter before it when the court has no residual discretion to review its own final orders.

9. Mr. Kapadia submits that there is no residual discretion vested in the Court because this is a statutory appeal.

10. The general common law position is that a Court may still recall or review its judgment which is yet to be passed and entered and not yet drawn up.

11. The Canadian Supreme Court case of **Chandler v Alberta Association of Architects**, [1989] 2.S.C.R 848 at pages 861 – 862 which is cited by all counsel, aptly places the state of finality at that point when there is:

"..nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain". (George Spencer Bower and A. K. Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths 1969), at page 132, as cited in Judicial Review of Administrative Action in Canada).

12. That state of finality is reached at the point when a decision maker is barred from revisiting the decision, other than to correct clerical or other minor errors under the slip rule being Order 20 Rule 10 of the High Court Rules. At common law, that point happens when the judgement is perfected – that is – when it is formally drawn up (see Scutt J's Ruling in **Naigulevu v National Bank of Fiji** (No. 2) [2009] FJHC 65; Civil; Action 598.2007 (10 March 2009), see also **Pitatails & Ors v Sherefettin** [1986] QB 868 cited by Scutt J in **Naigulevu**).

13. Once perfected, and sealed with the judicial seal, all the issues between the parties are then deemed to have been disposed off, finally.

14. The public policy that underlies the principle of finality is acknowledged by all counsel. That principle is aptly described by Lord Wilberforce in **Ampthill Peerage** (1976) 2 WLR 777:

> English law .... place(s) high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. [It]...is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards:

so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

15. In **Merchant Finance & Investment Co. Ltd v Lata** Court of Appeal Case No. ABU0034 of 2013, Almeida Guneratne JA relied on Jowitt's interpretation as follows:

> *'Jowitt's Dictionary of English Law (2nd ed, 1977) defines **functus officio** as "having discharged his duty", as an expression applied to a Judge, Magistrate or Arbitrator who has given a decision or made an order or award so that his authority is exhausted. In re: V.G.M Holdings Ltd. [1941] 3A11ER 417 (Ch.D.) it had been said that, **"where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal".** (per Morton, J. vide: the Head Note)*

16. This Court has not granted a stay of execution. I agree with Mr. Kapadia's point that the effect of prayer 1, if granted, would be to allow the Respondent to continue to operate RRL 12/14/45. The question I ask however is, whether that potential effect on its own, now precludes this Court from considering that point.

17. Mr. Kapadia submits that prayer 1 is akin to a plea for mandatory injunction. Mr. Kapadia argues that, because the grant of the permit by the Tribunal was based on numerous errors of law made by the Tribunal, an order akin to a mandatory injunction would be totally inappropriate as it would appear to give validity to the irregularities. Apart from that, it would deny the Appellant the fruits of his litigation.

18. The thing about this whole matter is that the final determination of all issues is now deferred to either the LTAAT or the LTA depending on the decision of the LTAAT.

19. Mr. Kapadia further submits that there is no appeal filed by PCL. PCL has until 13 April 2021 to file an Appeal and again file an application for stay pending Appeal. The current application is therefore an abuse of the process. PCL cannot make an application for stay when there is no appeal to the Fiji Court of Appeal. There is therefore no jurisdiction on which PCL can file an application for stay.

20. Mr. Kapadia also submits that PCL is re-litigating the very issues that this Court has dealt on this Appeal and determined on the errors of law that was made by the Tribunal when granting the service to PCL. The issues are now ***res-judicata***. The Court therefore cannot entertain prayer No. 2 of the Summons.

21. Mr. Chand argues that the Court may revisit its decision only under the SLIP Rule andf/or where there has been an error in expressing the manifest intention of the Court. He cites **Paper Machinery Ltd. v. J. O. Ross Engineering Corp.** [1934] S. C. R 186. He further submits that neither of these exceptions apply in this application before me as the judgement of the court is final.

22. In his submissions, Mr. Singh acknowledged the doctrine of *functus officio*. However, he cited various cases which suggested that there are exceptions to the rule, over and above the SLIP Rule (**Sterling China C. V. Glass Morders Pottery Plastics and Allied Workers Local 24** [2004] USCA 6, the US Court of Appeal; **Junkanoo Estate Ltd & Ors. v. UBS Bhamas Ltd** [2017] UKPC 8 the Privy Council; **iTaukei Land Trust Board v Cokotiono and Anor** Fiji Court of Appeal Number ABU 00 86 of 2016; **Diana Giesbrecht v Roweena Grace and Anor** Fiji Court of Appeal Number ABU 117 of 2017; Supreme Court of Fiji Appeal number CBV 0008 of 2016.

23. In **Sterling**, the US Court of Appeal appears to say that there is an exception when there is a *"need for an arbitrator's "clarification of an ambiguous award when the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation".*

24. In **Fiji Industries Limited v National Union of Factory and Commercial Workers**, the Supreme Court of Fiji dealt with a matter with a long pending matter. The issue was whether the Employment Relations Tribunal was *functus officio* when it dealt with an application in dealing with an award for

compensation when the Permanent Arbitrator had on a previous occasion already assessed and ordered compensation. The Supreme Court at paragraph 39 discussed that the theory was advanced that the ERT was *functus officio* and could not re-visit the issue of compensation as it was caught by *res judicata*, as follows;

> *"One of the arguments is that this award had been complied with following the dismissal of the application for judicial review, and there was no further role for the ERT as the successor of the arbitration tribunal to play. This amounted to an argument that the ERT was, to use the Latin phrase, functus officio. The other argument is that the issue of Mr. Vaja's compensation had already been definitely decided by the arbitration tribunal – in other words, the matter was, again to use the appropriate Latin phrase, res judicata, and could not be revisited by the courts except on an appeal. The answer to the first of these points is that what the union was really seeking on behalf of Mr. Vaja was the supplementation of the original award to address his compensation for the period after the period covered by the original award.* ***A court or tribunal is permitted to supplement an order which it previously made in order to deal with an issue which arose after its original order. Viewed in that way, the ERT was not functus officio. Moreover, the ERT was addressing the question of Mr. Vaja's compensation for the period during which he would have been reinstated but for the stay. That was an issue which by definition could not have been decided by the arbitration tribunal as its decision predated that period.*** No question of *res judicata* therefore arises as the arbitration tribunal and the ERT were considering different topics." Underling and emphasis ours.

25. Mr. Singh submits that the issue of what would be the consequences of the orders given by this Court has not been considered in that:

> The first Respondent has been operating the service it was awarded from September 2017 till the date of decision of this Honorable Court in March 2021.
>
> No doubt there was a need or demand for it to operate from 2017 till 2021.
>
> The demand that is of the public and the need that is of the public as well.
>
> The issue of what would happen to the demand or the need of the public was not decided on, though statutorily ought to be a consideration.

26. It is significant that the appeal is from the Land Transport Appeals Tribunal (LTAT), in that the interest of the public becomes one of the paramount considerations.

27. The LTA in deciding applications before pursuant to section 8 (b) of the Land Transport Act is required to take into account the interest of the public as it states as follows;

> "(b) to ensure so far as is practicable the provisions of road transport passenger services adequate to meet the requirements of the public;...."

28. In any appeal, the LTAT must consider public interest and so is the High Court in an appeal from LTAT.

29. The issue of what would happen in the interest of the public to stall/halt a service, which has been operating since 2017 has not been considered or decided by this Honorable Court. In fact, the consequences of cancellation of the RRL is only a factor, which becomes alive or has become alive after the decision of this Honorable Court. This consequence occurs after the decision takes effect.

30. Further it is significant that no changes are sought to the decision. It is something which needs to be supplemented due to the effect of the decision of this Honorable Court. The decision of the Court could also with respect be considered as incomplete in terms of the interest of the public when halting a service.

31. Because the Appeal was from LTAT dealt with a specific area, being public transportation, hence the interest of the public, when a service is halted, would need to be adjudicated upon by reason of the decision of the Court.

32. The issue of what would be the impact on the travelling public by reasons of the orders taking away a service provided to the travelling public from Suva in an express service departing Suva at 5.30am was not adjudicated upon. It is submitted that under the appeal from LTAT that would be most significant issue to be deliberated on. Therefore, issue remains open for adjudication before this Honorable Court and it is submitted that this Honorable Court was required to consider the interest of the travelling public when it removed the service operated by the first Respondent. To consider the consequence of the decision, which consideration is required by statute under **Section 8 (b) of the Land Transport Act**. Therefore, this Honorable Court does not become *functus*

on this issue in that what happens when the service that is being operated since 2017 is halted.

33. It is further submitted that the orders sought will supplement the decision of the Court as it does not see to set aside, vary or seek any clarification of the same. The orders sought are to supplement the orders of setting aside the judgment of the LTAT made in September 2017.

34. Therefore, on the words "*....**made such order or other order as the case may require...**" (from Order 55 Rule 7 of the HCR)* gives this Honorable Court the jurisdiction to make the orders that is sought by the first Respondent and this jurisdiction will need to be involved in the interest of the public.

35. In my Judgement, I had set out in detail the arguments and points of law raised by Mr. Kapadia. They were forceful arguments. However, I did not make a ruling on those arguments. If I had done so, those issues would be res judicata for the LTAT and would estopp the LTAT from having to revisit them. In fact, if I had made a decision on those points which Mr. Kapadia so eloquently raised, and validly I must say, then there would have been little point on my having to refer the matter back to the LTAT.

36. My decision to refer the matter back to the LTAT was on account of the other argument raised by Mr. Kapadia that, the LTAT had taken into account evidence and material gathered in 2004 when the original LTA decision was made.

37. The LTAT did not consider any fresh 2017 evidence and did not call for these. There is a public interest at stake, as argued, and as I have tried to record in the judgement. 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.

38. As I saw it, 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 the things upon which the entire licensing regime under the LTA Act and Regulations are based. There is,

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.

39. I then formed the view 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.

40. In my view, the failure of the LTAT to take into account the 2017 conditions prejudiced all parties, including the public interest which the LTA represents. Ideally, in such a case, the LTA, being the licensing authority, and the representative of the public interest in its licensing regime, should have raised and highlighted to the LTAT the need for the 2017 market and industry conditions to be examined afresh and advocated for the calling of fresh reports.

41. Considering what I have said above in 37 to 40, I am persuaded by the authorities relied on by Mr. Singh and in my view, I am not functus.

42. However, I am not prepared to grant any orders now. I will make directions in Court for the filing of affidavits and setting a hearing date for the application proper.

HIGH COURT OF FIJI
LAUTOKA

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Anare Tuilevuka
JUDGE
Lautoka

12 March 2021