

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Civil Action No. HBC 296 of 2020

BETWEEN : **DHAN LAKSHMI aka DHAN LACHMI** of Lomawai, Sigatoka
Domestic Duties - as Administratrix of the Estate of Marriappa aka
Mariappa Goundar late of Lomawai, Sigatoka, Farmer.

1ST PLAINTIFF

A N D : **MAHESH KRISHNA GOUNDAR** of Lomawai, Sigatoka, Farmer.

2ND PLAINTIFF

A N D : **LAND TRANSPORT AUTHORITY** - a statutory authority established
under the Land Transport Act 1998 having its registered office at Lot 1
Daniva Road, Valelevu, Nasinu.

DEFENDANT

Appearance : **Mr Filimoni Daveta for the plaintiffs**
Mr Waisake Raiubi for the defendant

Hearing : **Monday, 15th March, 2021 at 9.00am.**

Decision : **Thursday, 01st April, 2021 at 9.00am.**

DECISION

[A] Introduction

(01) The matter before me stems from the plaintiffs' notice of motion filed on 03-12-2020 seeking the grant of the following orders;

(A) *That the motor vehicle registration number EL762 be renewed.*

(B) *The costs of this application be costs in cause.*

(C) *Any other orders this Honorable Court seems just.*

(02) The application is made pursuant to Order 8, rule 2 and 3 of the High Court Rules, 1988 and the inherent jurisdiction of the court.

(03) The application is opposed by the defendant.

[B] The affidavits filed

- The affidavit of Mahesh Krishna Goundar, the second plaintiff, in support, sworn on 01st December, 2020.
- The affidavit of Deo Reddy, the Manager Enforcement for the Land Transport Authority, in response, sworn on 27th January, 2021.
- The affidavit of Mahesh Krishna Goundar, in reply, sworn on 05th February, 2021.

[C] The factual background

- (01) There is not much in dispute about the basic facts. The first plaintiff is the administratrix of the estate of her late husband, Mariappa aka Mariappa Goundar.
- (02) The second plaintiff is the son of late Mariappa aka Mariappa Goundar and also a beneficiary of the estate of Mariappa aka Mariappa Goundar.
- (03) The defendant is a statutory authority established under the Land Transport Act, 1998.
- (04) The vehicle registration number EL 762 is registered with Mariappa Gounder who was issued with two Traffic Infringement Notices [TIN] on 05th November 2019, and 03rd December 2019 respectively for carrying excess load.
- (05) The driver was Mahesh Krishna Goundar [the second plaintiff] who was served with the TINs albeit the TINs were issued to the registered owner.

- (06) On the first occasion on 05th November 2019 at Navutu Lautoka the 2nd plaintiff was driving the vehicle registration number EL 762 carrying pine logs and was stopped by the defendant enforcement officers.
- (07) The defendant enforcement officers weighed the said vehicle and it was carrying load weight of 19.56 tons when the legal weight and vehicle permissible gross weight approved by the Land Transport Authority at the time of booking was 9 tons therefore the total excess weight is 10.56 tons. There was no exception permit granted to the said vehicle to carry excess weight. (*Annexure "LTA 02" of affidavit in reply of DEO REDDY*)
- (08) As per the LTA record, the said vehicle was registered with Mariappa Gounder who is the registered owner and not the plaintiffs. [*Annexure "LTA 03" of affidavit in reply of DEO REDDY*]
- (09) The said vehicle is still currently registered with Mariappa Gounder and there is no change of ownership of the said vehicle and there is also no probate transfer even though as per the affidavit in opposition of Mahesh Krishna Gounder, at annexure "MKG 02" a probate No. 56503, letters of administration was granted to Dhan Lakshmi the first plaintiff on the 20 day of February 2015.
- (10) The registered owner Mariappa Gounder was issued with a Traffic Infringement Notice ('TIN') No 3849026 for the offence of 'permitting another person to drive motor vehicle with excess permissible gross weight loads'. [*Annexure 'LTA 04' in the affidavit in reply of DEO REDDY is the true copy of the TIN Number 3849026*]
- (11) The said TIN was only served on the driver as agent of the registered owner who is the 2nd plaintiff in this case, on 05 November 2019. [*Annexure "LTA 05" in the affidavit in reply of DEO REDDY is the true copy of the TIN Sheet showing the affidavit of service to Mahesh Krishna, and a copy of the Drivers Statement, and the copy of the dispatch book showing service made.*]
- (12) On the second occasion on 03rd December 2019 at Tagitagi, the 2nd plaintiff being the driver of the same vehicle registration number EL 762 carrying pine logs was again stopped by the defendant enforcement officers.
- (13) The said vehicle was weighed and found to be carrying load weight of 18.38 tons when the vehicle permissible gross weight is 15.4 tons therefore the total excess weight is 2.98 tons. [*Annexures "LTA 06" of the affidavit in reply of DEO REDDY is the true copy of*

the vehicle extract and the copy of the weight slip/weighing certificate showing excess load].

- (14) The vehicle registered owner Mariappa Goundar was issued with a Traffic Infringement Notice No. 3842626 for the offence of ‘permitting another person to drive motor vehicle with excess permissible gross weight loads’ and the said TIN was served on the driver Mahesh Krishna Goundar, the 2nd Plaintiff in this case. *[Annexure “LTA 07” of the affidavit in reply of DEO REDDY is the true copy of the TIN number 3842626 also showing affidavit of service, and a copy of the drivers statement and a copy of the despatch book showing service made]*
- (15) On the other hand, the second plaintiff claims that on 03-12-2019 he drove to Tropic Wood Industries Limited to verify the weight and the weighing machine at Tropic Wood Industries showed the weight of 15.20 tons which was less than the weight given in the infringement notice. Therefore, the second plaintiff disputes the TIN numbers 3849026 and 3842626 issued by the LTA on 05-11-2019 and 03-12-2019 respectively.
- (16) In **opposition**, the defendant says that;
- *. On both occasions on 05th November 2019 and 03rd December 2019 respectively and at all material time the weighing machine used by the defendant enforcement officers to weigh the Motor Vehicle EL 762 was dully calibrated and certified to be in good working conditions and readings correct, and this was certified by the Department of National Trade Measurement and Standard. *[Annexure “LTA 08” of the Affidavit in reply of DEO REDDY is the true copy of the Certificate of Verification Issued by the Department of National Trade Measurement and Standard of the Ministry of Industry and Trade]*
 - *. On every occasions before the defendant enforcement team carry out their Road Bookings a pre-test of the Weighing Machine is usually carried out to determine its operational accuracy and reliability. *[Annexure “LTA 09” of the affidavit in reply of DEO REDDY is the true copies of such pre-tests]*
 - *. The weighing machine operator on the 05 November 2019 booking, Mr. Samson Yohan Sahayam holds a valid Public Weighman License No. PW131 issued on 12 July 2018. *[Annexure “LTA 10” of the affidavit in reply of DEO REDDY is the true copy of the Samson Yohan Sahayam Public Weighmans License]*
 - *. And the weighing machine operator on 03 December 2019 bookings, Mr Simeli Ravalekama holds a valid Public Weighman License No. PW 120

issued on 12 July 2018. [Annexure "LTA 11" in the Affidavit in Reply of DEO REDDY is the true copy of the Simeli Ravalekama Public Weighmans License]

- (17) The defendant says that on 17th February 2020 the 2nd plaintiff in this case, as the only plaintiff originally filed an Amended Writ of Summons with an Amended Statement of Claim dated 14th February 2020 in the Lautoka High Court Registry in Civil Action No. HBC 25 of 2020 in his personal capacity with no locus standi as the TINS were issued to the Registered Owner who is liable for the traffic offences and not him. [Annexure "LTA 13" of the Affidavit in Reply of DEO REDDY is the true copy of this Writ of Summons and Statement of Claim]
- (18) The defendant further says that it filed a strike out application of the 2nd plaintiffs' Writ of Summons on 01st June 2020, however before the determination of the strike out application the plaintiff who is the 2nd plaintiff in this case via his Solicitor ask for a withdrawal of his action in Court on 21 October 2020, and the defendant consented to the withdrawal in good faith.
- (19) On 03-12-2020, the plaintiff filed a second writ and a statement of claim based on the same TIN numbers 3849026 and 3842626 claiming the following reliefs;
- (*) *Declaration setting aside the infringement notices dated 05th November, 2019 and 03rd December, 2019 as being wrong in law and unconstitutional.*
 - (*) *Compensatory punitive, general and exemplary damages.*
 - (*) *Loss of income.*
- (20) In paragraph (8), (9), (10), (11), (12) and (13) of the second writ and the statement of claim filed on 03-12-2020, the plaintiffs plead;
- (8) *That plaintiffs dispute the said bookings as the same is contrary to the actual weight of the vehicle.*
 - (9) *That the plaintiffs seek to set aside the infringement notices dated 5th November, 2019 and 3rd December, 2019 as the same is wrong in law.*
 - (10) *That the plaintiffs rights under the Fiji Constitution is denied.*
 - (i) *Section 2 – (1) This constitution is the supreme law of the State.*

- (ii) (2) *Subject to the provisions of this constitution, any law inconsistent with this constitution is invalid to the extent of the inconsistency.*
 - (iii) (3) *This constitution shall be upheld and respected by all Fijians and the State, including all persons holding public office, and the obligations imposed by this constitution must be fulfilled.*
 - (iv) (4) *This constitution shall be enforced through the courts, to ensure that-*
 - (v) (a) *laws and conduct are consistent with this constitution;*
 - (vi) (b) *rights and freedoms are protected; and*
 - (vii) (c) *duties under this constitution are performed.*
 - (viii) Section 14(2) *Every person charged with an offence has the right*
 - (a) *to be presumed innocent until proven guilty according to law.*
 - (ix) Section 15 (1) *Every person charged with an offence has the right to a fair trial before a court of law.*
- (11) *That on the 8th January, 2020 the Vehicle registration number EL 762 has expired.*
 - (12) *That the defendant (Land Transport Authority) has refused and refuses to grant Certificate of Fitness and accept Registration of the Vehicle in question.*
 - (13) *That as a result of the infringement notices the plaintiffs have suffered loss and damages and continue to suffer damages.*

[D] Abuse of process of the court

- (01) At the outset, the defendant vigorously sought to resist the plaintiffs' application before the court by inviting the court to regard the proceedings as an abuse of process of the court and applied to the court that notice of motion be struck out as being an abuse of process of the court. Counsel for the defendant submitted that the orders sought by the plaintiffs in their notice of motion filed on 03-12-2020 be denied because the order

claimed in (i) in the notice of motion filed on 03-12-2020 is requiring the defendant who is a statutory body with statutory functions to renew the registration of the vehicle number EL-762 is an order for mandamus and must be pursued via judicial review process under Order 53 of the High Court Rules, 1988.

- (02) Counsel for the defendant substantially relied on the decision of the High Court of Lautoka in **Paradise Transport Limited v Land Transport Authority**¹. In that case, by an originating summons filed on 15-11-2019 the plaintiff bus operator Paradise Transport Ltd applied for orders by the court directing the defendant, the Land Transport Authority, to process six applications lodged by the plaintiff with the defendant seeking the grant of Road Route Licenses. Hon. Justice Stuart dismissed the originating summons. In paragraph (24) of the decision, his Lordship Justice Stuart said;

*Even if PTL had comprehensively complied with all the requirements, and provided all the information necessary for its applications I do not agree that it is entitled to apply in a private action of this sort for the orders it seeks. This is not an action, such as that in **Land Transport Authority v Lal** (see paragraph 16 above), where administrative actions or failures have led to a personal claim for compensation. In fact in the present case the plaintiff does not even seek compensation. Instead it is quintessentially a judicial review case of the type considered by the House of Lords in **O'Reilly v Mackman** where allowing the plaintiff to bring a private action would be inconsistent with the public policy that has led to the passage of Order 53 governing and controlling such actions. To allow parties to commence private actions of the type commenced here by PTL would frustrate the measures and controls introduced by the Order. In particular, in the present case, (and without deciding the issue) I very much doubt that the plaintiff would have been successful in obtaining, in November 2019 when these proceedings were commenced, leave under O.53, r.3 to issue judicial review proceedings in relation to the six applications for road route licences that it had made in 2013 and early 2018.*

- (03) Counsel for the plaintiffs did not respond to the defendant's complaint of abuse of process of the court.
- (04) The question is whether the plaintiffs' proceedings commenced by notice of motion seeking an order of mandamus against the defendant who is a statutory body ordering the

¹ **Civil Action No. HBC 302/2019**

statutory body to take action to renew the registration of the vehicle number EL 762 could be regarded as an abuse of process of the court.

(05) The second plaintiff in his affidavit sworn on 01-12-2020 alleges at paragraph (8) and (9);

(8) *That I had on the same day, 3rd December, 2019 drove to Tropic Wood Industries Limited to verify on the Tropic Wood Industries Ltd weighing machine situated at Vakabuli Village Road, Drasa, Lautoka which showed the weight of 15.20 tons, which was different from the weight given in the infringement notice.*

(9) *That I dispute the said bookings as the same is contrary to the actual weight of the vehicle.*

(06) The second plaintiff by notice of motion seeks to establish that; (Reference is made to paragraph (10) of the affidavit)

(10) *That I seek to set aside the infringement notices dated 05th November, 2019 and 03rd December, 2019 as the same is **wrong in law**.*

[Emphasis added]

(07) The plaintiffs by notice of motion claim an order that;

(i) *That the motor vehicle registration number EL 762 be renewed.*

(08) The order sought by notice of motion is of prerogative order of mandamus ordering statutory body to take action to renew the registration of vehicle no. EL762. The defendant Land Transport Authority is a statutory body established under the Land Transport Act, 1998. **The Traffic Infringement Notice numbers 3849026 and 3842626 issued pursuant to regulation 5, 6, 7 and 9 of the Land Transport (Traffic Infringement Notice) Regulation 2017 [Legal Notice 23 & Legal Notice 86] is called into question in court by the plaintiffs and the plaintiffs are challenging the lawfulness of Traffic Infringement Notice numbers 3849026 and 3842626.**

(09) What concerns me is the propriety of suing by notice of motion for a prerogative order of mandamus against a statutory body instead of an application for judicial review under Order 53. If the allegations set out in the notice of motion and the statement of claim are true, the plaintiffs have a remedy obtainable by the procedure of an application for judicial review under Order 53 of the High Court Rules, 1988 and also under Section 14,15 and 44 of the Constitution against the acts of the defendant.

- (10) In my view it is an abuse of process of the court to apply for a prerogative order of mandamus against the acts of a statutory body by using the procedure laid down by the rules for proceedings begun by writ, originating summons or notice of motion instead of using the procedure laid down by Order 53 for an application for judicial review. The allegations made in the statement of claim and the notice of motion are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims against the acts of public authorities. By adopting this course, the plaintiffs evade the safeguards imposed in the public interest against the groundless, unmeritorious or tardy attacks on the validity of the actions of public authorities in the field of public law.

The relief sought in the notice of motion for an order of mandamus fails.

- (11) In the context of the present case, it is relevant to refer to the decision of the House of Lords in O'Reilly v Mackman & Ors² in which the issue was, in the words of Lord Diplock³:

Put in a single sentence the question for your Lordships is: whether in 1980, after RSC Ord 53 in its new form, adopted in 1977, had come into operation, it was an abuse of the process of the court to apply for such declarations by using the procedure laid down by the rules for proceedings begun by writ or by originating summons instead of using the procedure laid down by Ord 53 for an application for judicial review of the awards of forfeiture of remission of sentence made against them by the board which the appellants are seeking to impugn?

- (12) Applied to the present case, the decision in O'Reilly suggests that it will, as a matter of policy, be an abuse of court process to commence by way of writ or originating summons a claim that should have been commenced under the procedure for judicial review under Order 53 of the High Court Rules.

The reasoning behind this is as follows⁴:

by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under Ord 53 (from which there have now been removed all those disadvantages to applicants that had previously led the courts to countenance actions for declarations and injunctions as an alternative procedure for obtaining a remedy for infringement of the rights of the individual that are entitled to protection in public law only) the appellants had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision-making

² [1982] 2 All ER 1124


³ at page 1126

⁴ at page 1133

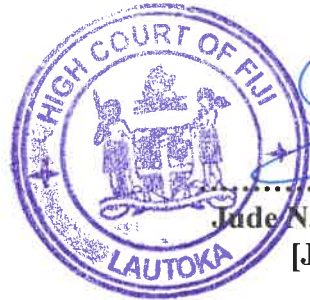
public authorities by Ord 53, and which might have resulted in the summary, and would in any event have resulted in the speedy, disposition of the application

ORDERS

- (01) The plaintiffs' notice of motion dated 02-12-2020 and filed on 03-12-2020 is hereby struck out as being an abuse of process of the court.
- (02) I make an order that the plaintiffs pay the costs of this action to the defendant which is summarily assessed in the sum of \$2,000.00. The costs to be paid to the defendant within Seven (07) days from the date of this decision.



01/04/2021



Jude Nanayakkara
[Judge]

**High Court – Lautoka
Thursday, 01st April, 2021**