

THE MAGISTRATES COURT OF FIJI AT LABASA
CRIMINAL JURISDICTION

Criminal Miscellaneous Application No. 14 of 2018

LAND TRANSPORT AUTHORITY

-v-

LOCAL TIMBER DISTRIBUTORS LIMITED

Prosecution: No Appearance

Counsel for the Defendant: Mr. S. Raramasi of Maqbool & Co

RULING

The Criminal Charge

1. On 25 May 2018, Local Timber Distributors Limited was issued Land Transport Authority Traffic Infringement Notice 3385552.
2. The Statement of Offence read: *Permitting Another Person to Drive Motor Vehicle with Non-Conforming Maximum Plus Load* contrary to Regulation 80 (a)(d), 87 (1)(a) and 122 of the Land Transport (Vehicle Registration and Construction) Regulation 2000.
3. The Particulars of Offence read: *Local Timber Distributors Ltd on the 25th day of May 2018 at Labasa in the Northern Division being the owner of motor vehicle Registration Number LTD 2 at Ritova Street permitted Surend Prasad to carry Gravel with a weight of*

26860 kg (26.86 tonnes) when the vehicle permissible gross-weight is 19990 kg (19.99 tonnes). The excess weight of the vehicle is (6870kg) 6.87 tonnes.

4. The body of Traffic Infringement Notice 3385552 clearly set out the following:

“This offence carries a maximum penalty of \$6000 and – demerit points. If you do not wish to contest this Notice, you are required to pay a Fixed Penalty of \$6000 to the Land Transport Authority.

The payment of the Fixed Penalty is due within 90 days from the date of issue of this Notice and is payable at any Land Transport Authority Office nearest to you. All liability in respect of the offence will be discharged and no further action will be taken against you with respect to this particular offence.

If you were not the driver of the motor vehicle at the time of the offence and wish to contest this Notice, you must fill in a Statutory Declaration Form and disclose to the Land Transport Authority the name and address of the driver of the motor vehicle at the time of the offence (including other relevant information and necessary documentation) within 90 days from the date of issue of this Notice.

If you wish to contest this Notice for another reason, you may elect to dispute this Notice in court.

If you fail to pay the Fixed Penalty, provide a Statutory Declaration or dispute this Notice within 90 days from the date of this Notice, you –

(a) will be liable to a late payment fee equivalent to 50 % of the fixed penalty, in addition to the Fixed Penalty;

(b) will be issued a departure prohibition order preventing you from leaving Fiji;

(c) will not be able to renew your licence or vehicle registration.

You may pay your Fixed Penalty and late payment fee in a single payment or in instalments.

The departure prohibition order and your ineligibility for licence or vehicle registration renewal will continue until you pay your Fixed Penalty and late payment fee in full or provide a Statutory Declaration or elect to dispute this Notice in court.

If you do not pay your Fixed Penalty and late payment fee in full or provide a Statutory Declaration or elect to dispute this Notice in court within 12 months from the date this Notice is issued to you, this Notice will take effect as a conviction and the Land Transport Authority may suspend your licence and seek the maximum penalty and demerit points applicable from the court.

5. On 5 July 2018 at 12.36pm, Local Timber Distributors Limited paid the Land Transport Authority \$6, 000.00 via Cheque Number 016189. The Land Transport Authority issued Receipt Number 7889383 to Local Timber Distributors Limited in respect of that payment. The narration in the Receipt reads: TIN No. 3385552 – LTD.

The Current Application

6. On 31 August 2018, Maqbool & Co acting for Local Timber Distributors Limited filed a Notice of Motion and Affidavit seeking the setting aside of a conviction and reimbursement of the \$6000.00 fine paid to the Land Transport Authority. The application was made pursuant to section 172 of the **Criminal Procedure Act 2009**.
7. With respect to counsel, I have no evidence before me to show that a conviction has been entered against Local Timber Distributors Limited. In addition, section 172 of the **Criminal Procedure Act 2009** does not apply. That provision relates to convictions entered *in absentia* by a court following a determination of guilt.
8. The Motion and Affidavit was first called on 2 October 2018. The Motion was struck out because parties did not appear.
9. On 9 October 2018, the Court *albeit* differently constituted heard and granted the Applicant's Motion for reinstatement of the matter.
10. The matter was subsequently called over 9 October, 2018, 20 November 2018, and 22 January 2019.

11. On 22 January 2019, plea was taken on the Traffic Infringement Notice and a trial date was fixed to 9 April 2019.
12. On 9 April 2019, the morning of the trial, no one appeared for the Land Transport Authority.
13. Counsel for Local Timber Distributors Limited immediately sought a dismissal of the Charge pursuant to section 166 of the **Criminal Procedure Act 2009**.
14. I adjourned to consider the application and to rule on it.

The Law

15. The **Land Transport (Traffic Infringement Notice) Regulations of 2017** applies.
16. The **Land Transport (Traffic Infringement Notice) Regulations** is enacted by way of delegated authority given to the Minister responsible for Land Transport. Section 92 of the **Land Transport Act of 1998** provides:

“92. The Minister may make regulations setting out all proceedings for Traffic Infringement Notices, including –

- (a) the manner, form and time frames for which Traffic Infringement Notices must be issued;*
- (b) the actions a person may undertake upon receipt of a Traffic Infringement Notice; and*
- (c) the penalties that a person to whom a Traffic Infringement Notice has been issued may be liable to.”*

17. I pause here to note that the body of Traffic Infringement Notice 3385552 accurately reflects the Regulations.

18. However, as will often be the case, the Notice does not reflect the entirety of the applicable law.

19. Regulation 5 of the **Land Transport (Traffic Infringement Notice) Regulations** makes provision for the service of Traffic Infringement Notices.

20. Pursuant to **Regulation 6:**

“6 A person to whom a Traffic Infringement Notice is issued, is liable to a fixed penalty and must, within 90 days from the date the Traffic Infringement Notice is issued, undertake one of the following actions –

- (a) pay the fixed penalty in a single payment or by instalments;*
- (b) make a Statutory Declaration to the Authority in accordance with section 85 (3) or 85A (2) of the Act; or*
- (c) elect to dispute the fixed penalty in court.”*

21. Regulation 7 (1A) and (1B) of the **Land Transport (Traffic Infringement Notice) Regulations** applies. That Regulations provide:

“(1A) If a person to whom a Traffic Infringement Notice is issued does not undertake any of the actions in regulation 6 within the prescribed period, the person is –

- (a) liable to pay a late payment fee in addition to the fixed penalty;*
- (b) issued a departure prohibition order preventing the person from leaving Fiji; and*
- (c) ineligible for the renewal of the person’s licence or vehicle registration,*

until the person undertakes one of the following actions –

- (i) *pays the fixed penalty and late payment fee in a single payment or by instalments;*
- (ii) *makes a Statutory Declaration to the Authority in accordance with section 85 (3) or 85A (2) of the Act; or*
- (iii) *elects to dispute the fixed penalty in court.*

(1B) If the person to whom a Traffic Infringement Notice has been issued pays the fixed penalty and late penalty fee, if applicable, and also elects to dispute or challenge the fixed penalty notice in any court, the person must notify the Authority on or before the point of payment of the fixed penalty and late payment fee, if applicable of the person's intention to dispute or challenge the Traffic Infringement Notice."

22. Regulation 7 (1C) and (1D) of the **Land Transport (Traffic Infringement Notice) Regulations** are particularly relevant:

"(1C) If a person to whom a Traffic Infringement Notice has been issued pays the fixed penalty and late payment fee, if applicable, and also elects to dispute or challenge the Traffic Infringement Notice and the court subsequently makes a final determination in the person's favour (including the determination of any appeal in any appellate court), the Authority must refund the fixed penalty and late payment fee, if applicable, to that person."

(1D) Notwithstanding anything contained in these Regulations, where Traffic Infringement Notice has been issued for an offence relating to the carrying of excess load, the person to whom the Traffic Infringement Notice has been issued or in the case of an agent, the principal, must pay the fixed penalty for the offence within 90 days from the date the Traffic Infringement Notice is issued."

23. Pursuant to Regulation 7 (1E):

"(1E) If the person or the principal, if applicable, does not pay the fixed penalty in accordance with sub regulation (1D), the Authority must suspend the

registration of the person's or principal's vehicle and any other vehicle the person or principal utilises for the purpose of carrying loads."

Analysis

24. In this instant case, Local Timber Distributors Limited were charged with an offence relating to the carrying of excess load, specifically *Permitting Another Person to Drive Motor Vehicle with Non-Conforming Maximum Plus Load*. As such, they were mandated by law to pay the fixed penalty within 90 days from the date the Traffic Infringement Notice was issued. They did so.

25. The question I adjourned to consider was whether they were thereafter barred from disputing or challenging the fixed penalty notice in court. On a plain reading of the applicable regulation, they are not barred from doing so.

26. The Regulation says that in instances like this the person must pay the fixed penalty. If they did not, the Authority had the power to suspend the registration of LTD 2 *and* every other vehicle Local Timber Distributors Limited used for the purpose of carrying loads. The law does not, however, expressly prohibit persons charged with an offence relating to excess load from, electing to dispute or challenge the fixed penalty notice in court.

27. For me to hold that it did would cause a serious *due process of law* violation. The result of such a finding would be that persons charged with an offence relating to the carrying of excess load would never be able to challenge that charge and such a holding would be in direct contravention of Local Timber Distributor Limited's constitutional rights as an accused person: *see* Article 14 (2)(a), (d), (e), (f), (k) and (l) of the Constitution.

28. According to Regulation 9 of the **Land Transport (Traffic Infringement Notice) Regulations of 2017:**

"9 If a person to whom a Traffic Infringement Notice is issued does not undertake any of the actions provided in regulation 7 within 12 months from the date the

Traffic Infringement Notice is issued, the Traffic Infringement Notice takes effect as a conviction and the Authority may –

(a) suspend the person's licence; and

(b) seek from the court a sentence providing for the issuance of demerit points and maximum penalties for the offence.”

29. Here, Local Timber Distributors Limited filed their Notice to challenge the Traffic Infringement Notice within 30 days of the mandatory payment of the \$6, 000.00 fine; well within the 90 day and 12 month time-frames provided for by law.

30. In the overall context of Regulation 7, I have jurisdiction over the matter.

31. This was to be the first hearing in respect of the alleged Infringement. As such, once the Traffic Infringement Notice was challenged, a court of law being seized of the matter had to put the issuing authority to proof. This process was to have taken place on 9 April 2019 by way of trial. The presumption of innocence was to apply. The burden and standard of proof would thereafter, have been governed by section 58 and section 59 of the **Criminal Procedure Act 2009**. In short, the burden of proving the Infringement would lie with the issuing authority and would not shift; and the standard of proof remained that of beyond reasonable doubt.

32. It is clear from the Record that the parties implicitly recognised this. On 22 January 2019, after the challenge was re-instituted, a representative for the Land Transport Authority served full disclosures upon counsel for Local Timber Distributors Limited. Local Timber Distributors Limited formally entered a 'not guilty' plea to the Infringement and the matter was set for mention to fix a trial date. On 26 March 2019, this Court *albeit* differently constituted fixed the trial on the Infringement to 9 April 2019. Mr. A. Sharma was present for the Land Transport Authority on that day and Mr. A. Sen appeared for Local Timber Distributors Limited.

33. The process referred to at paragraph [31] did not happen. On 9 April 2019, no one appeared for the Land Transport Authority and the matter could not go to trial. In the

circumstances, counsel for Local Timber Distributors Limited applied for a dismissal of the Infringement Notice pursuant to section 166 of the **Criminal Procedure Act 2009**.

34 Section 166 of the **Criminal Procedure Act 2009** is titled *Non-appearance of complainant at hearing*. The provision reads:

“166. (1) *This section applies to any case in a Magistrates’ Court, where –*

(a) *the accused person –*

- (i) *appears in obedience to the summons at the time and place appointed in the summons for the hearing of the case; or*
- (ii) *is brought before the Magistrates Court under arrest; and*

(b) *the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear –*

- (i) *in person; or*
- (ii) *by his or her lawyer.*

(2) *In the circumstances stated in subsection (1), the Magistrates’ Court shall –*

- (a) *dismiss the charge; or*
- (b) *adjourn the hearing of the case until some other date upon such terms as it determines if there are reasons for not dismissing the case; and*
- (c) *upon any adjournment the Magistrates’ Court shall –*

- (i) *admit the accused to bail; or*
- (ii) *remand the accused to prison; or*
- (iii) *take such security for his or her appearance as the Magistrates Court determines.*

(3) *The expression "lawyer" in this section and in this Part shall in relation to a complaint include a prosecutor."*

35. With respect to counsel, this is not the appropriate section. Section 166 of the **Criminal Procedure Act 2009** applies to first call. The proceedings here have progressed well beyond that stage.

36. It is section 171 (1) (b) of the **Criminal Procedure Act 2009** that applies:

"171 (1) If at the time or place to which the hearing or further hearing is adjourned –

(a) the accused person does not appear before the court which has made the order of adjournment the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and

(b) if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the accused person who has not appeared is charged with an indictable offence, or if the court refrains from convicting the accused person in his or her absence, the court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the court."

37. In the circumstances, the complainant in the matter not appearing, that complainant being the Land Transport Authority as the issuing authority, I have no recourse but to exercise section 171 (1) (b) of the **Criminal Procedure Act 2009** and dismiss Traffic Infringement Notice 3385552.

38. To leave the matter at that would result in an impermissible violation of the Defendant's rights. They have a statutory right to challenge the charge against them *i.e.* the Traffic Infringement and to put the Land Transport Authority to proof.

39. They have exercised that right and they seek a determination of innocence or guilt. If they are deemed innocent, that is, if the Court finds that there was no infringement then Regulation 7 (1C) of the **Land Transport (Traffic Infringement Notice) Regulations of 2017** operates in their favour. If they are found guilty, then the matter ends there, subject to their right of appeal to the High Court.
40. In this instance, their right to have the matter determined has been frustrated by the prosecutor's non-appearance. The law, very rightly, does not permit me to make a determination of guilt ^{or innocence} without relevant and admissible evidence to ground that finding.
41. However, the law does permit me to dismiss the Traffic Infringement Notice with or without costs and I do so here.
42. What happens then to the mandatory fine paid by Local Timber Distributors Limited pursuant to Regulation 7 (1D)?
43. The answer is that it reverts back to Local Timber Distributors Limited. A dismissal of the Infringement Notice in effect quashes it. The end result is that there is nothing in existence to ground and justify the fine paid into the Land Transport Authority.
44. In ordinary circumstances, provided they are not time-barred from doing so, the Land Transport Authority might issue a fresh Traffic Infringement Notice. If that happens, then proceedings commence afresh and Local Timber Distributors Limited will need to pay the fine and then make a determination as to whether they wish to dispute the Infringement or not. These are matters to be considered by the Land Transport Authority, Local Timber Distributors Limited and this or another court *after* the ruling. I leave it to the parties to decide their own course of action hereinafter. Fortunately, it is not a matter for me to make a determination on here and now.
45. However, I am asked to make a determination in respect of a conviction that Local Timber Distributors Limited through counsel says was issued against it. I am not certain if a conviction had, in fact, been entered.

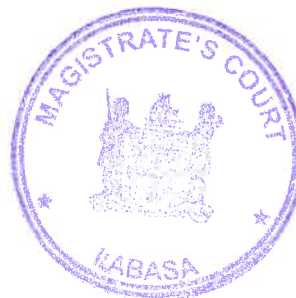
46. I indicate that it is unlikely that one was entered. Pursuant to Regulation 9 of the **Land Transport (Traffic Infringement Notice) Regulations of 2017**, a conviction would only be entered after a period of 12 months in circumstances where the infringement is not disputed. Where it is disputed, a conviction would only be entered by order of court. The twelve month period is not over and guilt or innocence is not, as yet, determined.


Orders:

47. In the final and for the reasons articulated above, I make the following orders:

- (i) Traffic Infringement Notice 3385552 is dismissed and Local Timber Distributors Limited discharged.
- (ii) The \$6000.00 fine paid to the Land Transport Authority on 5 July 2018 at 12.36pm is to be returned to Local Timber Distributors Limited forthwith.
- (iii) If a conviction has been entered against Local Timber Distributors Limited in respect of Traffic Infringement Notice 3385552, that conviction is wrongly entered and is hereby quashed.

48. **28 days to appeal.**





Seini K Puamau
Resident Magistrate

Dated at Labasa this 16th day of April 2019.