IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL PETITION NO: CBV0011 OF 2021

Court of Appeal No. ABU 0026 of 2019

BETWEEN	:	**LAND TRANSPORT AUTHORITY**	*1st Petitioner*
		JEAN MICHEL COUSTEAU FIJI ISLANDS	*2nd Petitioner*
		PARMESH SHARMA	*3rd Petitioner*
		ANJNISH JOKHAN	*4th Petitioner*
		MERE SAMISONI	*5th Petitioner*
		FRANK ROBANAKADAVU	*6th Petitioner*
AND	:	**RAJENDRA DEO PRASAD**	*1st Respondent*
		NORTHERN BUSES LTD	*2nd Respondent*

CORAM	:	**The Honourable Mr. Justice William Calanchini** **Judge of the Supreme Court**
	:	**The Honourable Madam Justice Lowell Goddard** **Judge of the Supreme Court**
	:	**The Honourable Mr. Justice Filimone Jitoko** **Judge of the Supreme Court**
COUNSEL	:	**Mr. A. Maharaj and Ms. N. Prasad for the Petitioners**
	:	**Mr. R K Naidu and Mr. S. Ratoto for the Respondents**
Date of Hearing	:	**03 August 2023**
Date of Judgment	:	**31 August 2023**

JUDGMENT

Calanchini J

[1] I have read in draft form the Judgment of Jitoko J. and agree with his reasoning and his proposed orders.

Goddard J

[2] I have also read the draft judgment of Jitoko J and concur with his reasoning and conclusions and with the orders as proposed.

Jitoko J

[3] This is an application for leave by the First, Third, Fourth, Fifth & Sixth Petitioners, to appeal the judgment of the Court of Appeal of 28 May, 2021 in finding the Petitioners guilty of tort of misfeasance in public office, and breach of duty to act fairly and reasonably in the exercise of their statutory powers.

Background

[4] The First Petitioner, the Land Transport Authority (the Authority), is a statutory authority established under section 6 of the Land Transport Act 1998. The functions of the Authority under section 8 include, inter alia,

> *"8 (1) ....*
>
> *(a) to devise, initiate and carry out measures for the coordination, improvement and economic operations of passenger transport and goods transport by road;*
>
> *(b) to ensure as far as practicable the provision of road transport passenger services adequate to meet the requirements of the public;*

(c) to register vehicles, licence drivers and establish standards for such registration and licensing consistent with the objectives of road safety

(d) to develop and implement traffic management strategies and practices consistent with the needs of road users and the objectives of road safety, in conjunction with highway authorities…"

[5] The Third, Fourth, Fifth and Sixth Petitioners are members of the Authority who, under section 7, are appointed by the Minister responsible for the Act, subject to the approval of the Prime Minister.

[6] The Second-named Petitioner is a duly incorporated company in the tourism industry and operates the Jean Michel Cousteau Fiji Islands Resort (the Resort) out of Savusavu on the island of Vanua Levu. On the day of the hearing, the Counsel for the Petitioners applied by Summons, which unbeknown to the Court, had been filed on 22 June 2023, but misplaced in the Registry, for the Second Petitioner to be removed as it no longer is a party to the proceedings.

[7] The Court, in exercise of its powers under Rule 31 of the Supreme Court Rules 2016 and O15 R6 (2) (a) of the High Court Rules 1988, granted the application and ordered that the Second Petitioner, cease to be a party, and with no costs awarded.

[8] The First Respondent is a bus operator in the industry and is the Managing Director of the Second Respondent, a duly incorporated company under the laws of Fiji in the business of operating public service vehicles for the carriage of passengers, within specified road routes on the island of Vanua Levu, as authorised by the First Petitioner, the Land Transport Authority (the Authority).

[9] At the material time, the respondents were holders of Road Service Licence (RSL) Numbers 12/23/34 and 12/23/55 authorising them to operate a stage and as well as a express service to defined destinations and bus stop points, pursuant to section 65 (3) (a) (i) and (ii) of the Land Transport Act 1998. RSL 12/23/55 approved on 21 August 2001

was what is commonly referred to as *"express"* service between Labasa/Savusavu/Labasa. RSL 12/23/34, approved on 16 July 2002 was for a stage service between Labasa/Qawa Road junction and back to Labasa town.

[10] On or about 6 September, 2004 the Respondents applied for a Road Contract Licence (RCL) under section 65 (3) (b) to enable them to provide a charter bus service for the guests and staff of the Resort. It is accepted that early in 2004, the Respondents and the General Manager of the Resort had orally agreed for the former to provide charter bus services for the latter's guests and staff and incorporated into writing through exchange of letters of 21 February and 30 October 2005 respectively. It is also not in dispute that the Respondents, had begun operating the charter bus service to the Resort for a fee, without the approval of the Authority through the issuance of a proper and valid road contract licence.

[11] For a variety of reasons, which the court will revert to later, the Authority has not been able up to the present, to decide on the RCL application by the Respondent's. Further, the Authority had, indefinitely suspended the Respondents' RSLs.

[12] On 25 October 2006, the Respondents filed their Amended Statement of Claim as set out at paragraph 2.1 of their submission:

> *"2.1 The 1st and 2nd respondent's pleaded 4 causes of action against the 1st, 3rd, 4th, 5th and 6th petitioners in the amended statement of claim filed on 25 October 2006. In summary, the 1st and 2nd respondents claimed the 1st, 3rd, 4th, 5th and 6th petitioners:*
>
> *(i) Committed the tort of misfeasance in public office*
>
> *(ii) Owed a duty to the 1st and 2nd respondents to act fairly and with reasonable care when dealing with the 2nd respondent's application for Road Contract Licence. They failed in their duty.*
>
> *(iii) Unlawfully interfered with the contractual relations between the 1st and 2nd respondents and the 2nd petitioner.*
>
> *(iv) Unlawfully interfered with the 1st and 2nd respondents business.*

[13] The Respondents' sought reliefs as set out at paragraph 2.4 of their Submission as follows:

> *"2.4 In its amended statement of claim the 1st and 2nd respondents sought the following reliefs against the 1st, 3rd, 4th, 5th and 6th petitioners jointly and or severally:*
>
> *(a) Damages for wrongful suspension of the 1st respondent's Road Service Licence from 14th January, 2005 to 28th April, 2005 (105 days in total) at $480.00 (approx.) per day, total sum being $50,400.00*
>
> *(b) Damages for wrongful suspension of 1st respondent's Road Service Licence for one day in July, 2005 in the sum of $480.00 (approx.).*
>
> *(c) Damages for premature rescission or revocation or termination of agreement with 2nd respondent for at least a period of 4 years and 9 months (57 months in total) at $5,000.00 per month, total sum being $285,000.00.*
>
> *(d) Damages for loss of future income.*
>
> *(e) General damages for misfeasance and abuse of office*
>
> *(f) General damages for mental distress, emotional harm anxiety, anguish and injury to feelings suffered by the 1st respondent.*
>
> *(g) Exemplary damages.*
>
> *(h) Interest on the award of damages.*
>
> *(i) Costs.*
>
> *(j) Further or other reliefs."*

Agreed Facts

[14] The following additional material facts are admitted by the parties set out in the pre-trial conference minutes filed into Court on 19 August 2009 as appeared from paragraphs 9 to 36 thereof.

> *"9. The 3rd, 4th, 5th and 6th Defendants were at all materials times appointed members of the Land Transport Authority with powers, functions and duties provided under the Land Transport Act and regulations. In*

carrying out their duties the 3rd, 4th, 5th and 6th Defendants were carrying out a public office at all material times.

10. *At all material times the 3rd Defendant was a General Manager of Merchant Finance & Investment Company Ltd.*

11. *That Bus Operators in Vanua Levu have been operating and continue to operate charter bus service without a special licence or permit.*

12. *In accordance with the practice prevalent in Vanua Levu, the Plaintiffs entered into an oral agreement with the 2nd Defendant around early 2004 to provide to the 2nd Defendant charter bus service for Cousteau Resort guests and staff for a reward. The Plaintiffs provided charter bus service to Cousteau Resort since around early 2004. This oral agreement was later incorporated partly in writing in the form of two letters dated 21 February, 2005 and 30 October, 2005.*

13. *On 11 August, 2004, the 1st Defendant wrote to the 1st Plaintiff advising him that it had received complaints from the Plaintiffs competitor Vishnu Holdings Limited regarding the trips the 1st Plaintiff's buses were making to Cousteau Resort.*

14. *On 18 August, 2004 the 1st Defendant wrote to Vishnu Holdings Limited stating that the 2nd Defendant was satisfied with the bus services provided by the 1st Plaintiff. The letter also purported to say that the 1st Defendant was investigating the matter (i.e. about the bus services the 1st Plaintiff was providing) and that it would take necessary action.*

15. *The 1st Defendant through its servants and or agents advised the Plaintiffs to make an application to the 1st Defendant for a Road contract licence to operate charter bus service for Cousteau Resort.*

16. *On or about 06 September, 2004 the 2nd Plaintiff made an application to the 1st Defendant for a Road Contract Licence to operate a charter bus service for Cousteau Resort. The 2nd Plaintiff paid the prescribed fee for the application and advertisement costs as prescribed by the Land Transport Regulations. The 2nd Plaintiff also provided the 1st Defendant with a copy of its contract for charter bus service with the 2nd Defendant.*

17. *By letter dated 21 October, 2004, the 1st Defendant asked the 1st Plaintiff to appear before the 1st Defendant on 09 November, 2004 to show cause why the 1st Plaintiff's Permits RRL 12/23/34 and 12/23/55 should not be cancelled varied or suspended in terms of Regulation 12 of the Public Service Vehicle Regulation.*

18. *The 1st Defendant dealt with the matter (stated at paragraph 17 above) on 09 November, 2004 and by its letter of 20 December, 2004 advised the 1st Plaintiff of the suspension of his road service licence for six months from the date of delivery of the letter on 21 January, 2005 on the grounds that the 1st Plaintiff had consistently failed to comply with the terms of his permits 12/23/34 and 12/23/55 to the detriment of other public service operators.*

19. *The 1st Plaintiff appealed against the suspension of his permit and also applied for a stay pending the determination of his appeal. The Land Transport Appeal Tribunal set aside the suspension on 28 April, 2005 and it handed over its written ruling on 30 June, 2005.*

20. *On 21 February, 2005 the 1st Plaintiff and 2nd Defendant signed an agreement as follows:*

> *"February 21, 2005*
>
> *Agreement to provide Bus Services*
>
> *"This agreement confirms that Northern Buses Limited will provide Bus Transport for the guests and staff of Jean-Michel Cousteau Fiji Islands Resort."*
>
> *…….* *…….*
> *Rajendra Deo Prasad* *Grey Taylor*
> *Northern Buses Ltd* *Jean-Michel*

21. *On 04 May, 2005 the Plaintiffs through their former solicitors G P Shankar & Co wrote to the 1st Defendant requesting the 1st Defendant to hear the application lodged by the 2nd Plaintiff on or about 06 September, 2004 for Road Contract Licence to operate charter bus service for Cousteau Resort. The 1st Defendant did not respond.*

22. *On 14 July, 2005 the 1st Defendant held a meeting at the Labasa Town Council Conference Room. The 3rd, 4th, 5th and 6th Defendants were present at the meeting. On the agenda was the 1st and 2nd Plaintiffs applications:*

<u>First Plaintiff's Application</u>

(a) Opposed application for Transfer of Road Route Licence 12/23/34 and 12/23/55.

(b) Opposed application for new Road Permit (Road Route Licence).

(i) Route: Raranibulubulu/Raranikawai/Qelelumu/Korovatu/Labasa

(ii) Route: Labasa/Malau/Labasa

Second Plaintiff's Application

(i) Opposed application for Road Permit (Road Contract Licence)

(ii) Route: Labasa/Savusavu/Labasa

(iii) Route: Nukubalavu/Cousteau Resort via Naqere

23. *At the meeting of 14 July, 2005 the 1st Defendant through the 3rd, 4th, 5th and 6th Defendants refused to hear the Plaintiffs application and deferred the same without any proper basis or any justified reasons.*

24. *According to the 1st Defendant Minutes of the Meeting of 14 July, 2005, the 1st Defendant through the 3rd, 4th, 5th and 6th Defendants suspended the 1st Plaintiffs Road Permit 12/23/55 in a Private Meeting.*

25. *By letter dated 21 July, 2005 the 1st Defendant formally advised the 1st Plaintiff that it had suspended the 1st Plaintiff's express service Labasa/Savusavu Road Route Licence 12/23/55 with effect from 22 July, 2005. The letter Licence 12/23/55 with effect from 22 July, 2005. The letter further stipulated that the suspension was for a period until the 1st Plaintiff's case was dealt with by the 1st Defendant or three months from the date of the letter.*

26. *The 1st Plaintiff's former solicitor responded to the 1st Defendant's letter on 22 July, 2005 stating that the suspension was wrong in law and Unconstitutional.*

27. *By letter dated 22 July, 2005 the 1st Defendant advised the 1st Plaintiff to resume his operation on the Labasa/Savusavu Express Trip Route RRL 12/23/55 immediately. The letter further stipulated that the 1st Defendant would inform the 1st Plaintiff's competitor Parmod Enterprises Limited to withdraw from the said route.*

28. *On 30 October, 2005 the 1st Plaintiff and 2nd Defendant signed the following memo:*

"30th October, 2005
Northern Buses Ltd

Lot 14, Vakamasisuasua Subdivision
Nasekula
Labasa
Fiji

Dear Rajendra,

I refer to our agreement dated Feb 21, 2005; we hereby to confirm that we have a contract in place, payable in arrears at the end of each month, for the provision of transport services for Resort guests and staff.

The trips are exclusively for the Resort and do not involve transport of members of the public.

You have asked for a letter committing us for five years. I would be happy to continue asking using your services for a period exceeding five years subject to the standard and pricing of those services continuing to be competitive.

I trust the LTA will provide whatever documentation you need to continue to provide service to the Resort.

If I can offer you any additional assistance, I would be pleased to help.

Yours truly

……
Grey Taylor
Resort Director"

29. *The 2nd Plaintiff's Application for a Road Contract Licence to operate a charter bus service for Cousteau Resort is still pending as the 1st, 3rd, 4th, 5th and 6th Defendants have failed and or neglected to hear and determine the same to date.*

30. *As a result of the failure by the 1st, 3rd, 4th, 5th and 6th Defendants to hear and determine the 2nd Plaintiff's application, one of its competitor Vishnu Holdings Limited approached the 2nd Defendant to provide charter bus service to the 2nd Defendant. Vishnu Holdings Limited however does not have a Road Contract Licence to provide a charter bus service.*

31. *The 2nd Defendant as a result terminated its contract with the Plaintiffs for the hire of their buses from 09 January, 2006.*

32. *The 2nd Defendant is currently using the charter bus services of Vishnu Holdings Ltd. Vishnu Holdings Limited also does not have a road contract licence.*

33. It was a duty of the 3rd, 4th, 5th and 6th Defendants when exercising their statutory powers in relation to the 1st and 2nd Plaintiff to exercise them in a fair and dispassionate manner and without malice.

34. The 1st, 3rd, 4th, 5th and 6th Defendants were at all material times under a duty to the 1st and 2nd Plaintiffs to act fairly, impartially and with reasonable care when dealing with the 2nd Plaintiff's application for Road Contract Licence and to hear and determine the application without unreasonable delay.

35. At all material times the 2nd Defendant had direct knowledge that the 1st and 2nd Plaintiffs did not have a road contract licence to provide charter bus service. Despite this the 02 Defendant agreed for the 1st and 2nd Plaintiffs to provide charter bus service to Cousteau Resort.

36. It was a term and condition of the agreement that the 2nd Defendant would continue to use the 1st Plaintiffs charter bus service for a period exceeding five years."

Proceedings

[15] The High Court, per Amaratunga J, after hearing all the evidence tendered, concluded, on 11 December 2018, as follows (at paragraph 95 of the judgment):

95. The 1st and 3rd to 6th Defendants had not acted in abuse of their respective offices and there is no misfeasance in a public office as pleaded at paragraph 36 (a) to (g) of the amended Statement of Claim. Their deferring the Plaintiff's application RCL cannot be considered as negligent act. There is no proof of the said Defendants unlawfully interfering with a legally enforceable contract between the Plaintiff and the 2nd Respondent. Said Defendants had not unlawfully interfered with the Plaintiffs' business or discriminated him. The contract between the 2nd Defendant and the Plaintiffs was an illegal contract as the Plaintiff did not have road contract licence to provide such service. The fact that Plaintiff engaged Vishnu Holding, another company without road contract licence cannot change the position of illegality. The said agreement between the plaintiffs and 2nd Defendant is void and contrary to public policy. Both parties being aware of the illegal contract is not a reason to deviate from the accepted norm. The plaintiff's claim against the 2nd Defendant is struck off due to illegality and granting damages to such a contract is against public policy."

[16] The Court ordered the Writ of Summons to be struck out and the Statement of Claim be dismissed.

Appeal to and Judgment of the Court of Appeal

[17] The Respondents (plaintiffs) appealed the decision of Amaratunga J to the Court of Appeal setting out eight (8) grounds of appeal as follows:

> *"(1) The learned trial judge erred in law by failing to give comprehensive reasons dealing with all significant/critical evidence in his judgment which his Lordship ought to have, given the inordinate delay between the date of the trial and delivery of the judgment.*
>
> *(2) The learned trial judge erred in law in holding that the Appellants failed to establish the tort of misfeasance against the 1st and 3rd to 6th Respondents.*
>
> *(3) The learned trial judge erred in law in failing to hold that the 1st Respondent was negligent, unfair and careless in failing to hear and determine the 2nd Appellants application for Road Contract Licence without unreasonable delay despite the weight of evidence clearly indicating fault/delay on the part of the 1st Respondent and despite the Pre Trial Conference minutes clearly stating that:*
>
> > *(i) At the meeting of 14 July 2005 the 1st Respondent through the 3rd, 4th, 5th and 6th Respondent refused to hear the Appellants application and deferred the same without any proper basis or any justified reasons.*
> >
> > *(ii) The 2nd Appellant's Application for a Road Contract Licence to operate a charter bus service for Costeau Resort is still pending as the 1st, 3rd, 4th, 5th and 6 Respondents have failed and or neglected to hear and determine the same to date.*
> >
> > *(iv) It was a duty of the 3rd, 4th, 5th and 6th Respondents when exercising their statutory powers in relation to the 1st and 2nd Appellants to exercise them in a fair and dispassionate manner and without malice.*
> >
> > *(v) The 1st, 3rd, 4th, 5th and 6th Respondents were at all material times under a duty to the 1st and 2nd Appellants to act fairly,*

impartially and with reasonable care when dealing with the 2nd Appellant's application for Road Contract Licence and to hear and determine the application without unreasonable delay.

(4) The learned trial judge's reason for judgment on the Appellants cause of action in negligence against the 1st Respondent is deficient and does not adequately address and determine the issue between the Appellants and the 1st Respondent.

(5) The learned trial judge in his judgment disposed of the merits of the Appellants claim in negligence against the 1st Respondent in a mere sentence without setting out and analyzing the evidence of the Appellants and the 1st Respondents witnesses.

(6) The learned trial Judge erred in law by holding that immunity provided in Section 21 of the Land Transport Act applied to the 1st Respondent when determining the Appellants claim in negligence against the 1st Respondent

(7) The learned trial judge erred in law in failing to hold that the 1st and/or the 1st, 3rd, 4th, 5th, and 6th Respondents unlawfully interfered with the contractual relations between the Appellants and the 2nd Respondent and with the Appellants business.

(8) The learned trial judge erred in law in failing to hold that the 2nd Respondent breached its agreement with the Appellants by prematurely terminating the agreement between them and by entering into a contract of Vishnu Holdings Limited."

[18] In its judgment of 28 May 2011, the Court ordered as follows:

"1. The Appeal against the 2nd Respondent is dismissed with costs payable in the High Court proceedings fixed at $1,500.00 within 21 days of this judgment.

2. The Appeal against the 1st and 3rd to the 6th Respondents is allowed on Grounds of Appeal No. 1 to 6 urged in the original Notice of Appeal.

3. The matter is remitted to the High Court for purposes of determining the matters stated in paragraph [48] above.

4. As far as the present appeal is concerned, I make Order against the 1st Respondent to pay as Costs of this Appeal $5,000.00 to the Appellants within 21 days of this Judgment.

5. Orders 1 and 4 are to take effect contemporaneously."

[19] Paragraph [48] of the Court's judgment, referred to under Order 3 above, stipulates as follows:

"*In Re: Award of Damages, Interests and Costs*

[48] Having looked at the Amended Statement of Claim of the Appellants against the 1st and 3rd to 6th Respondents and the quantum of damages claimed by the 1st Appellant on the RRL issue and the 2nd Appellant on the RCL issues in the light of the evidence led on behalf of the Appellants while allowing the Appellants' Appeal on the said grounds of appeal (No.1 to No.6) I make order remitting the matter to the High Court to make an appropriate Order as to the quantum of damages to be awarded with interest thereon in terms of relevant legal provisions and costs."

Appeal to the Supreme Court

[20] The 1st and 3rd to 6th Respondents (Petitioners) aggrieved by the decision of the Court of Appeal, filed on 27 October 2021 their Petition for Special Leave to Appeal to this Court, setting out seven (7) grounds of appeal as follows:

"a) The Court of Appeal erred in law when it made a findings of misfeasance in public office, and negligence on the part of the First Petitioner when the contract in which the First Respondent and the Second Petitioner entered into and is the basis of the Respondents cause of action against the Petitioners, is illegal ab initio and further declared by the High Court on its judgment dated 11 December 2018 is illegal, a finding that is not disturbed nor overturned by the Court of Appeal in its ruling dated 28 May 2021.

b) The Court of Appeal erred in law and fact when it failed to make a finding that the application for an Road Contract License for charter services submitted by the First Respondent in 2004 was not done in good faith, because it was precipitated upon and based on an illegal contract, and tainted with the First Respondent's own numerous and consistent violations of their permit conditions and the provisions of the Land Transport Act 1998, and as such the First Petitioner cannot be coerced to be subject to the expected standard of care to perform its statutory duty to give effect to an illegal contract, or held liable to be in breach of

such statutory duty when it failed to process such application on time or fail to give reasons

c) *The Court of Appeal erred in law and fact when it failed to take judicial notice of the various actions instituted by the Respondents including an appeal to the Land Transport Appeal Tribunal, Respondent's application for an interim stay to the High Court, application for Judicial Review, and Respondents filing of the Amended Statement of Claim on 25 October 2006 concerning this action, and which barred any further determination or processing of the Respondent's Road Contract License Charter service application by the First Petitioner until to date when the matters are then determined by the High Court and the Court of Appeal, and that the findings of the Court of Appeal that the First Petitioner being negligent, unfair and careless for failure to process application in time and until to date, not only was improper but unreasonable, incorrect, invalid and erroneous in law.*

d) *The Court of Appeal erred in law and fact when they upheld that the Respondent's natural justice, and legitimate expectation applied in this case are not fulfilled by the First Petitioner, when the Respondents must know and ought to have known that its own illegal actions that gave rise to numerous penalties issued by the First Petitioner, and disciplinary proceedings for show cause including its entering into an illegal Contract with the Second Petitioner had a bearing on the status of its Road Contract License Charter Services application and it may only have legitimate expectation and hold public officer accountable if he has done everything that required to be done, but in good faith and in legal manner.*

e) *The Court of Appeal erred in law in terms of making Order numbered 3 in tis judgment dated 28 May 2021 by "remitting the matter to the High Court to make an appropriate Order as to the quantum of damages to be awarded with interest...", when in the findings of the High Court dated 11 December 2018 that the Contract upon which the cause of action the Respondents relied upon was illegal, and that findings of illegality of the Contract was not disturbed nor overturned by the Court of Appeal, anywhere in its judgment dated 28 May 2021, and that there cannot be an assessment of damages on an income flowing from an illegal Contract.*

f) *The Court of Appeal erred in law by failing to uphold that in the administration of civil justice, the awarding of an order for damages in a private action claim against Public statutory authority for its purported failure to carry out its statutory public duty, the kind that is dealt with in this matter concerning an allegation of failure to propose a Road Contract Licence application for charter service by the First Petitioner, is inconsistent with the longstanding common law positions and*

precedent authorities that public law matters must be pursued by way of public law recourse via Judicial review where aggrieved party to seek public law remedies and not necessarily the private action seeking private law remedies which is against legislative intention and public policy.

g) The Court of Appeal erred in law in failing to uphold that the Provision for immunity under Section 21 of the Land Transport Act 1998 ("the Act"), afforded to Board Members from any liability personally, for carrying out their public functions in good faith must also be attributed to the Board collectively who is the First Petitioner itself pursuant to Section 6 of the Land Transport Act 1998, and that the immunity provision generally implied the legislative intention and policy consideration that a public authority which is the First Petitioner in this case, lawfully exercising its statutory duty in good faith is protected from private civil claim and award of damages in a cause of action of this nature, especially when the Court of Appeal did not uphold the First Petitioner's allegations of unlawful business or contractual interference by the Respondent in grounds numbered 7 and 8 of their Notice of Motion."

Decision of the Land Transport Appeals Tribunal

[21] At its meeting at the Boardroom of its Valelevu headquarters on 9 November, 2004, the 1st Petitioner, called in the 1st Respondent to show cause why his *"express"* licence RRL 12/23/55 should not be cancelled, varied or suspended for numerous breaches he was alleged to have committed. The *"show cause"* procedure is exercisable by the 1st Petitioner under Regulation 12 of the Land Transport (Public Service Vehicles) Regulations 2000 and stipulates as follows:

"12 (1) The Authority may cancel, vary or suspend a permit if a condition subject to which the permit was granted, has not been complied with and the Authority is satisfied that the breach is serious, frequent or causes inconvenience or danger to the public.

(2) The Authority, must, before cancelling, varying or suspending a permit, give the holder of the permit an opportunity to be heard.

(3) If the Authority varies or suspends a permit, it must give notice in writing to the holder that the permit has been varied or suspended

as from the date of which the notice is delivered to the holder."

[22] At its 9 November 2004 meeting, the 1st Respondent was present or through his Counsel and he was asked to show cause why his RRL 12/23/55 should not be cancelled, varied or suspended for breaches of his license. His counsel, G. P. Shankar, refuted the allegations and asserted that his client was only operating his *"express"* service trips. However, the 1st Petitioner's record produced into court in the Agreed Bundles of Documents of the Minutes of its 9 November 2004 meeting specifically stated the reasons for the 1st Petitioner's suspension for six (6) months of the 1st Respondents' RRL 12/23/55 licence was because:

"Rajendra Deo Prasad admitted the following:

1. *He was operating illegally in the Savusavu area;*
2. *He was operating Charter services illegally in the Savusavu area;*
3. *He was operating under the name of Northern Buses, an unregistered and defunct entity;*
4. *His buses operate from 5.30am – 11pm daily;*
5. *He has garaged for buses in Savusavu to service the express route from Labasa to Savusavu. The RRL he had, originates and terminates in Labasa."*

[23] The decision to suspend for six (6) months the 1st Respondent's RSL 12/23/55 licence was the subject of appeal by the Respondents to the Land Transfer Appeals Tribunal pursuant to section 44 of the Act.

[24] In its Decision of 30 June 2005, the Tribunal held that the 1st Petitioner's action in suspending the 1st Respondent's licence was ultra vires the Act in that the exercise of its Regulation 12 powers may only be invoked after the alleged breaches of the 1st Respondent's licensing conditions, have been heard and proven under section 65(4) of the Act.

[25] With respect, this court does not agree with the Tribunal's finding. The regulatory provisions under Regulation 12 are capable of operating separately from the section 65 (4) legal action. The fact that the service provider under the Regulations is required to appear before the Board to answer to allegations of breaches, guarantees procedural fairness, which was the concern at the heart of the Tribunal's decision.

[26] In any case, the Tribunal's decision resulted in the restoration of the 1st Respondent's RSL 12/23/55 Labasa/Savusavu/Labasa *"express"* service and the substituted service offered to Parmod Enterprises Limited for the route, was withdrawn.

[27] The charter bus service under the Road Contract Licence (RCL) which the 1st Respondent had applied for to service the guests and the workers of the Cousteau Resort lodged with the 1st Petitioner on 6 September, 2004, remains pending up to the present time.

Leave to Appeal

The Threshold Requirement Under Section 7 (3) of the Supreme Court Act 1998

[28] To obtain leave, the Petitioners have to satisfy this court that the case raises (as per section 7 (3)):

> *"(a) a far-reaching question of law.*
> *(b) a matter of great general or public importance*
> *(c) a matter that is otherwise of substantial great interest to the administration of civil justice."*

[29] There are abundance of Supreme Court decisions on the interpretation of the provision. In the first place, the three (3) criteria above are not cumulative requirements; they should be read as if *"or"* appears between them: **Lt Colonel Filipo Tarakinikini v Commander Republic of Fiji Military Forces & Ors** (2004) SC Reps 04/599 CBV 7/06 (apf ABU 70/06) 17 July 2008 per Fatiaki P, Gault and Mason JJ.

[30] The analysis and conclusions on the litmus test to be applied have carefully been examined and applied in **Bulu v Housing Authority** (2005) FJSC 1 CBV0011.2004S (8 April 2005);

Dr. Garnesh Chand v Fiji Times Ltd (2009) CBV0005 of 2009 (31 March 2011) **NLTB v Shanti Lal & Ors** (2011) CBV0009 of 2011 (25 April 2012); **Wakaya Limited v Kenneth Chambers & Or** (2012) 2 FLR 76; **Land Transport Authority v Ravind Milan Lal & Ors** (2012) 2FLR 321. The general consensus in all of these cases are aptly summarised in the judgment of **Sun Insurance Company Limited v Mosese Qaqanaqele** [2017] FJSC CBV0009 2016 (21 July 2017) at paragraph [31] stating:

> *"[31] It is clear from these decisions that special leave to appeal is not granted as a matter of course and that for the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character. Even so, special leave would be refused if the judgment sought to be appealed from, was plainly right, or not attended with sufficient doubt to justify the grant of special leave…."*

[31] The legal principles that are codified under section 7 (3) of the Supreme Court Act as enunciated in the various Fiji Supreme Court decisions above have long been established by the Privy Council in **Daily Telegraph Newspaper Limited v McLaughlin** [1904] AC 776, 779.

[32] In the present case, the Respondents submit that the impugned judgment of the Court of Appeal is plainly right and that the 1st Petitioner must be held liable for its *"procrastination"* with the 3rd to 6th Petitioners, in processing the Respondents' RCL. Furthermore, the finding of misfeasance, negligence and unlawful interference by the Petitioners with the contractual relations and unlawful interference with the 1st and 2nd Respondents' business, did not raise matters of national importance nor does it involve a matter of public interest or raise an important question of law. In addition, the issue of the contract and its illegality are between the parties and do not form matters of public importance.

[33] All in all, the Counsel for the Respondents submits that the Petitioners have not satisfied the threshold requirement under section 7 (3) for leave to be granted.

Consideration

[34] The 1st Petitioner is a statutory body and the 3rd to 6th Petitioners were, at the material time, members of the Board, with powers conferred on them under section 9 (1) of the Act, to inter alia,

> *"9 (a) regulate and control all or any means of land transport;*
>
> *(b) take such steps and do all such acts, matters and things as it may think necessary or desirable for effecting the coordination of road transport services, and the improvement of the means of, and facilities for, road transport;*
>
> *(c) .....*
>
> *(d) do all things necessary or convenient to be done for, or in connection with, or incidental to, the exercise of its powers or the performance of its functions under this Act or any other Act."*

[35] There is an unequivocal finding by the trial court from all the evidence presented to the court including the witnesses' testimonies, that the Petitioners had not abused their offices neither was there misfeasance or acts amounting to malfeasance in the exercise of their public duties. At paragraph 95 of His Lordship's judgment, Amaratunga J concluded:

> *"95. The 1st and 3rd to 6th Defendants had not acted in abuse of their respective offices and there is no misfeasance in a public office as pleaded at paragraph 36 (a) to (g) of the amended statement of claim. Their deferring the Plaintiffs' application RCL cannot be considered as negligent act. There is no proof of the said Defendants unlawfully interfered with a legally enforceable contract between the Plaintiffs and 2nd Defendant. Said Defendants had not unlawfully interfered with the Plaintiffs' business or discriminated him…"*

[36] The contrary findings by the Court of Appeal on the conclusion of the trial court, on both matters of fact and law, especially as they involve the functions and powers of statutory bodies in performance of their public duties are, in my view, sufficient to satisfy the criterias and therefore meet the threshold requirements of section 7 (3).

[37] Leave is therefore granted.

Grounds of Appeal

[38] As apparent from reading the seven (7) grounds of appeal set out at paragraph [18] above, they lack somewhat the clarity in identifying the exact issues of law and how these are matters of great and general public importance or substantial general interest to the administration of civil justice. They generally overlap, and the court is minded to consider the grounds and the issues together where they coincide as follows:

1. Was there misfeasance in public office (grounds a), b) and d)?
2. Were there Petitioners negligent and/or in breach of public duty (ground c))?
3. Does the Immunity Provision Under section 21 Apply (ground g)?
4. Public law and judicial review (ground f).
5. Quantum of damages, if any (ground e)?

Ground 1 – Misfeasance in Public Office

[39] The Court of Appeal, in allowing the respondents appeal recognized and agreed to the respondents' contention that the Petitioners were guilty of the tort of misfeasance as well as negligence.

[40] As a general statement of law, any act or omission done or made by a public official in pursuance of the functions of his or her office, can found an action for misfeasance in public office.

[41] The elements of the tort of misfeasance are well established. The leading case in the Privy Council decision of Lord Diplock in **Dunlop v. Woollahra Municipal Council** (1982) AC 158, and followed in the High Court of Australia in **Northern Territory v Mengel** [1995] HCA 65 underline these as follows:

(i) exercise of power by a public officer
(ii) in the purported discharge of his or her public duties
(iii) exercise of power must be invalid

(iv) there is malice (intention to injure)

(iv) there is loss or harm to the plaintiff

[42] A fuller exposition of the elements of the tort of misfeasance in public office is set out in the House of Lords decision in **Three Rivers District Council v Bank of England** [2000] 3 All ER 1, at page 36:

> *"(1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in **Northern Territory v Mengel** (1995) 185 CLR 307), it has some similarities to them.*
>
> *(2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously: See Mengal ((1995) 185 CLR 307) per Deane J.*
>
> *(3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position.*
>
> *(4) For the purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstance in which he believes or suspects that his act will probably damage the plaintiff or such a person, if he does not ascertain whether that is so or not, or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage.*
>
> *(5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort.*
>
> *(6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what*

he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act."

[43] It is the contention of the Petitioners that the elements of the tort of misfeasance in public office as set out in the Australian cases of **Dunlop** and **Northern Territory** have not been satisfied and that, the Court of Appeal had not thoroughly analysed all the elements of the offence including the critical element of malice in arriving at its conclusion. Counsel referred to **Northern Territory v Mengel** (supra) in which the Court stated per Deane J at paragraph 24;

"In the context of misfeasance of public office, the focus of the requisite element of malice is injury to the plaintiff or injury to some other person through an act which injuriously affects the plaintiff (142). Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge of invalidity or lack of power and with knowledge that it would cause or be likely to cause such injury. Finally, malice will exist if the act is done with reckless indifference or deliberate blindness (143) to the invalidity or lack of power and that likely injury. Absent such an intention, such knowledge and such reckless indifference or deliberate blindness, the requirement of malice will not be satisfied."(Emphasis is mine)

[44] It is clear in the submission of Counsel for the Petitioners, that the critical element in the context of misfeasance in public office is "malice" or acting in bad faith". This, has to be proven by the Respondents to the satisfaction of the Court, according to the Petitioners. The Respondents the Petitioners argue, had failed to do.

[45] In this instance, the Respondents are relying on the particulars set out as paragraph 36 (a) to (g) of their Amended Statement of Claim to substantiate their submission on allegations of misfeasance. Under sub- paragraphs (a) and (b) the Respondents allege that the fact that the 3rd Petitioner was the General Manager of a lending institution that had solicited without success business including loans to the Respondents had resulted in the 3rd

Petitioner failing to act impartially when the Petitioners dealt with the Respondents' licence.

[46] Under sub-paragraphs (c) and (d) the Respondents alleged that the Petitioners had acted in bad faith by permitting charter bus services to another bus company, for the same destination points, even although the other company did not possess the necessary RCL. Sub-paragraph (e), relates to alleged breaches of the Respondents' RSL condition resulting in the suspension of its licence notwithstanding that the suspension was ultra vires section 65 (4) of the Act.

[47] Finally under sub-paragraphs (f) and (g) the Respondents allege that at its meeting of 14 July 2005, the Petitioners had, "*improperly and wrongfully"* resolved to suspend the Respondents' RSL when the item was not on the agenda of the meeting, thus acting in excess of its jurisdiction, and such an act was either done with malice or *"with knowledge that they were acting ultra vires, perversely and negligently".*

[48] In this court's view, the allegations under paragraph 36 (a) and (b) of the Respondents' Amended Statement of Claim, of the 3rd Respondent having, because of his position in the lending institution; a vested interest in the decision affecting the Respondents business, was correctly dismissed by the trial court as without merit, and in any case, as the Court of Appeal noted, the 3rd Petitioner, had excused himself from sitting at the meetings when the Respondents' application came before the Petitioners.

[49] The Respondents further claim under sub-paragraph (c) that the Petitioners had acted in bad faith in allowing a rival company to operate a similar charter service between the same points, even although it did not possess the necessary RCL. It was clarified in the Petitioners Counsel submission to the Court that firstly, the rival company had not been given or issued a RCL by the Petitioners, to serve the destinations originally serviced by the Respondents, and secondly, whilst they were aware of the existence of such a service there had not been any public complaints against it.

[50] The Respondents' application for a RCL originally lodged with the Petitioners in June 2004, had not been heard or decided upon up to today. It seems apparent from the evidence,

that the non-decision by the Petitioners on the Respondents' RCL application, has always been linked to the multiple breaches of the Respondents' RSL, which the Petitioners had indicated they wished addressed, before deciding on the application.

[51] The Respondents submit that the Petitioners action or non-action amounted to malice which had caused serious loss of business as well as mental and emotional distress to the 1st Respondent.

[52] The claim by the Respondents under paragraph 36 (e) of the Statement of Claim to support the ground of tort of misfeasance is that they were not afforded the opportunity to answer allegations against them by a rival company, specifically on services provided between 9th to 16th and 18th July, 2004 amounted to procedural unfairness and denial of natural justice. Counsel submitted that the Petitioners' knew or ought to have known, that the suspension of their licence for 6 months in the exercise powers under Regulation 12 was ultra vires the Act and specifically the provisions of section 65 (4) thereof.

[53] With respect, *"constructive knowledge"* of the absence of power in a public office to act with foreseeable damage as a consequence, is not supported by the tenents of law of negligence and misfeasance of public office. As Brennan J articulated in **Northern Territory v Mengel** (supra) at paragraph 11:

> *"…If liability were imposed upon public officers who though honestly assuming the availability of powers to perform their functions, were found to fall short of crucial standards of reasonable care in ascertaining the existence of those powers, there would be a chilling effect on the performance of their functions by public offices. The avoidance of damage to persons who might be affected by the exercise of the authority or powers of the office rather that the advancing of the public interest would be the focus of concern."*

[54] The exercise by the 3rd to 6th Petitioners of the discretion powers vested in them under Regulation 12 cannot, in my view, by any stretch of imagination, be seen to have been done with malice or in bad faith. They sincerely believed that they collectively, as the Board, have the powers to vary, suspend or cancel public vehicle licence if the holders of these licences are in breach of their conditions, acting in accordance, they believed, with

their functions under section 8 of the Act. That the Tribunal had found their action ultra vires section 65 (4) of the Act, does not of itself impute malice or bad faith on their part.

[55] It is interesting that the 1st Petitioner did not see it fit to appeal the Tribunal's decision, given the nature and impact of the two provisions to its statutory functions as opined by this court in paragraph [25] above. Be that as it may, the court cannot find from the evidence before the trial court, the existence of all the elements, including the presence of malice, in the exercise of the Board's discretionary powers to suspend the 1st Respondent's RSL. There is no evidence that the act was intended to cause injury, especially since the sole purpose of the Board was to rectify breaches of the law. Not only were there numerous complaints from rival service providers, but also the letters and traffic infringement notices (TINs) issued by the 1st Respondent itself, are all in evidence to show the callous almost indifferent disregard for the law by the 1st Respondent in continuing to act in breach, of the conditions of his RSL.

[56] In addition this court notes, that the Court of Appeal did not find any evidence of *"bad faith"* in the Petitioners dealing with the Respondents, and specifically in the delay in deciding on the RCL application.

[57] In the end, this Court holds the view that whilst there may have been some "procrastination" by the Petitioners, in deciding to grant or refuse the issuance of a RCL to the Respondents, it did not amount to or constitute the offence of tort of misfeasance of office.

[58] This ground of appeal by the Petitioners succeeds.

Ground 2 - Was there Negligence and/or Breach of Public Duty?

[59] There is no dispute that the Respondent had filed his RCL application on 6 September, 2004. On 4 May, 2005, the solicitors for the 1st Respondent requested in writing, for a hearing date of his RCL. No response was received from the Petitioners.

[60] In the meantime on 21 October 2004 the 1st Petitioner notified the 1st Respondent to appear before the Board on 9 November 2004 and show cause why his RRL 12/23/34 and 12/23/55 should not be cancelled, varied or suspended under Regulation 12, because of the Respondent's breaches of his licences. After the 9 November 2004 meeting, which the Respondent attended with his Counsel, the Petitioners decided to suspend the 1st Respondent's licences for 6 months. As explained above, the Respondents successfully appealed to the Tribunal resulting in the lifting of the suspension.

[61] The application for the road contract licence (commonly referred to as *"charter"* service) is made in section 65 (3) (b) of the Act that states:

> *"(3) A person may apply to the Authority for a road permit in respect of –*
>
> *(a) …*
>
> *(b) A road contract licence authorizing the conduct of one or more road services for the transportation of passengers and goods on the basis of a contract either express or implied, between the holder of the licence and another person…"*

[62] It is important to note that the type of licence (*"charter")* or (RCL) applied for by the 1st Respondent is made under section 65 (3) (b) and different from those which the 1st Respondent possessed in 12/23/34 under section 65 (3) (a) (i) *"route service"* providing scheduled service around Labasa town boundary specified route, and 12/23/55, the *express service"* under section 65 (3) (a) (ii) that the 1st Respondent provided between Labasa and Savusavu and return.

[63] While there is no clear explanation given by the Petitioners, as the reason they had not dealt with or decided on the 1st Respondent's RCL application made on 6 September, 2004, their witnesses' evidence as well as the Petitioners' submissions all point to firstly, the unresolved issues relating to the other licences 12/23/34 and 12/23/55 and secondly, the *"numerous proceedings filed"* by the Respondents, that prevented the Petitioners from dealing with the RCL application. As counsel for the Respondents argued the complaints against them for breaches of the RSL *"did not relieve the 1st and 3rd to 6th Petitioners of*

their obligation to hear and determine the 1st and 2nd Respondents application for a Road Contract Licence."

[64] With respect, I do not concede to the Counsel for the Petitioners' argument that the delay in the Petitioners deciding on the 1st Respondent's 2004 RCL was rightly based on the issues of breaches of the RSLs, nor on the court proceedings filed by the Respondents in respect of the RSL issues. The relevant considerations that pertain to each are not the same. This Court fails to see how the decision on the award of RCL should await the resolutions of the issues in the RSLs. The former operates under a contract licence, whilst the latter are stage and express services licences respectively.

[65] In my considered opinion, there were no impediments to prevent the petitioners from deciding to grant or deny the 1st Respondent RCL application.

[66] The only question is whether the delay was such that it amounted to negligence or breach of public duty.

[67] In the Court of Appeal, Guneratne AP (as he then was) raised the concern at paragraph 29 thus:

> *"…what is the explanation the 1st and 3rd to 6th Respondents offered as to why they had procrastinated from as way back as September 2004 in not making a final decision whether to grant or not the RCL which the Appellants sought which as learned Counsel for the Appellants argued still remain undetermined".*

[68] The expectations and the standard of conduct required of statutory bodies are explained in His Lordship's judgment at paragraphs 33 to 35 as follows:

`

> *"[33] The actions of the 1st and 3rd to 6th Respondents being, in pursuance of the exercise of statutory power discretion no doubt being implied, if there had been a failure to exercise such discretionary power, if sufficiently negligent, may involve a breach of a duty of care and consequent liability (Vide Wade & Forsythe, supra at page 657)*
>
> *[34] Indeed 1st and 3rd to 6th Respondents as the test of reasonableness demands ought to have foreseen that the delay in failing to make a*

determination on the application of a RCL could very well have led to the cancellation of the Appellants' contract with the 2nd Respondent.

[35] The said Respondents being holders of statutory power indeed involving regulatory powers, such powers needed to be exercised fairly, reasonably and in conformity with the principles of natural justice."

[69] While a mere failure to exercise a discretionary statutory power may not be actionable per se, the non-performance of public duty might be. These contrasts are no longer discernable: **East Suffolk Rivers Board v Kent** [1941] AC 74. *"Failure to exercise a discretionary power, if sufficiently negligent, may involve breach of duty of care and consequent liability."* (HWR. Wade Administrative Law – 6th Edition page 768)

[70] In **Anns v Merton London Borough Council** [1978] AC 728, the House of Lords per Lord Wilberforce rejected the distinction between statutory duty and statutory power and that (at page 760)

> *"…the defendant council would not be guilty of a breach of duty in not carrying out inspection of the foundations of the block unless it was shown (a) not properly to have exercised its discretion as to the making of inspections and (b) to have failed to exercise reasonable care in its acts or omissions to secure that the bylaws applicable to the foundations of the block were complied with…"*

[71] On the facts of this case, given that it has been almost 20 years ago when 1st Respondent had filed his application for his RCL and duly paid the necessary application fees, and there has been no decision to date taken by the Petitioners to approve or reject the application, and that there being no justifiable reason why the Petitioners had not yet made a decision, this court agrees with the Court of Appeal in finding that the Petitioners *"had failed to act fairly and in conformity with the tenents of natural justice timely."* There was a legitimate expectation by the 1st Respondent, that his application would have been dealt with in a reasonable manner.

[72] Having taken all the facts and the circumstances, this court finds, in agreement with the Court of Appeal, that the Petitioners, in not deciding on the Respondent's RCL application in a timely manner, had acted negligently and in breach of their public duty of care.

[73] The appeal on this ground by the Petitioners, is without merit.

Ground 3 - Immunity Under section 21

[74] The Petitioners relied on the immunity provisions of section 21 as affording the Petitioners protection from legal proceedings. The section states:

> *"Protection against personal liability*
>
> *21. A person who is or has been:-*
> *(a) a Chairperson member or employee of the Authority;*
>
> *(b) a police officer assisting the Authority in accordance with section 20,*
>
> *shall not be personally liable for any civil proceedings or demand for any act done or contract entered into in good faith, by or on behalf of the authority."*

[75] In the Petitioners' view, the immunity provided under section 21 protects both the Board members as well as the Authority in carrying out their public functions in good faith without fear or threat of private civil actions and consequential damages. This legislative intention, the Counsel for the Petitioners submit, is underlined in section 6 of the Act, establishing the 1st Petitioner imbued with *"power to acquire hold and dispose of property both real and personal and generally do all such acts and things that are necessary for or incidental to the performance of its functions under this Act or any other written law"*

[76] However, this Court agrees with the view and the interpretation of section 21 offered by Counsel for the Respondents. The section 21 immunity provision only applies to the members of the Board, in that they cannot be held personally liable for any act done or contract entered into, by them on behalf of the 1st Petitioner. Section 6 (2) also clearly states:

> *"6 (2) The Authority shall be a body corporate with perpetual succession and a common seal and may enter into contracts and sue and be sued in its corporate name…."*

[77] The Authority in the end is still responsible and therefore liable for any wrongful or unlawful act, committed by the members of the Board.

[78] The Respondents' Counsel submits further that, notwithstanding the immunity provided under section 21, the members of the Board, as represented by 3rd to 6th Petitioners, would still be liable if they had not acted in good faith, as set out in section 21. Counsel referred to various authorities including **Tampion v Anderson** [1973] VR715; **E v. K** [1995] 2 NZLR 239; **Dunlop v Woollahra** (supra) and **Currie v Dempsey** [1967] 2 NSWLR 532 in support. In addition, Counsel for the Respondents suggests that the onus of proving that immunity applied is on the person who relies on it and cited **Barrette & Ors v South Australia & Anor** (1994) 63 SASR 208 in support. In this instance, the Respondents argue that the Petitioners did not present any evidence to show that they had, in dealing with the Respondents licence application, not acted in good faith.

[79] With respect, I disagree with the Counsel's submission as supported by the decisions cited, that the onus of proof is on the Petitioners to show that they are entitled to the protection of Section 21. In my view, the wordings of section 21 are explicit enough to presuppose that any acts performed on behalf of the 1st Petitioner, by the 3rd to 6th Petitioners, were in good faith. It is for the Respondents therefore to prove that the Petitioners did not act *"in good faith."*

[80] In any event, the submission on this issue by the Respondents is bound to fail given the Court's conclusion on Grounds (a) and (b) above.

Ground 4 – Public Law and Judicial Review

[81] The gist of the Petitioners' argument in support of this ground, is, that the proceedings should have been by way of judicial review, given that the matter deals with a claim against a public authority for purported failure to carry out its statutory public duty.

[82] Counsel for the Respondents in response submitted that the issue had been heard and determined when on 21 June 2007, the Master had struck out the judicial review

application made by the Respondents on 25 January, 2007. There is sufficient reason, even although there was no written Ruling by the Master, to believe that his refusal to grant leave was based on the ground that the public authority to whit, the 1st Petitioner, had made no *"decision"* capable of being reviewed. It follows from the presumption that since the usual remedy sought in a judicial review is an order for certiorari, then there must be a *"decision"* or *"determination"* that is made by the public authority, capable of being quashed.

[83] The requirement of a *"decision"* it must be noted, is not absolute as there maybe instances where the relief sought is only a declaration.

[84] In this case, the application for the RCL was made in September, 2004 and the Petitioners had the application on its agenda of meetings several times, only to be deferred to later. There was expectation of a decision to make soon enough hence the application for judicial review being struck out. It would be a different consideration, for example, if the judicial review application were to be made now but for a declaration or order for mandamus for non-decision on the RCL application, after such a long delay. The case of **Solomone Sila Kotobalavu v The Secretary Public Service Commission** JR No. 31 of 2001 is authority on this proposition.

[85] In the circumstance, this court finds this ground of appeal is without merit.

Ground 5 – Quantum of Damages if any

[86] The Court having allowed the Petitioners appeal against the Court of Appeal's finding of misfeasance in public office, but agrees with the finding of negligence and or in breach of public duty, concedes that given that negligence of the Petitioners in their failure to make a decision in the exercise of their discretionary powers, within a reasonable or a timely manner, the non-action, amounts to actionable negligence. In such circumstances, damages, or economic loss must be proven.

The "Illegal" Contract

[87] Through two exchanges of letters between the 1st respondent and the Cousteau Resort Director (the original 2nd Defendant), dated 21 February 2005 and 30 October 2005 respectively, the parties had entered into a contract for the provision of charter bus services for the transportation of the resort's guests and workers from and to terminal points.

[88] The trial court at paragraph [91] of its judgment observed that:

> *"It is not in dispute that the plaintiffs were providing charter bus service to the 2nd defendant without having a RCL."*

[89] In its conclusion, the court said that:

> *"The contract between the 2nd Defendant and Plaintiffs was an illegal contract as the plaintiff did not have road contract licence to provide such service."*

[90] It therefore found the contract void as it was contrary to public policy.

[91] The Court of Appeal, referring to the finding of the trial court inquired at paragraphs [13] and [14]:

> *"[13] How could the 2nd Respondent have proceeded with a contract which the Appellants had no legal basis to have proceeded with?*
>
> *[14] If so, could the 2nd Respondent have been faulted for entering into a contract with a third party (Vishnu Holdings Limited)?"*

[92] As the Court of Appeal correctly surmised, the absence of the RCL frustrated the contract and in the end the 2nd defendant entered into an agreement with another bus service provider for carriage of its guests and workers.

[93] Counsel for the Petitioners submitted before this court that:

> *"8. The reasons for the trial judge in declaring the contract between the Respondents and the Second Petitioner void ab initio was due to the fact that the parties had entered into the contract in 2004 on the basis that*

the Respondents would provide bus charter services to the Second Petitioner when they did not hold a licence to that effect. The law requires bus operators who intend to supply such services to hold a licence."

[94] However, contrary to the finding of the High Court and the submission by Counsel for the Petitioners, it is the considered opinion of this court that the Contract between the 1st Respondent and the Resort (2nd defendant) was valid per se. It was a contract that was understood to be conditional on a valid RCL possessed by the 1st Respondent as the service provider. The law clearly recognizes the pre-existence of an agreement to provide charter service (RCL) under section 65 (3) (b) when it states:

> *"(3) A person may apply to the Authority for a road permit in respect of-*
> *(a) …*
>
> *(b) a road contract licence authorizing the conduct of one or more road services for the transportation of passengers and goods <u>on the basis of a contract either express or implied,</u> between the holder of the licence and another person…"* (emphasis is mine)

[95] In this instance, the application by the 1st Respondent for a RCL for the carriage of guests and workers to and from the Cousteau Resort, need not have been accompanied by a written agreement. The fact that the 1st Respondent had produced such a document should not have prejudiced the application. The carriage of guests and workers in the absence of a valid RCL is a different matter altogether that I suggest, falls properly within the prosecutorial discretion of the 1st Petitioner's powers under section 65 (4) of the Act.

[96] This Court agrees with the Court of Appeal that while the contract between the Respondents and the 2nd Defendant was valid, it was frustrated by the absence of a RCL. The 2nd Respondent therefore had no alternative but to terminate the agreement.

[97] There remains the issue, given the court's finding above that there was actionable negligence against the Petitioners in their failure to perform their public duty, whether the Respondents claim in damages can be proven.

[98] It is not in dispute that as evidenced by the agreement between the 1st Respondent and the Cousteau resort, that the purpose for the RCL being applied for, was for the carriage of passengers to and from the Resort. There is undisputed evidence that the Respondents had begun providing the charter services, albeit illegally, for the Resort in the 2004-2005 period until it was terminated by the Resort. The termination of the contract as between the contracting parties was not for the reason that it was illegal, but because of the frustration of its purpose and its intention.

[99] There is no doubt in the Court's view, that the failure of the Petitioners, in deciding in a reasonable and timely manner, the Respondent's RCL application, had resulted in economic loss to the Respondents. While it would be just an estimation by this court of the quantum or the exact amount of the loss resultant from the negligence of the Petitioners, it would not, I suggest, be in the interest of justice to refer the issue of damages back to the High Court to deliberate over. The matter has been ongoing on for almost 20 years.

[100] It therefore cannot be denied that the failure of the 1st Respondent to acquire a RCL in reasonable time resulted in loss of business opportunities, including the charter services that he promised to provide in an agreement with the Cousteau Resort. The measure of the possible loss of business by the 1st Respondent maybe approximated by the charter services which he initially provided to the Resort, albeit illegally. Nevertheless, it is a useful frame of reference to use in assessing the quantum of damages to the 1st Respondent. The 1st Respondent had, in his evidence stated that his takings from the charter service beginning from middle of 2004, was between $3,530.00 and $5,000.00 per month and he claimed the period of 4 years 9 months to the expiry of the five years period of this agreement with the resort, with a total sum of $285,000.00.

[101] This must be made subject to the fact, firstly, that even although there was an informal understanding that the arrangement for charter service was for at least five (5) years, it remained an open-ended agreement on a month by month basis, until the Resort terminated the agreement.

[102] Furthermore, the 30th October, 2005 letter confirming the February 21st 2005 agreement between the parties specifically stated that it was *"subject to the standard and pricing for those services continuing to be competitive."*

[103] It is clear from the evidence of the Resort Manager, that he started receiving complaints from both the resort guests and staff within 6 months of the service starting. He said that, *"The buses had mechanical issues, long time to repair and "I informed the plaintiff to provide new buses, he agreed but never done"* [p.36 of the High Court record].

[104] Finally, the Cousteau resort by a letter of 5 January 2006 terminated the service agreement and the Resort Manager in his letter of 7 January 2006 explained that reasons as follows:

> *"1. The continued problems you appear to be having satisfying the LTA licence requirements. I note your comment regarding the real need for such a licence but the matter could become significant in the event a guest was injured in one of your vehicles and sought redress from the Resort.*
>
> *2. Mechanical problems that sometimes appear to take a while to resolve.*
>
> *3. Our new owners' commitment to review all our supplier arrangements for maximum value and quality.*
>
> *4. Our desire to use an Operator based in Savusavu with new vehicles."*

[105] It would seem from the content and tenor of the letter that the Resort was terminating the agreement not only because of the 1st Respondent's failure to obtain a RCL, but also of the age of the buses that were being used for the service, and their attendant mechanical problems. The Resort had also identified a new operator *"with new vehicles"* to provide the services, in the place of the Respondents.

[106] It is, in the court's view, most unlikely therefore that the informal understanding between the 1st Respondent and the Resort would have run its five (5) year course as intended. Any assessment of damages has to take this factor also into consideration.

[107] In the final, this Court having found the Petitioners were negligent and in breach of their statutory and public duty, and that there is proof to the satisfaction of this court that the Respondents had suffered some loss, and also given that this matter has been ongoing for almost twenty (20) years, and it is in the best interest of justice for all the parties, that this proceedings be brought to a closure, this Court, having taken the Respondents' submission on the quantum of loss, and other relevant factors into consideration, awards the Respondents the sum of $72,000.00 as the appropriate amount in damages.

[108] ***Orders:***

1. *Application for leave is granted.*
2. *Appeal is partially allowed in respect of grounds (a), (b) and (d).*
3. *Appeal is otherwise dismissed on grounds (c), (e), (f) and (g).*
4. *The Judgment of the Court of Appeal is affirmed in respect of grounds (c), (e), (f) and (g).*
5. *Damages in the sum of $72,000.00 against the 1st Petitioner is awarded to the Respondents.*
6. *Costs of $5,000.00 to be paid by the 1st Petitioner to the Respondents on this appeal.*
7. *Damages and costs awarded in all proceedings to be paid within 31 days.*

.....
The Honourable Mr. Justice William Calanchini
Judge of the Supreme Court

SUPREME COURT FIJI

.....
The Honourable Madam Justice Lowell Goddard
Judge of the Supreme Court

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The Honourable Mr. Justice Filimone Jitoko
Judge of the Supreme Court