Appeal

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 8 of 1984

Between:

THE ATTORNEY-GENERAL — Appellant

and

LAUTOKA CITY COUNCIL — Respondent

Dr. A. Singh,N. Nand for the Appellant
A. Patel for the Respondent

Date of Hearing: 15th November, 1984
Delivery of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

O'Regan, J.A.

This case is now one of narrow compass and its destiny turns on the construction of an order made by the Honourable J.B. Naisara Esquire, Minister Responsible for Lands, Local Government and Housing in purported exercise of the powers conferred upon him by section 124 of the Local Government Act (Cap. 125). We hasten to add that we have used the phrase, "purported exercise", because the respondent has contended before us that in making the order the Minister exceeded his statutory powers and thus one of the matters for our determination is whether or not he has done so.

On 5th August, 1983 there were promulgated by notice in the Fiji Royal Gazette, the Lautoka (Market) Amendment By-Laws, 1983 by which, inter alia, the former schedule of charges for the use of stalls and for other facilities was revoked and replaced.

These by-laws were made by the Council pursuant to subsection (1) of section 122 of the Local Government Act and were approved by the Minister of Lands, Local Government and Housing, pursuant to subsection (2) of that section. Subsection (2) provides :

> "(2) All by-laws made by a municipality under the provisions of this Act, or under the provisions of any other written law by virtue of which the Council is authorised to act shall be of no effect until such by-laws have been approved by the Minister."

The promulgation of the amended by-laws provoked opposition from the Lautoka Market Vendors which culminated in their refusal to use the markets as from 22nd August, 1983. The controversy which arose occasioned discussions between the Minister, the respondent Council and Lautoka Market Vendors Association but with the matter unresolved on 5th September, 1983, the Minister on that date, made an order in the following terms :

> " TO THE COUNCIL OF THE CITY OF LAUTOKA
>
> Whereas it has been brought to my notice that a serious disagreement exists between the Council and the Market Vendors arising out of the new scale of fees issued by the Council under the Lautoka (Market) (Amendment) By laws, 1983, being Legal Notice No. 68/83 published in the Fiji Royal Gazette dated 5th August, 1983;
>
> And whereas I am satisfied that efforts to resolve this disagreement have been unsuccessful:
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> I, therefore, hereby ORDER, in exercise of the powers vested in me under section 124 of the

Local Government Act, Cap. 125, that the Schedule to the Lautoka (Market) By-laws be revoked forthwith and replaced by the Schedule of Fees which applied immediately prior to the coming into force of the said By-laws.

DATED this 5th day of September, 1983

sgd. J. B. NAISARA
Minister Responsible for Lands,
Local Government and Housing. "

Section 124 of the Local Government Act provides :

" The Minister may, by order served upon a Council, require such Council to make such by-laws as are specified in the order and to amend or revoke any such by-laws. "

On 9th September, 1983 the respondent initiated proceedings for judicial review of the Minister's order. These proceedings were heard by Sadal J. on 30th September 1983. At the conclusion of the argument the Judge set aside the Minister's order and said that he would give reasons for decision in writing at a later date. And they were delivered on 25th October, 1983.

In his reasons for judgment the Judge had this to say :

" Before considering whether the Minister had the power to make the Order dated 5th September, 1983 it is important to look at what the Order says. It is clear from this Order that the Minister had revoked the schedule to the Lautoka (Market) (Amendment) By-laws 1983 and had replaced it by the schedule of fees which applied immediately prior to the coming into force of the new by-laws. If there was any doubt as what this Order meant it was clarified by the letter (referred above) sent to the Council the very next day (6th September, 1983) by the Ministry of Lands, Local Government and Housing. This letter very clearly says that the Minister by the Order of 5th September, 1983

had revoked the schedule to the Lautoka (Market) (Amendment) By-laws, 1983 and replaced it by the 'schedule of fees which applied immediately prior to the coming into force of Legal Notice No.68/83'. The learned counsel for the defence, Mr. Singh, argued that the Minister by Order of 5th September, 1983 did not revoke any such by-laws but ordered the Council to do certain acts. This is not what the Minister did. Mr. Singh's further submission that the letter from the Ministry dated 6th September, 1983 be disregarded could not be accepted. This letter, as stated in it, was written on instructions given by the Minister. The Chief Assistant Secretary in the Ministry of Lands, Local Government and Housing who had signed that letter stated in his affidavit that he had discussions with the Minister before that letter was written. That letter was produced in Court not by the Council but by the Ministry itself. The Chief Assistant Secretary was doing what he was empowered to do under section 82 of the Constitution of Fiji (referred above). "

The text of the letter to which reference is made in that passage is :

"Dear Sir

LAUTOKA (MARKET) (AMENDMENT) (BY-LAWS)

I refer to the Order dated the 5th September 1983 issued by the Minister Responsible for Lands, Local Government and Housing, revoking the schedule to the Lautoka (Market) (By-laws) and replacing it by the schedule of fees which applied immediately prior to the coming into force of Legal Notice Number 68/83.

I am directed by the Minister to advise that this matter will be reviewed in two or three months time.

Yours faithfully

(sgd.)
G.R. Sharan
for Acting Permanent Secretary for
Lands, Local Government and Housing"

In our view, the passage from the judgment which we have set out contains a series of manifest factual errors

and an error of law.

Dealing first with errors of fact, there is no warrant for the statement that the letter of 6th September, 1983 "as stated in it, was written on the instructions given by the Minister". To so state is to imply that the Minister personally subscribed to and initiated the statements contained in the first paragraph. The only part of the letter of which it could be said "as stated in it" was written on the Minister's instructions was the final sentence. And there was no warrant for the statement that the Chief Assistant Secretary who signed the letter had stated in his affidavit that he had discussions with the Minister before the letter was written. The Chief Assistant Secretary did not so depose unless, perchance, the Judge is referring to paragraph 15 of the affidavit in which he deposed that :

> "Following the receipt of the copy petition dated 22nd August, 1983 a number of discussions took place between the Minister for Lands, Local Government and Housing and myself in which I expressed the view that the increase in market fees was untimely in view of the damage caused by Cyclone Oscar and the subsequent drought which had caused economic hardship in the Western Division. "

If that passage is the genesis of the observation then it is misleading to allude to it in a context which is clearly identifying discussions between Minister and Secretary with the first paragraph of the latter's letter. And to attach, as he apparently did, any significance to the fact that the letter was produced to the Court by the Ministry and not by the Council, was of no moment. No question of estoppel or the application of the contra proferentem principle could possibly arise in a case where the construction of a ministerial order was the matter for consideration.

And we think that the learned Judge erred in his construction of the Order. We interpolate here that when construing section 124, he referred to, and applied the primary rule for construction of statutes - that if there is nothing to modify or qualify the language which the statute contains it must be construed in the ordinary and natural meaning of the words and the sentences in which they appear - see per Jessel M.R. in Attorney-General v. Mutual Tontine Westminister Chambers Association Ltd. (1876) 1 Ex. D 469.

Indeed he himself cited the wellknown dictum of Tindall C.J. in The Sussex Peerage Claim (1844) 11 Cl and F 85, 143 which was repeated in the judgment of Griffith C.J. in the case of Perth Local Board of Health v. Maley (1904) 1 C.L.R. 702, 710 to which he referred :

> " If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. "

The same rule applies to ministerial orders - indeed to all written instruments of a public character - see River Wear Commissioners v. Adamson (1877) 2 App. Cas. 743, 763.

Before applying that rule to the Minister's order, we note features of it to which we think special attention must be directed. First, the document is addressed to "The Council of the City of Lautoka"; secondly, it is expressly stated in the body of the document that it is made in exercise of the powers conferred by section 124 of the Local Government Act (Cap. 125); thirdly, the use of the word "be" in the operative part of the Order, particularly considered along with the first and second features to which we have just referred.

Expanding the document to incorporate these features we have the Minister, under his hand, addressing

himself to the respondent Council stating that what he in process of doing is being done pursuant to a statutory power to which he makes specific reference, whereby he may, by order, require a Council, inter alia, to make specified by-laws and to revoke specified by-laws, and next issues the Order (I hereby order .....) that the schedule to a specified by-law of the respondent Council be revoked and another specified by-law be made to replace it.

Construing the document in that simple way we think it is clear that the Minister by order addressed to the Council - preparatory to its being served upon it - required it to make and revoke specified by-laws.

The learned Judge allowed that if the interpretation which has found favour with us were correct there would be "no room for doubt as to the validity of the Minister's order".

We uphold the contention of the appellant that the Judge erred in law in his construction of the order. We hold it valid, with the consequence that if the matter has not been otherwise resolved, the respondent must comply with the requirement embodied in it and thereafter put in train the steps consequential to its resolution prescribed by the Local Government Act.

The second ground of appeal was that the Judge erred in law in calling in aid the letter dated 6th September, 1983 as an interpretational guide when construing the Order. Strictly speaking, it has become unnecessary for us to rule on this ground. We have already made observations concerning the letter which, if it were a permissible aid to construction, greatly diminished its efficacy. And we are of the view that the letter did no more than express the writer's view either as to the effect of the order or as to the ultimate result when the action required of the respondent and the consequential

steps required by statute had been carried into effect.

The view of a public servant, however senior and however closely identified with the matter in hand or with the Minister executing the statutory power, as to the meaning of a ministerial order made pursuant to statutory power, is not an aid to its construction. And even if such public servant in a letter stated what he understood or believed to be the view of the Minister, such would, in addition to offending the rules of construction, offend the rule proscribing the admission of hearsay evidence. These matters have but to be stated to throw into bold relief that the approach taken by the Judge was untenable.

The appeal is allowed.

However, we cannot forbear from the comment that if the draftsman of the order had resorted to the elementary rule of following the words of the statute and used the word "required" instead of "order" this controversy and the attendant litigation may well never have arisen.

The orders made in the Court below are vacated. There will be no order as to costs with the result that the parties pay their own costs here and below.

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Vice President

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Judge of Appeal

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Judge of Appeal