

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO.ABU 36 of 2021
High Court Civil Action No.31 of 2020

BETWEEN : **ZAKREEN HOLDINGS PTE LIMITED**
Appellant

AND : **ISLAND BUSES LIMITED**
1st Respondent

AND : **LAND TRANSPORT AUTHORITY**
2nd Respondent

AND : **TACIRUA TRANSPORT LIMITED**
DEE CEE'S BUS SERVICES PTE LIMITED
TEBARA TRANSPORT PTE LIMITED
Interested Parties

Coram : Dayaratne, JA
Qetaki, JA
Morgan, JA

Counsel : Mr N. Lajendra for the Appellant
Mr F. Haniff for the 1st Respondent
Ms L. Tikoinayau for the 2nd Respondent
Mr V. Kapadia for the Interested Parties

Date of Hearing : 14 July, 2023

Date of Judgment : 28 July, 2023

JUDGMENT

Dayaratne, JA

[1] This appeal is against the judgment of the High Court of Suva dated 15 March 2021.

Facts in brief

[2] The Appellant had been granted licences by the Board of the Land Transport Authority (LTA) to operate its buses on certain routes.

[3] The First Respondent as well as the second and third named Interested Parties had lodged appeals with the Land Transport Appeals Tribunal (Tribunal) against the said decision of the LTA Board.

[4] The Appellant had filed an application through its solicitors to strike out the said appeal filed by the First Respondent on the basis that the Notice of Appeal had been filed out of time.

[5] The Tribunal by its Ruling dated 14 December 2020 (erroneously referred to by the High Court as 22 July 2020 in its judgment), upheld the said objection and allowed the application of the Appellant to strike out the First Respondent's Appeal.

[6] The First Respondent appealed against that Ruling to the High Court and the High Court allowed the appeal and quashed the Ruling of the Tribunal.

[7] This Appeal is against the said Judgment of the High Court.

The Grounds of Appeal

[8] The Grounds of Appeal before this court are as follows;

(a) That the learned High Court Judge erred in law in holding that the 1st Respondent complied with section 45(1) of the Land Transport Act by emailing the Notice of Appeal to the Secretary of the Land Transport Appeals Tribunal.

(b) That the learned High Court Judge erred in law in not holding that the mandatory requirements provided under section 45(1) of the

Land Transport Act was not complied with in time to constitute a valid appeal.

- (c) *That the learned High Court Judge erred in law in failing to apply the principles set out in Tom Rickets v. Inoke Devo, Semesa Karavaki and Iviisaele Weleilakesa, Miscellaneous Action No. 0029 of 2006; and*
- (d) *That the learned High Court Judge erred in law in failing to consider that Dee Cee's Bus Service Pte Limited (another affected party from the same decision of the LTA Board and 2nd Interested Party within this appeal) was able to file its appeal with the Land Transport Appeals Tribunal on 22 June 2018'.*

[9] Considering the nature of the grounds of appeal and the ultimate decision this court is expected to arrive at, I will consider all grounds of appeal together.

[10] The outcome of this Appeal revolves around the interpretation of Section 45 of the LTA.

[11] Section 45 (1) of the LTA is as follows;

'An appeal under this section shall be commenced by Notice of Appeal, in writing, which shall state specifically and concisely the grounds of Appeal, and shall be lodged with or forwarded to, the Secretary to the Tribunal not later than 14 days after the date of the decision in respect of which the Appeal is brought or within such other period as may be provided in the regulations'.

[12] It is admitted between the parties that the Decision sought to be appealed was communicated to the parties on 8 June 2018 and hence the 14 day period within which the Notice of Appeal had to be filed ended on 22 June 2018.

[13] The Notice of Appeal of the First Respondent had been filed physically at the Tribunal on 25 June 2018 and therefore was late by three days.

Explanation offered by the First Respondent

[14] The First Respondent has explained that the delay was for no fault of theirs and takes up the position that its solicitors were not able to file the said Notice of Appeal on 21 June 2018 although an attempt was made to do so and the reason given is the non-availability of the Secretary of the Tribunal at his office.

- [15] The First Respondent has explained by way of an affidavit of a personal assistant of its solicitors that it was not possible to file the Notice of Appeal at the Tribunal since the Tribunal's Registry was closed on 21 June 2018 (this was a Thursday). She had then telephoned the Secretary of the Tribunal who had informed her that he was travelling to Lautoka and that he will be back in office only on 25 June 2018 (the following Monday).
- [16] She had then sent him an email the same afternoon wherein she referred to the telephone conversation had with him and had attached the Notice of Appeal that was sought to be filed that day. A print out of a screenshot of her sent items mailbox has been attached to her affidavit in support of her position. The same afternoon the solicitor of the First Respondent had informed the First Respondent that the Notice of Appeal had been sent by email to the Secretary of the Tribunal.
- [17] On 25 June 2018, the Secretary of the Tribunal had responded to her email and informed her that he is available in his office that week. Accordingly, steps had been taken to physically file the Notice of Appeal with the Secretary of the Tribunal on 25 June 2018. The relevant application fee too had been paid on that day.

The Judgment of the High Court

- [18] A perusal of the Judgment of the learned High Court Judge reveals that he has taken into consideration the provisions contained in the Electronic Transactions Act 2008 (ETA) in interpreting the provisions contained in Section 45 (1) of the LTA. He has observed that the Electronic Transactions (Amendment) Act 2017 enables legal recognition of electronic mail in legal proceedings and concluded that the transmission of a Notice of Appeal by email has to be construed as having 'forwarded it to the Secretary of the Tribunal' in terms of Section 45 (1) of the LTA. On that basis he has allowed the appeal of the First Respondent.
- [19] At the hearing before this court, counsel for all parties submitted that they did not rely on the provisions of the ETA and that there was no reference at all during the High Court proceedings to the ETA. They also submitted that although the learned High Court Judge has referred in his judgment to his having inquired from counsel about the applicability of the ETA, such a discussion never took place.

- [20] In addition, all counsel took up the position that there are no processes in place for the transmission of documents and payment of fees through electronic means and that filing of documents and payment of fees take place manually even to date. They pointed out that Regulations and Rules have not been made as yet in terms of the ETA regarding the manner in which such steps ought to be taken. This position is also adverted to by the Tribunal in its Ruling (at page 79 of the Supplementary Copy Record)
- [21] Having examined the relevant provisions contained in the ETA and Section 45 (1) of the LTA, I find that the interpretation of the learned High Court Judge that the Notice of Appeal could have been validly 'forwarded' by means of an email is not incorrect.
- [22] However, there arises another issue.
- [23] Section 45 (2) of the LTA reads as follows;
- 'At the time of lodging or forwarding of the Notice of Appeal, the Appellant shall cause to be deposited with the Secretary to the Tribunal, the application fee for this purpose and such fee shall be forfeited in the event the Appeal is dismissed'.*
- [24] Although the act of forwarding the Notice of Appeal may have been fulfilled electronically as held by the learned High Court Judge, the concomitant requirement of the payment of the 'application fee' has not been fulfilled. In any event there were no processes in place for the payment of such fees electronically.
- [25] Learned counsel for the First Respondent contended that it was not necessary for the Tribunal and the High Court to have considered whether the requirement contained in section 45(2) had been fulfilled since the Appellant had not taken up such position in its request to strike out the Notice of Appeal at the Tribunal. I do not consider that to be a correct interpretation of Section 45 of the LTA.
- [26] Section 45 (1) of the LTA cannot be considered in isolation and necessarily has to be read in conjunction with 45(2). Strict compliance was needed and it was thus mandatory that all requirements as spelt out in sections 45(1) and (2) are satisfied if the Notice of Appeal was to be considered as having been validly '*lodged with or forwarded to, the Secretary to the*

Tribunal. The application fee should have been paid to the Secretary at the time of lodging or forwarding the Notice of Appeal to him.

[27] Admittedly this was not done. In the case of **Tom Ricketts v Inoke Devo, Semesa Karavaki and Ivisaele Weleilakesa Inoke Devo, Semesa Karavaki and Ivisaele Weleilakesa, Miscellaneous Action No. 0029 of 2006** cited by the Appellant, the High Court of Suva had expressed a similar view with regard to strict compliance of provisions contained in the Electoral Act 1998. This in any way is trite law and needs no further discussion.

[28] Therefore, even if the provisions of the ETA were to be relied upon, the First Respondent had failed to file a valid Notice of Appeal. The learned High Court Judge therefore fell into error in his conclusions.

[29] Before I move on, I wish to express the view that the correct approach of the High Court should have been to determine this issue by recourse to the provisions contained in the LTA and not to have applied the provisions contained in the ETA. The ETA no doubt was legislation legally in force at the time, but practically it was not capable of being given effect to.

Were the circumstances as explained by the First Respondent acceptable?

[30] The above conclusion of mine does not bring an end to this matter. This court has to consider as to whether there were any valid reasons adduced by the First Respondent to explain as to why it could not file the said Notice of Appeal within the mandatory time period.

[31] Since the High Court has not delved into this aspect, it becomes necessary for this court to look at that aspect in the determination of this appeal.

[32] As referred to earlier, the First Respondent has, at the Tribunal, explained by way of an affidavit, circumstances surrounding the filing of the said Notice of Appeal. That position has not been controverted before the Tribunal. Although an affidavit has been filed on behalf of the LTA, there is neither a denial nor a confirmation of the matters adverted to in the affidavit filed on behalf of the First Respondent. Only an objection has been taken with regard to the validity of that affidavit.

- [33] The Tribunal too has failed to look at that aspect in its Ruling. A perusal of the Ruling (at page 79 of the Supplementary copy record) reveals that the Tribunal has observed that the date of filing should be the date on which it was physically filed and date stamped. It goes on to observe that if a party were to take up the position that it was filed on some other day, the onus was on such party to prove it. Although an explanation had in fact been offered by the First Respondent pertaining to its attempt to file the Notice of Appeal, the Tribunal has failed to probe into it and make a pronouncement.
- [34] The learned counsel who appeared for the Second Respondent LTA, admitted before this court that there are occasions when the office of the Tribunal is closed since the Tribunal along with the Secretary travels to other parts of the country to attend hearings.
- [35] Court inquired from her as to whether a party can be faulted for not filing any document if the office of the Tribunal is closed when an attempt is made to file a document. She admitted to a shortage of staff and facilities at the Tribunal and attributed that as being the reason why the office is not open on certain days.
- [36] Learned counsel for the First Respondent further pointed out that Section 45(1) of the LTA envisages the Notice of Appeal being '*lodged with or forwarded to the Secretary to the Tribunal*' (emphasis added). His position was that since the office of the Tribunal was closed and the First Respondent's solicitors had been informed by the Secretary of the Tribunal himself that he will not be available till the 25th of June, there was no other option available other than to wait till the 25th of June when the Secretary was next available to physically file the Notice of Appeal.
- [37] The response of learned counsel for the First Respondent to the Ground of Appeal that the Second Interested Party had managed to file its Notice of Appeal on the 22nd of June was that he is unaware as to how that happened. His position is that the First Respondent relied on the word of the Secretary of the Tribunal that he will only be available in office on the 25th of June.
- [38] As alluded to earlier, there has been no attempt made by the Secretary of the Tribunal or any other officer on behalf of the Tribunal to explain matters as to whether the office was open on the 21st or 22nd of June. This court is not expected to engage in a voyage of

discovery and if at all any attempt to place evidence to controvert the position taken up by the First Respondent or offer any other explanation should have been done at the Tribunal. That has not happened.

- [39] Although there had to be strict compliance with all requirements stipulated in Sections 45(1) and (2) of the LTA in filing the Notice of Appeal, the First Respondent has in my view adequately explained the reasons surrounding its inability to file the Notice of Appeal on time. The delay in any event is three days and that too because there was an intervening weekend.

Conclusion

- [40] Considering all matters as discussed by me above, I am of the view that the inability on the part of the First Respondent to file the Notice of Appeal on time was beyond its control and hence that should not deprive its right to have its appeal heard by the Tribunal.
- [41] The appeal of the Appellant should fail and the First Respondent's Notice of Appeal should be accepted by the Tribunal albeit not for the reasons relied upon by the learned High Court Judge but for reasons more fully discussed herein.
- [42] All grounds of appeal are answered in the affirmative but due to the reasons adduced by me that does not have an impact on the ultimate conclusion of this court.

Qetaki, JA

- [43] I have considered the judgment by my brother Dayaratne, JA in draft. I agree with the conclusions and the reasoning.

Morgan, JA

- [44] I concur with this judgment of Dayaratne, JA.

Orders of Court

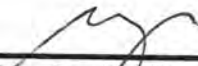
- (1) *Appeal dismissed.*
- (2) *The order of the High Court dated 15 March 2021 quashing the Ruling of the Land Transport Appeals Tribunal dated 14 December 2020 (erroneously referred to by the High Court as 22 July 2020 in its judgment) is upheld.*
- (3) *The Land Transport Appeals Tribunal is directed to consider the appeal filed by the First Respondent on its merits along with appeals filed by other interested parties.*
- (4) *No costs.*



Hon. Justice Viraj Dayaratne
JUSTICE OF APPEAL



Hon. Justice Alipate Qetaki
JUSTICE OF APPEAL



Hon. Justice Walton Morgan
JUSTICE OF APPEAL

Solicitors:

Lajendra Lawyers for the Appellant
Haniff Tuitoga Lawyers for 1st Respondent
LTA Legal for 2nd Respondent
Kapadia Lawyers for Interested Parties