

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 286 of 2019

BETWEEN : **FIJI TAXI ASSOCIATION**

PLAINTIFF

AND : **LAND TRANSPORT AUTHORITY**

DEFENDANT

Counsel : **Plaintiff: Mr. A. Chand**
Defendant: Mr. Stephan

Date of Hearing : **4.10.2019**

Date of Judgment : **31.10.2019**

JUDGEMENT

INTRODUCTION

1. Plaintiff is an association of taxi operators sought to restrain Defendant from conducting re-draw of taxi permit holders. Defendant was also granted an opportunity to make submission at the hearing of the said interim orders as the re draw was to be held on the day after originating summons was filed. This interim relief was not granted and the matter was fixed for hearing of the remaining orders. Defendant was also granted time to file affidavit in opposition within fourteen days, but neither affidavit in opposition nor any summons to seek extension of that time and or strike out was filed within that time period. After expiration for time to file affidavit in opposition, on 20.9.2019 summons for strike of action out was filed and the same was listed before Master on 3.10.2019 and on that day, without any directions as to the summons this was referred to me as hearing of the originating summons was fixed for 4.10.2019. Since Defendant had not filed affidavit in opposition within the time allocated and had not sought extension of time facts contained in the affidavit in support can be considered as undisputed. Since strike out

application of the Defendant was in terms of Order 18 rule 18 (1) (a) no affidavit can be considered for the determination of strike out. So hearing of originating summons was taken along with application to strike out in terms of Order 18 rule 18(1)(a) of High Court Rules of 1988. Defendant's reason for seeking strike out was that Plaintiff had failed to comply Order 7 rule 3 (1) of High Court Rules 1988. Both parties were granted time to file written submissions and submissions of the Defendant contained annexed documents. Written submission is not a method to circumvent failure to file affidavit in opposition and all annexed documents to written submission, except laws, regulations, other matters where judicial notice could be taken, including judgments were considered and the rest disregarded. Plaintiff had sought inter alia declarations and two of them are not ambiguous. Defendant's Chief Executive (CEO) in terms of *Land Transport (Public Service Vehicles) (Amendment) Regulation 2017 Regulation 5B* is required to act **reasonably** in the determination of quota for taxi permits for each transport zone. The duty to act reasonably in a matter of public importance invariably requires proper consultation with all stake holders, and there was no evidence of such consultation with stakeholders including Plaintiff. New taxi permit quota and 'open base' are both have impact on all stake holders. So such decisions needs consultation and also evaluation , as they have an impact on Plaintiff and other stake holders including other vehicle users and general public. Due regard needs to be made to its effect on traffic congestion, availability of parking spaces in lieu of taxi base and the suitability of such parking etc. Since this action is not judicial review only declarations can be granted no review or orders of Defendant can be granted and where an order sought had not specified sufficiently that was also not granted. Though Order 7 rule 3(1) was not complied that was not a fatal error to dismiss the entire action as there were undisputed facts supporting declaration regarding non consultation with stake holders.

FACTS AND ANALYSIS

2. Plaintiff is an association of taxi operators over 2000 members and they have written to Defendant several occasions regarding issuing of new taxi permits and implementation of them through 'open base' . This means that new taxi will not be assigned to a base.
3. Plaintiff had indicated instances there such taxi being parked on an existing base and not being removed when requested by taxi operators belonging to such a base.
4. There is no evidence of such issues being adequately consulted with stakeholders, either before or after implementation of 'open base' system.
5. In a letter address to Plaintiff's secretary annexed as '6' Defendant had informed that prior to issuing of new taxi permits 'through analysis of industry' was done.

6. No details of that analysis was given except to state that 'analysis' was based on population of the area and 'demand and supply' of taxi by area. Defendant stated that they will only be issuing new taxi permits based on an assessment based on needs.
7. Before analysis, consultation with stake holders are needed if not all the issues will not be ventilated sufficiently. A decision such as 'open base' cannot be decided only on statistics on population or demand and supply alone. It has wider impact on public as well as on industry.
8. Plaintiff had written another letter to Defendant on 30.7.2018 raising issue of new taxi permits issued and non availability of parking spaces for large number of taxi permits issued etc. There was no response to that letter.
9. Plaintiff also states that there was no monitoring of the new open base taxi permits hence these new operators are operating outside respective zones and also parking in other taxi operators' bases.
10. Plaintiff had also made submissions to 15th National Transport Consultative Forum, 2018 annexed as '9'.
11. There was no evidence that Regulation 5B of *Land Transport (Public Service Vehicles)(Amendment) Regulation 2017* was implemented with consultation of all stake holders before implementation of the same.
12. Plaintiff sought four declaratory orders and an order for review of a decision in its originating summons. They are as follows;
 - a. *A declaration that Defendant had failed to follow and exhaust process pursuant to Section 5 (5A-5G)(Land Transport (Public Service Vehicles)(Amendment) Regulation 2017 being the new Division 2 inserted in lieu to the new Taxi Permit Quota.*
 - b. *A declaration that Defendant is to carry out thorough consultation with all stakeholders especially with the Fiji Taxi Association and other Taxi operators to make proper determination for new Taxi Permit Quota and open base system.*
 - c. *A declaration that the Defendant faile in having consultation with the Fiji Taxi Association and the existing Taxi permit holders to get the views and feedback on the need to new Taxi Permit Quota and open base system in lieu to the current traffic congestion around Nadi and Latoka Zone.*
 - d. *Above declaration to be considered as preliminary issue before further issuance of the Taxi permit and open taxi base system.*

e. An order that all zone permits that has been issued by Defendant in Nadi and Latoka Zones be reviews with the presenc of the Fiji Tazi Association members and made publicly know on the procedures used to issue each and every permit.

13. Plaintiff sought an order to review decisions taken already and this type of order can only be made in judicial review, for which Plaintiff needs to first obtain leave of the court. So order 6 contained in the originating summons cannot be considered or granted in these proceedings.
14. By the same token order 5 contained in the originating summons though stated as a declarative order the effect of that order is again is scope of judicial review application hence that cannot be granted which gives directions of the court to Defendant.
15. Defendant in its preliminary objection raised the noncompliance of Order 7 rule 3(1) of High Court Rules 1988. In terms of said provision every originating summons must also contain a statement of questions on which the determination is sought. The purpose of this provision is to identify cause of action before court.
16. Defendant was given an opportunity to oppose interim relief and the counsel for the Defendant successfully did so at the hearing conducted prior to giving directions to file affidavit in opposition. Neither at that hearing , nor fourteen days given for them to file affidavit in opposition Defendant raised any issue as to non-compliance of Plaintiff with regard to Order 7 rule 3 (1)of High Court Rules.
17. Any party that desired to make such objection should also do so in terms of High Court Rules and this can only be taken at the earliest opportunity so that any technical objection can be dealt early and expeditiously. The procedure for such objection is contained in Order 2 rule 2 (1) and this needs to be made within reasonable time.
18. What should be included in such summons is also contained in Order 2 rule 2(2). This is to prevent any technical objections standing on the way to prevent merits being considered. This is also to prevent courts adopting path of least resistance to dispose a matter that has merits.
19. First there is no application made in terms of Order 2 rule 2(2) of High Court Rules of 1988 for determination of procedural irregularity of not filing a statement that is required in terms of Order 7 rule 3(1) of High Court Rules of 1988.
20. Even if summons filed for strike out in terms of Order 18 rule 18 of High Court Rules of 1988, on 20.9.2019 is considered as a summons in terms of Order 2 rule 2(2) of High Court Rules, 1988, it was not made within a **reasonable time** as time to file objections

had lapsed by 20.9. 2019. What is reasonable depend on the circumstances of the case and in this case where Defendant had already participated in oral hearing issues before the court were known early and procedural irregularity should have been brought to notice immediately. Another requirement was that summons should include specific irregularity. It had not included specific irregularity or ground of objection (i.e non compliance of Order 7 rule 3(1) of High Court Rules of 1988). So, the objection to strike out entire proceeding is refused.

21. The summons filed on 20.9.2019 was an afterthought of the Defendant for adjournment of the hearing rather than any genuine objection. If Defendant raised this objection sufficiently as required by Order 2 rule 2(2) of High Court Rules of 1988 it could have been cured by giving directions to file such a statement or dealt otherwise . In my judgment this irregularity is not a reason to strike out this entire proceedings though it affect to a vague order.
22. Court of Appeal in Reserve Bank of Fiji v Gallagher [2006] FJCA 37; ABU0030, ABU0031, ABU0032U.2005S (14 July 2006) though observed the non compliance of Order 7 rule 3(1) of High Court Rules , did not make a determination to strike out on that when there are merits.
23. Defendant submitted two High Court decisions where court had struck off originating summons for non compliance of Order 7 rule 3(1) and Plaintiff had also submitted one decision where court had not done so. In the circumstances through the word 'must' is used in Order 7 rule 3 (1) of High Court Rules of 1988 there is a discretion to court not to strike out the originating summons when the objection was not made within a reasonable time. Defendant had also failed to comply with Order 2 rule 2(2) in stating the said objection in its summons.
24. There are merits for determination and laches on the part of the party making such application for strike out. Defendant did not file affidavit in opposition within the time allocated. If they were prejudiced by non compliance they could have at least file the summons in terms of Order 2 rule 2 within immediately after they got notice of this action. Defendant not only successfully participated at interlocutory hearing but also raised number of legal issues and that prevented interim relief sought. If the claim was ambiguous or not comprehensible why they took time more than 22 days till the expiration of time granted for filing affidavit in opposition needs an explanation and there is none.
25. I was submitted two High court decision where originating summons was struck off for non compliance of order 7 rule 3 (1) of High Court Rules of 1988, but none had considered Order 2 rule 2(2) of the High Court Rules of 1988. I was also submitted

another decision of High Court where court had not done so. In my mind non compliance of Order 7 rule 3 (1) is not fatal when Defendant had participated in interlocutory hearing without such an objection.

26. Plaintiff as an association that has more than 2000 members were concerned about 'open base' taxi operations and had raised this issue with Defendant. Before 'open base' taxi permits were issue all taxi permits had a specific base and that they also paid a fee for that base. Large number of taxi permits were issued under 'open base' which is a novel method.
27. CEO of Defendant must act reasonably in the determination of 'transport zones' in Fiji and also 'quota' for said zones. Duty to act reasonably will invariably needs fairness to all stakeholders. There is a need for procedural fairness, in such instance. This procedural fairness emanate from legitimate expectation. Plaintiff as an association expect that their members will continue taxi operation in a competitive , but fair and level playing environment, without unnecessary conflicts with other stakeholders.
28. UK Supreme Court in *R (on the application of Moseley (in substitution of Stirling Deceased) Vs London Borough of Haringey* [2014] 1 WLR 3947] it was held, (29 October 2014)

'23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in R v Devon County Council, ex parte Baker [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.' (emphasis added)

29. Consultation of a matter of public importance needs participation of all stakeholders and four point consultative method is suggested in *R (on the application of Moseley (in substitution of Stirling Deceased) Vs London Borough of Haringey* (supra) Further held,

*'25. R v Brent London Borough Council, ex p Gunning, (1985) 84 LGR 168
Hodgson J quashed Brent's decision to close two schools on the ground that the*

manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:

*"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. **First**, that consultation must be at a time when proposals are still at a formative stage. **Second**, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. **Third**, that adequate time must be given for consideration and response and, finally, **fourth**, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."*

*Clearly **Hodgson J** accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the Baker case, cited above (see pp 91 and 87), and then in R v North and East Devon Health Authority, ex parte Coughlan [2001] OB 213 at para 108. In the Coughlan case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:*

*"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. **Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response**. The obligation, although it may be quite onerous, goes no further than this."*

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472, 126 BMLR 134, at para 9, "a prescription for fairness".(emphasis added)

30. Defendant is required to act reasonably and that requires giving adequate notice regarding zoning, new issue of permits and also 'open base' system before these are implemented with sufficient reasons to deviate from the existing method. Adequate time should also be granted to all stake holders including Plaintiff and their response needs to be considered.
31. What is 'fairness' in consultation will depend on the circumstances of the case. (See **R (Edwards) v. Environment Agency** [2006] EWCA Civ 877 at paragraph [90]). It will

also depend on how 'novel' is the determination and impact on that on general public. Depending on the type of determination even post implementation evaluation is needed to cater any unforeseen or unintended or unexpected consequences.

32. There is no evidence of such cautious method of consultation with all stake holders were held. Plaintiff had also complained about lack of any monitoring by Defendant, that had resulted violation of new taxi permit holders and even inappropriateness in the screening of applicants.
33. In *Foods Pacific Ltd v Comptroller of Customs* [1993] FJHC 14(decided on 17 February 1993) Fatiaki J(as his lordship then was) held

'Similarly the mere fact that 'judicial review' may be a more appropriate procedure insofar as the plaintiff's complaint is against a decision of a public officer exercising statutory powers, namely, the Comptroller of Customs acting under the Customs Act, does not persuade me that no other 'form of action' may be taken for the determination of the plaintiff's rights.'

34. The fact that judicial review is more appropriate should not deter Plaintiff obtaining declaratory relief. The relief which are no specific and vague and has the effect of judicial review are struck off. Remaining purely declaratory relief sought in order 3 and 4 can be granted. Power of the court to grant declaratory orders are discretionary in terms of Order 15 rule 16 of High Court Rules of 1988.¹ High Court can make a declaration under said 'rule not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the said rule²'. So , a declaratory relief can be granted without any consequential relief, and a point of law can be clarified in the process as in this matter.³

CONCLUSION

35. The Plaintiff sought a declaration that Defendant had failed to follow Regulation 5(5A-5G) (Land Transport (Public Service Vehicles) (Amendment) Regulation 2017. Regulation 5A is interpretation and 5 C is an obligation of an applicant for a taxi and Regulation 5 is exhaustive and without specific reference to a particular provision it is vague. This is more as Plaintiff had not filed the statement in terms of Order 7 rule 3(1) of High Court Rules of 1988. Though such noncompliance was not fatal to entire action this is a situation where its utility would have favored Plaintiff to clarify ambiguity. In my judgment order 2 is vague and not specific hence this should be struck off. At the

¹ 15/6/6 p 225 The Supreme Court Practice 1988.

² 15/16/1 Ibid

³ ibid

hearing counsel for Defendant said that there is no need to consult Plaintiff or other stakeholders in terms of Regulations. To some extent the same sentiment prevailed in Defendant's letter of 7.6.2018. Regulation 5B of Land Transport (Public Service Vehicles) (Amendment) Regulation 2017 allows CEO of Defendant to make reasonable quota for taxi permits to be issued for each transport zone. This is a matter that has wide public interest including and not limiting Plaintiff and also general public and proper consultation is needed for future implementation. The four point consultation method approved in *R (on the application of Moseley (in substitution of Stirling Deceased) Vs London Borough of Haringey* [2014] 1 WLR 3947] is desirable. It is a 'prescription for fairness' and cornerstone in reasonable decision that has a wide impact on general public. Following declarations are granted and all other reliefs sought is the originating summons are struck off. Considering the circumstances of the case no cost awarded.

FINAL ORDERS

- a. A declaration that Defendant needs to carry out consultation with all stakeholders including and not limiting to the Plaintiff, other taxi before making any future determination for new Taxi Permit Quota and open base system.
- b. A declaration that Defendant failed to consult Plaintiff and or other taxi permit holders for their views and feedback on the need of new Taxi Permit Quota and open base system in lieu to the current traffic congestion around Nadi and Lautoka Zone.
- c. Cost of this application to borne by each party.

Dated at Suva this 31st day of October, 2019.



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Justice Deepthi Amaratunga
High Court, Suva