

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 136 of 2022

BETWEEN: **FIJI TAXI ASSOCIATION** an association formed by Taxi Operators having its office in Lautoka.

PLAINTIFF

AND: **LAND TRANSPORT AUTHORITY** a statutory body established under the Land Transport Act 198 having its registered office at Lot 1 Daniva Road, Valelevu, Nasinu.

1ST DEFENDANT

FIJI ROADS AUTHORITY a statutory body established under the Fiji Roads Authority Act 2012 having its registered office at Suva.

2ND DEFENDANT

MINISTRY OF COMMERCE, TRADE, TOURISM AND TRANSPORT

3RD DEFENDANT

BEFORE: **Hon. Mr. Justice Vishwa Datt Sharma**

COUNSEL: **Mr Chand A.** for the Plaintiff
Mr Chand N. with Mr Chand V. for the 1st Defendant
Mr Deo S. for the 2nd Defendant
Ms Motofaga M. with Ms Faktaufon M. for the 3rd Defendant

Date of Ruling: **Friday, 01st July 2022 @ 9.30 am.**

DECISION

[Inter-parte Originating summons seeking Injunctive and Declaratory orders]

On the outset, the Plaintiff's Inter-Partes Originating Summons would be determined on the following-

- Mode of beginning proceedings in the High Court [Order 5 of the High Court Rules, 1988].
- Inter-Partes Originating Summons together with the affidavit in support.
- Section 15 of the State Proceedings Act 1951.
- Principals of Separation of Powers.
- Enacted Act No. 33 of 2021 and Act No. 22 of 2022 [To amend the Land Transport Act 1998].
- Open Taxi Rank System.

Introduction

[1] The Plaintiff, **Fiji Taxi Association** filed this Inter-partes Originating Summons and sought for the following Injunctive and Declaratory Orders:-

- (i) An Injunction Order that the **Open Taxi Rank system that is scheduled to become fully operation from the Monday, the 25th April 2022**, shall be on hold until the full and final determination of this substantive matter by this Honourable Court;
- (ii) An Order that Defendant shall specify the specific designated areas of operation by taxis under Open Taxi Rank system.
- (iii) A Declaration that Defendants shall carry out thorough consultation, and awareness with all stakeholders especially with the Fiji Taxi Association and other operators in respective districts around Fiji, where taxi operates, to make proper determination for operation of Open Taxi Rank system;
- (iv) A Declaration that Defendants have failed to provide policies and or guideline to the Fiji Taxi Association, taxi operators and to the taxi drivers around Fiji regarding the proper operation of the Open Taxi Rank system;
- (v) A Declaration that Land Transport Authority has failed to properly analyse and follow the High Court Order granted on 31st October 2019 in the case of Fiji Taxi Association v Land Transport Authority, High Court Civil Action Number HBC 286 of 2019 resulting Land Transport Authority conceded to the concept of the Open Taxi Rank system without any consultation with Plaintiff;
- (vi) A Declaration that the Open Taxi Rank system be on hold or be permanently stayed under Defendants carry out proper survey, make proper consultation, provide proper policies and guidelines regarding the operation of the Open Taxi Rank to the Fiji Taxi Association and to all taxi operators, as to how the new system of Open Taxi Rank can be implemented and introduced in Fiji.
- (vii) A Declaration that Land Transport Authority has failed to comply and follow the Land Transport (budget Amendment) Bill 2021 and Land Transport (budget Amendment) Act 2021 by not achieving the key policy objectives for taxi operators in lieu to the operation of the Open taxi rank System.
- (viii) That the Declarations sought herein be determined as a preliminary issue before any further operation of Open taxi Rank base system.
- (ix) An early court date for this action.
- (x) Costs for this action to be paid by Defendants.

(xi) Further or other relief as this Honourable Court may deem fit.

[2] The Application was **supported by an Affidavit deposed** by General Secretary of Fiji Taxi Association, Ashwin Asish Lal.

[3] The Defendants were represented by their respective Counsels, made oral submissions and opposed the Plaintiff's application and the orders sought therein.

Submissions [summarised]

[4] The Submissions from the parties are as follows:-

Plaintiff:

- Certain injunctive orders at prayer 1 and 2 are currently sought with regards to the 'Open Taxi Rank System'. Affidavit in Support to Application filed.
- HBC 286 of 2019 refers wherein Court granted the orders for LTA to carry out consultations with all the stakeholders.
- The Parliament has passed the Law with regards to new Taxi permit quota and open base system. The Open Base System is similar concept, basically same thing as open taxi rank.
- No policies and guidelines filed.
- Seek that Open Taxi Rank System shall be on hold until full and final determination of the substantive matter.

1st Defendant

- Inter-partes originating summons filed.
- Section 113 LTA Act refers and the Minister is empowered.
- Guides therein as to how the System will operate.
- Injunctive Orders cannot be sought against the State.
- Should file Writ of Mandamus. Declarations are sought.
- There are no breaches.
- Consultation made in September 2021. Taxi union objected. Court cannot usurp.
- The Minister has effected the Law Act No. No. 22 of 2022 and came into effect on 25/4/2022.
- Injunctive orders sought are flawed.
- There are preliminary issues for Court to determine.
- Application not filed properly.
- Seek striking out of the Action.

2nd Defendant

- Supports 1st Defendants submission
- FRA has own functions including markings and statutory duty empowered by LTA. Roads have been marked all throughout Fiji.
- Evidence from the Plaintiff does not mention anything post 21st April 2022.
- Plaintiffs failed to file a Supplementary affidavit after the operation commenced on 25th April 2022.
- Since 21st April 2022, it became operative. Why make this application on the eve of Easter? No fault of the Court.
- Seek Plaintiff's application be struck out for abuse and/or time to file and serve affidavit in response.

3rd Defendant

- Support application for striking out
- Orders/Prayers sought does not say against which Defendant(s) orders sought.
- Act made and gazetted on 25/4/22.
- Cannot override functions of the Parliament. It is a Law already commenced on 25th April 2022.
- Will not file any affidavit in light of Submissions made.

[5] The Plaintiff in reply submitted-

- All defendants failed to touch on our argument.
- No evidence on consultations.
- Filed Originating Summons seeking declaratory orders.
- Bill passed but did not have the explanatory note.
- Law has been passed by the 2nd Defendant.
- Will file response affidavit as to what has transpired in this week wef 21st April 2022.
- Seek application not to be struck out.
- Seek prayers 1 and 2 respectively.

Determination

[6] The issue for this Court to determine is **'Whether Injunctive and Declaratory orders should be granted as sought by the Plaintiff in his Inter-Partes Originating Summons?'**

Mode of beginning proceedings in the High Court [Order 5 of the High Court Rules, 1988]

[7] The subsequent question that kicks in is **'Whether the Plaintiff has adopted the correct procedure to commence this proceedings by filing a Inter-parte Originating Summons together with an Affidavit in Support?'**

[8] Order 5 Rule 1 [O.5 r.1] of the High Court Rules, 1988 provides-

"Subject to the provisions of any Act and of these Rules, civil proceedings in the High Court maybe begun by writ, originating summons, originating motion or petition."

[9] In essence, the application is filed in terms of the ***Land Transport Act 2021 and Regulation 2017 and Orders 7, r.2 and 4 of the High Court Rules 1988 and under the inherent jurisdiction of this Court.***

[10] ***Order 7, r.2 and 4 of the High Court Rules 1988*** states as follows:-

"2(1) In every originating summons (other than an ex parte summons) shall be in Form 3 Appendix 1 or, if so authorised or required, in Form 4 in Appendix 1, and every ex parte originating summons shall be in Form 5 in Appendix 1.

(2) The party taking out an originating summons (other than an ex parte summons) shall be described as a plaintiff, and the other parties shall be described as defendants."

"4(1) Rules 2(1) and 3(1) shall, so far as applicable, apply to ex parte originating summonses, but, save as aforesaid, the foregoing Rules of this Order shall not apply to ex parte originating summons.

(2) Order 6, Rule 6(2) and (4) shall, with the necessary modifications, apply in relation to an ex parte originating summons as they apply in relation to a writ."

[11] ***Order 7 r.3*** deals with the contents of the Summons and provides as follows:-

"3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

(2) Order 6, Rules 3, 4 and 7 shall apply in relation to an originating summons as they apply in relation to a writ."

In Reserve Bank of Fiji-v-Trevor Robert Gallagher and Another (Unreported Civil Appeal NO.30 of 2005 delivered on 14th July 2006) The Fiji Court of appeal stated at paragraph 58 that:

"Order 7 Rule 3 (1) requires an Originating Summons to state in addition to the relief sought, sufficient particulars to identify the causes of action on which the Plaintiff relies."

[12] ***Order 5 rule 3 of the High Court Rules 1988*** determines which cause of action must be begun by 'Originating Summons'.

"Proceedings by which an application is to be made to the High Court or a Judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorised to be made by some other means. This Rules does not apply to an application made in pending proceedings."

[13] This rule is specific to applications made under any Act except where these rules or the Act itself says that the application must be begun. This requirement is mandatory. Reserve Bank of Fiji v. Gallagher (2006) FCA 37 ABU 0030 per Ward JA, Barker JA & Henry JA. Order 7 of the High Court Rules determines the form and contents of the originating summons.

[14] However, **Order 5, r.4** provides as follows:-

- "4(1) Except in the case of proceedings which by these Rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.
- (2) Proceedings-
- (a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or
- (b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ."

[15] In the current application before Court seeking for injunctive and declaratory orders, it has become very clear and evident from the oral submission of the parties to the proceedings that there are substantial dispute of facts.

[16] Further in terms of **Order 7, rule 3**, the Plaintiff has failed to file the substantive originating summons with statements of the questions on which the Plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy being claimed in the proceeding with **sufficient particulars to identify the causes of action** in respect of which the Plaintiff claims that relief and/or remedy.

[17] The Plaintiff chose to commence the proceedings by way of an "Ex Parte Originating Summons" which was later made into Inter- Partes by Court, which is *interlocutory* in itself. **Order 5 of the High Court Rules 1988** does not provide an *Ex-parte Originating Summons* as a mode of beginning court proceedings in the High Court. The Plaintiff should have commenced the proceedings by filing a Substantive Originating summons together with an **Interlocutory application** seeking for **injunction and declaratory orders therein**. The Interlocutory **Inter-Partes Originating Summons would then have a nexus with the Substantive Originating Summons**.

[18] An option to institute proceedings in terms of **Order 5 of the High Court Rules 1988** [mode of beginning civil proceedings in the High Court] is considered a wrong option and/or a non-compliance of the Rules when it does not follow the directions given by **Order 5 of the High Court Rules 1988** about how that particular course of action should be instituted or whether it is proper originating procedure or form. The procedural step taken by the Plaintiff in the current proceedings is **irregular** and also in **non-compliance with the High court Rules**.

[19] However, the **Ex-parte Originating Summons** [later converted to Inter Partes by the Court] is not an **Originating process** in terms of **Order 5 rule 1 (O.5, r.1) of the High Court Rules**. If it was an originating process albeit an incorrect one, then it could have been cured by the Court upon application of Order 2, Rule 2. The reason being that the Court cannot wholly set aside any proceedings or originating process on the ground that the proceedings were required by the Rules to be begun by an originating process other than the one employed herein (order 2 rule 1(3) refers.

- [20] The originating process provided for under *Order 5 of the High Court Rules 1988*, is a fundamental requirement of the Rules and any non-compliance would tantamount to an irregularity. The fundamental requirement goes to the root of the procedural aspect of commencing proceedings by an Originating Summons as mandated by *Order 5 rule 3 of the High Court Rules 1988*.
- [21] The Plaintiff did not consider it appropriate to seek a short adjournment and duly comply with the procedural aspect of the proceedings as mandated by *Order 5 Rule 3 of the High Court Rules, 1988*, instead made a decision to proceed with the Inter-Partes Originating Summons as an Interlocutory application.
- [22] I find that the Plaintiff has failed to initiate and commence proceedings via the Substantive Originating summons in terms of Order 5 of the High Court Rules, 1988 and the non-compliance results in an irregularity and therefore, the Plaintiff's Inter-Partes Originating Summons must fail in the circumstances.

Section 15 (1) (a) of the State Proceedings Act 1951

- [23] I also considered it necessary to make reference to *Section 15 of the States Proceedings Act 1951 which provides as follows-*

"Nature of relief

15 (1) In any civil proceedings by or against the State the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require, provided that—

(a) where in any proceedings against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the State for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the State to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the State if the effect of granting the injunction or making the order would be to give any relief against the State which could not have been obtained in proceedings against the State."

- [24] It would appear that the First Injunctive Relief sought by the Plaintiff is of some relevance to the First proviso in Section 15 of the "*States Proceedings Act 1951*."
- [25] It is sufficient to state that to the extent that this Injunctive Relief sought by the Plaintiff against

the Defendant(s) is for the court to make 'an Injunctive order that the "Open Taxi Rank System" that was scheduled to become full operational from Monday, 22nd April 2022 shall be put on hold until the final determination of the application before this court.

[26] The effect of the order sought by the Plaintiff tantamount to Injuncting the state and to stop the implementation of the Law passed by the Parliament with regards to Taxis operating under the 'Open Taxi Rank System' framework.

[27] However, the court is prevented from making this order against the "State" by virtue of section 15 of the 'States Proceedings Act 1951. "

[28] House of Lords in *Factortame Ltd. v. Secretary of State for Transport* (1989) 2 All ER 692 said-

"(2) Moreover, the court had no power to grant an interim injunction against the State in judicial review proceedings because injunctions had never been available at common law in proceedings on the State side and that position has been effectively preserved by SS.21 (2) and 23 (2) (b) of the State Proceedings Act 1947 (which are in identical terms to our Sections 15 (1) and (2) of the State Proceedings act 1951.

[29] Bearing in mind Section 15 of the "**State Proceedings Act 1951**", I find that there is in this case no jurisprudence or enactment which requires this court to ignore or over-ride the clear Statutory Prohibition expressed in Section 15 of the "State Proceedings Act 1951" , either as a final or as an interim measure.

[30] Once again, the Plaintiff's Inter-Partes Originating Summons is doom to fail accordingly.

[31] Under the Principles of Separation of Powers, the Parliament of the Republic of Fiji also referred to as the Legislature is the Supreme body that makes and amends the Laws of Fiji.

[32] The Judicial or Judiciary is the system of Courts that interprets and applies the Laws that have been passed and subsequently enacted as an Act.

[33] The Land Transport Act 1998 was amended and enacted by the Parliament of the Republic of Fiji by an Act No. 33 of 2021 and assented on 30th July 2021 and subsequently amended further by Act No. 22 of 2022 and assented on 25th March 2022 respectively.

[34] Courts are ultra-virus and cannot stop the State from implementing the Laws passed by the Parliament

In Conclusion

[35] The Plaintiff has failed to initiate and commence this proceedings procedurally as was required of him in terms of Order 5 of the High Court Rules, 1988. The Inter-Partes Originating Summons is an Interlocutory Application and it should have been filed together with a Substantive Originating Summons, but the Plaintiff has failed to do so.

[36] Section 15 of the State Proceedings Act 1951 states very clearly that "in any civil proceedings by or against the State any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance."

"The Court should not grant an injunction or make an Order for specific performance, but may in lieu thereof make an Order Declaratory of the rights of the parties." *Crystal Clear Video. A. G and Commissioner of Police* Suva Civil Action No. 331 of 1988 refers.

[37] Courts are ultra vires and cannot stop the State from implementing the laws passed by the Parliament of the Republic of Fiji.

[38] For the aforesaid rational, I refuse the grant of the Injunctive and Declaratory orders sought herein and proceed to Dismiss the Plaintiff's Inter-Partes Originating Summons accordingly.

Costs

[39] Matter proceeded to hearing with parties to the proceedings made oral submissions at the hearing.

[40] It is only appropriate and fair that the Plaintiff pays a summarily assessed cost of \$500 to each of the Defendants totalling to \$1,500 within 7 days.

Orders

- i. The Plaintiff's Inter-Partes Originating Summons is dismissed accordingly.
- ii. The Plaintiff to pay each of the Defendants a sum of \$500 as summarily assessed costs a total of, \$1,500 within 7 days.

DATED AT SUVA THIS 01ST DAY OF JULY, 2022.



VISHWA DATT SHARMA
JUDGE

*Cc: Amrit Chand Lawyers, Suva;
Attorney Generals Chambers, Suva;
Land Transport Authority;
Ministry of Commerce, Trade, Tourism and Transport, Suva.*