

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 1955/20**

**In the matter of :-**

**Mohammed Uslum Shah Sohawon**

**Appellant**

**v/s**

**District Council of Riviere du Rempart**

**Respondent**

**DETERMINATION**

1. This is an appeal against the decision of the Respondent ["the Council"] for having rejected the application of the Appellant for a Building and Land Use Permit ['BLUP'] for the construction of four reinforced concrete buildings each comprising of basement, ground and first floors situated Off Chemin Vingt pieds B45, Grand Baie. The ground for refusal communicated to the Appellant via the National E-Licensing Service ['NELS'] is as follows:

"Site has been excised for residential purpose (ref: MORC/0631/2018/PRDC) but is found within a morcellement which is under injunction by the MHL. Previous application was rejected. New application made with a new element that an affidavit is being uploaded. He avers that he has requested MHL to remove his name from the list of fake morcellement. No official confirmation received from the MHL till date."

2. Both parties were legally represented. Mrs. Prayag, OMA at the Morcellement Board and Mrs. Padayachi, Planning Inspector, deponed on behalf of the Respondent. We have duly considered the evidence on record as well as submissions.

## **I. BACKGROUND AND CONTEXT ANALYSIS**

3. The subject site is a portion of land of the extent of 4586 sq.metres located at La Salette, Grand Bay duly transcribed and bearing TV 1498/22, as evidence by copy of title deed marked as annex A to the Statement of Case. The extent of the surplus land that was left is 2,998 sqm as per annex E of the Statement of Case, a Rapport de Distraction made by SLS Mr. Koherattee, after 2 distinct excisions of 51p and 1,266 sq.m had taken place therein as evidenced by Notarial Deed dated 14/01/2019, annex B to the Statement of Case, whereby it is described that Mr. Mohammed Uslum Shah Sohawon is the sole owner of the land that remains after excision of a portion of land of the extent of 2152.65 sq.m from a greater extent of land with a surface area of 1A59p and as per the BLUP for excision granted to the Appellant on 15<sup>th</sup> July 2019, annex C to the Statement of Case, respectively. It is undisputed that no application for morcellement permit was ever received at the Ministry of Housing and Land Use Planning ['MHL'] with regards to this plot of land. However, it appears that a fake morcellement permit was issued with respect to the land bearing TV 1498/222 on 15<sup>th</sup> January 2018 as per the records submitted by the Ministry of Housing and Land Use Planning to the Chief Executive of the District Council of Riviere du Rempart on the 13<sup>th</sup> September 2019, produced and marked as Doc A and the issuance of fake morcellement permits are currently subject to a police enquiry.
4. The case of the Appellant is that he does not intend to subdivide his plot of land but in fact seeks to have a BLUP from the Council for the construction of four concrete buildings on the subject site. He explained that he acquired the original plot of 1A59p from his mother in 1980, as evidenced by annex A to the Statement of Case, who had a droit de jouissance on the plot but that he became the full owner of the property upon her demise. It is not disputed that Mr. Sohawon has been granted a BLUP by the Respondent on 2 previous occasions, for the excision of two plots of land of the extent of 51 perches and 30 perches (1,266 sq.m) which have been sold off. He disagreed in the course of the hearing that he had made any application for a morcellement permit and stated that it was his brother who had done so.

5. He also testified that he is only seeking a BLUP for construction of buildings and that he had deposited a letter from Notary Dookhee with the Ministry of Housing and Land Use Planning to have his name removed from the list of those having suspicious permits although Mrs. Prayag, OMA at the Ministry of Housing and Land Use Planning, in her testimony disagreed that there was any such request from the Appellant. The latter stated that he did not get any reply from the Ministry. He agreed in cross-examination that his name was on Doc A, the list of those who had been granted suspected fake morcellement permits. He confirmed that he is not in possession of a morcellement permit and that he had learnt that it is a fake one.
6. The Respondent's case, in essence, is that in the face of a Letter emanating from the Ministry of Housing and Land Use Planning with a list of names annexed thereto to the effect that an issue of fake morcellement permits had been raised and that Councils were requested not to process any BLUP applications for plots of land in connection with fake morcellement permits pending further enquiry, the application for BLUP of the Appellant was refused on the basis that the subject site appears to have a fake morcellement permit. As per the Council's representative, the Respondent was instructed not to issue BLUPs with regards to lots issued with fake morcellement permits and that the Council maintains its refusal. The enquiry is ongoing.

## **II. GROUNDS OF APPEAL**

7. The 7 grounds of appeal as set out in the notice of appeal of the Appellant are reproduced below:

*"1. The District Council of Riviere du Rempart based itself on irrelevant consideration to reject the application of the Appellant.*

*2. The District Council of Riviere du Rempart based itself on irrelevant consideration, that the site has been excised for residential purposes (ref: MORC/0631/2018/PRDC) but is found within a morcellement which is under injunction by the MHL, to reject the application of the Appellant for the BLUP.*

3. *The District Council of Riviere du Rempart based itself on irrelevant consideration, that a previous application (ref BLP1-DCRR-2020-711) was rejected, to reject the application of the Appellant for the BLUP.*

4. *The District Council of Riviere du Rempart based itself on irrelevant consideration, that whilst a new application was made with a new element that an affidavit is being uploaded and that Appellant has averred that he has requested MHL to remove his name from the list of fake morcellement but no official confirmation has been received as at date of the decision of the District Council of Riviere du Rempart, to reject the application of the Appellant for the BLUP.*

5. *The District Council of Riviere du Rempart failed to consider a relevant consideration, i.e that the Appellant was merely basing his application on his ownership of his remaining plot of land as a whole, and not on any allegedly fake morcellement permit, to apply for the BLUP, and as a result came to the wrong decision not to grant the BLUP.*

6. *The District Council of Riviere du Rempart ought to have granted the application for the BLUP made by the Appellant in as much as the application satisfied all legal requirements, whether under the planning laws or otherwise.*

7. *The District Council of Riviere du Rempart ought to have granted the application for the BLUP made by the Appellant in as much as the application was not in contravention of any legal requirements, whether of the planning laws or otherwise.”*

### **III. OUR DECISION**

8. Having assessed the evidence on record, we are of the view that although there are several grounds of appeal to the grounds of refusal of the Council, the crux of the case boils down to one issue, namely whether the Council was right to refuse the Appellant’s application for a BLUP for construction of buildings, firstly, on the basis of a fake morcellement permit having been issued in relation to his land and secondly, on the basis of a letter from the Ministry of Housing and Land Use Planning.

9. It is the contention of the Appellant under grounds 1,2,3 and 4 that the Respondent based itself on several irrelevant considerations to reject the application namely that the site has been excised for residential purposes, and that the site is found within a morcellement which is under injunction by the MHL, that a previous application (ref BLP1-DCRR-2020-711) was rejected, and that whilst a new application was made with a new element that an affidavit is being uploaded and that Appellant has averred that he has requested MHL to remove his name from the list of fake morcellement but no official confirmation has been received as at date of the decision of the District Council of Riviere du Rempart. It is also the contention of the Appellant under grounds 5,6 and 7 that the Respondent failed to consider a relevant consideration in that the Appellant was merely basing his application on his ownership of his remaining plot of land and not on any allegedly fake morcellement permit and that the Council should have granted the BLUP as the application satisfied all legal requirements and was not in contravention of any of them. We have decided to treat all the grounds of appeal together as the issues are intertwined and any segregation of them may result in repetitive analysis of evidence and observation.
10. A morcellement, as described in the **Morcellement Act 1990**, is the division of a plot of land into two or more lots. For the development of a morcellement, which normally entails not only subdivision of land into smaller lots but also infrastructural work such as road networks, street lighting and drains amongst others, a morcellement permit is required to be issued by the Morcellement Board of the Ministry of Housing and Land Use Planning. It stands to reason that a morcellement permit is a requirement only when one wishes to subdivide one's plot of land into smaller individual lots.
11. The Respondent produced a letter dated 13<sup>th</sup> September 2019, marked Doc A, emanating from the then Ministry of Housing and Lands, under the signature of its Senior Chief Executive sent to the Chief Executive of the District Council of Riviere du Rempart, which was acted upon by the Respondent to refuse the application for BLUP of the Appellant. We find it apposite at this stage to reproduce the relevant extract of the letter which the Respondent claimed to have acted upon:

*“Please refer to the meeting of the Morcellement Board held on 31 July 2019, wherein the issue of fake morcellement permits had been raised (copy of an updated list of fake Morcellement permits is enclosed...*

...

*3. You are also requested to abide in respect of the following:-*

*(i) in case Building and Land Use Permits have been applied for plots of land in connection with fake Morcellement Permits, the said applications should not be processed pending further enquiry (see section 117(7)(b) of the Local Government Act); and*

*(ii) in case where Building and Land Use Permits have been issued, but construction not yet started, to inform the holder of the permit that the BLUP was issued in connection with a fake Morcellement permit.”*

12. In the present case the Appellant wishes to use the plot *in lite*, which is undeniably exclusively in his ownership, to construct 4 buildings thereon. The Council has assessed his application for this development, as per its refusal letter which is on record. Upon a careful analysis of the situation from the evidence on record, we have been given to understand that a number of fake morcellement permits were granted when infact these applications were never processed or issued by the Morcellement Board of the Ministry of Housing and Land Use Planning. Morcellement permits form the basis of certain types of developments, that is, subdivision into smaller lots. In the present case, the proposed development is not for subdivision into smaller lots but rather for construction of buildings on a single plot. The issues are distinct. Hence, any fake morcellement permit which may have been issued in relation to the land *in lite* is not being acted upon. We are of the view that the BLUP for construction of the building on the property *in lite* will operate as any standard development where the developer owns a plot and wants to use it for the construction a few buildings thereon.

13. Although a fake morcellement permit has been issued in relation to this subject site, the Appellant is not seeking to act on or make use of the fake morcellement permit to have his land subdivided into smaller lots. These being the facts, we find that development of the land which in the present case is the “construction of buildings”,

without going into the planning assessment of it, by the owner of the property cannot be barred on the very principle that he has a right to property, a right enshrined in our Constitution, and which also means to use and enjoy his property. If the fake permit were to be used by the Appellant to support his application, then the Council's decision may have been justified. Conversely, if a genuine morcellement permit were granted to the Appellant and he chose not to act upon it but instead use his land as a whole to construct 4 buildings on it, the Council would not be precluded from granting a BLUP for such constructions even if the land had been approved for a morcellement.

14. The evidence of the representative of the Council, Mrs. Padayachi, Planning and Development Inspector, has contradicted most of the grounds of refusal of the Council. She clarified in examination in chief that there is no court injunction in force or even any action for injunction by the MHL. She stated that it was a grammatical mistake and that it was a decision by the MHL which was communicated to the Council *vide* letter dated 13<sup>th</sup> September 2019. This, therefore, dilutes the directions given to the Council by the MHL in that there was no court order in force. According to Mrs. Padayachi, the Council has to abide by the letter emanating from the MHL and in cross-examination she stated that had the Council not received such a letter from the MHL, in processing the application of the Appellant there would be no planning objection to the granting of his permit. This speaks volumes. It appears that the Council had in fact considered the planning merits of the application of the Appellant and found it to be meritorious but it acted on the sole basis of the letter from MHL.

15. We now turn to the law that governs the processing of BLUP applications by the Council. This is found under **Section 117 (6) of the Local Government Act 2011** ['LGA'] which provides

*"The Permits and Business Monitoring Committee shall process every application for an Outline Planning Permission or a Building and Land Use Permit, having regard to the provisions of the Building Control Act, the Environment Protection Act, the Mauritius Fire and Rescue Service Act, the Planning and Development Act and the Town and Country Planning Act and the Planning and Development Act and any guidelines issued under those Acts."*

16. These are the laws and the relevant guidelines applicable under these laws should be applied for the processing of applications for BLUP but there is no visibility on which law or by virtue of which guidelines the Council has acted to decide to not grant an application for BLUP of sound planning merit. The decision of the MHL, as rightly submitted by Counsel appearing for the Appellant, is not to be found in the list clearly provided by the law. We do take on board the fact that there is an ongoing enquiry and possibly a criminal investigation in relation to the fake morcellement permits which could possibly have a bearing on the fate of the plots where a fake morcellement permit has been granted. This would not however affect a right to apply for a BLUP simpliciter which is the crux of the present appeal. The Appellant in fact testified that he wished to withdraw his name from the list of those who have been given fake morcellement permits. We are given to understand that he no longer wishes to have a morcellement permit and had, as per his evidence, requested his Notary to do the needful to have his name removed. The Respondent's witnesses testified that no such request was received at the MHL. Be it as it may, we find that an enquiry on the issuance of the fake morcellement permits to have no bearing on any plot which is not being subdivided in anyway. The Council is aware, having assessed the planning merits of the application, that the Appellant does not wish to subdivide the land, but use it in its totality to construct 4 buildings thereupon.

17. The Council's contention as per its last 2 grounds of refusal is that a previous application was rejected and that although there is an alleged new element to the latest application, that is the subject-matter of the present appeal, in that the applicant has requested the MHL to have his name removed from the list of those granted a fake morcellement permit, no official confirmation has been received. The fact that a previous similar application made was rejected by the Council is not a ground for refusal of an application, as Mrs. Padayachi agreed in cross-examination, since it is not based on planning principles. Even if there was a previous application that was made and rejected and assuming upon consideration of the fresh application, no new element was found to be prevailing, the Council has based itself on an erroneous assumption that the site is a morcellement subject to an injunction by the MHL, when in fact it was merely a decision of the MHL. This cannot be the basis for



the Council's refusal because *ab initio* the Council's action was not in accordance with the provisions of the LGA. Rather than applying the provisions of the MHL's letter right across the board, the Council should consider each application on a case-to-case basis and in this case, it should have motivated its decision based on whether the application sought to enforce the fake morcellement permit. The Appellant was merely basing his application on his ownership of his remaining plot of land, and not on any allegedly fake morcellement permit. The conclusion reached by the Council in not granting the BLUP is in our view wrong decision. Whilst academic, it is also possible that the tenor of the said letter from MHL was intended to adopt this position viz, applications "in connection with" fake morcellement permits. Free standing applications, as in the present case, were therefore to be considered on their individual merits. The grounds of refusal do not hold.

18. For all the reasons set out above, we find that the appeal is meritorious. The appeal is allowed. No order as to costs.

Determination delivered on 2<sup>nd</sup> June 2022 by

**Mrs. J. RAMFUL-JHOWRY**

**Vice Chairperson**

**Mr. S. MOOTHOSAMY**

**Member**

**Mr. R. SEEBOO**

**Member**