IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C751/14

In the matter of:

Mr Marie Thelemaque & Ors

Applicant

v/s

Mrs. S. L. Nirsimloo

Respondent

IPO:

District Council of Moka

Co-Respondent

JUDGMENT

1. An appeal has been lodged before the Environment and Land Use Appeal Tribunal by the applicants against the decision of the co-respondent (hereinafter referred as the "Council") for having granted a Building and Land Use Permit ("BLUP") to the respondent for the conversion of a building at ground and first floors to be used for pre-primary education and child day-care activities at Morcellement Bellevue, Gentilly, Moka. The applicants, who are in fact the contiguous neighbours, objected to the application submitted by the respondent for the BLUP and after having heard the objections of the applicants, the co-respondent granted the permit. Having obtained the BLUP, the respondent therefore proceeded with the running of the school and nursery. On 9th September 2014, I declined to grant the interim injunction prayed for by the applicants in their *exparte* application. Affidavits have now been exchanged in relation to whether an interlocutory injunction should be granted to prohibit and restrain the respondent from proceeding with the running and operation of the nursery and the school pending the determination of the appeal case, hence the present application.

2. At the very outset of the hearing for the present application, counsel appearing for the respondent moved to take two points in law which in essence are that the appeal in this case having been lodged outside the time frame the present application for injunction cannot be entertained. Secondly, that applicants not being "aggrieved parties" within the meaning of **section 117 of the Local Government Act 2011**, the applicants cannot enter a case before the Tribunal, hence no application for injunctive relief can be sought. The motion was resisted by counsel for the applicants. I shall address this issue further on. The Co-respondent also raised a *plea in limine* in its first affidavit but same was not pressed. In the course of submissions counsel for the applicants also moved for a site visit, which I declined.

3. I have taken into account the submissions of all counsel and all evidence placed before me. From the affidavits of the applicants, respondent, co-respondent and submissions of their counsel, it is apparent that as a background to this application there are a number of legal and factual issues which I needed to address my mind to and shall now rule upon.

4. **Appeal outside delay**

Counsel for the respondent raised the point that in essence for there to be an application for injunction there should be a substantive cause of action, in this case a proper appeal before this Tribunal. In the present case, her motion was that since the appeal was lodged outside the prescribed time limit, it amounted to there being no appeal, hence the application for injunction could not stand and should be disregarded. In support of this contention she referred to the applicants' affidavits and documents filed as part of the affidavits.

Lord Diplock said in **The Siskina [1979] AC 210**:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action."

I have been referred to the letter of notification sent to Mr. Thelemaque and a copy sent to Mr. Eric Chan, another applicant. It is trite law that for an appeal to be

procedurally valid, it should be lodged within 21 days from the date of notification. "Date of notification" means the date when the party lodging the appeal received notification of the decision. For me to appreciate this issue, it should be clearly placed before me when the party received notification and when the appeal was lodged so that I can take cognizance of the expiry of the time limit. The applicants' affidavit is silent on the date on which the appeal was lodged before the Tribunal. At paragraph 7 of the applicants' first affidavit, it is averred that the appeal is pending before the Environment and Land Use Appeal Tribunal. The respondent for her part in her first affidavit simply admits the averments of the applicants on this issue. The applicant's affidavit contains a copy of the notice of appeal lodged by the applicants. Ex-facie the document, I find that I cannot rely on this document because, albeit a copy, it does not bear the official stamp of the Tribunal nor has the part "For Official Use" been filled out by the registry of the Tribunal. This being the case, there is no evidence before me as to when the appeal has been duly lodged at the registry of the Tribunal and if it is the respondent's case that the appeal has been lodged outside the time prescribed by law, then it was for the respondent to prove her case. This is a civil case and as the principle goes "He who avers must prove". In this case, not only did the respondent in her affidavit admit the averment of the applicants that an appeal has been lodged at the Environment and Land Use appeal Tribunal but at the stage where it was contested, no evidence was produced as to when the Tribunal duly recorded the appeal lodged by the applicants. In the absence of such crucial evidence, I cannot speculate that the appeal must have been lodged on the 11th August 2014. On this point therefore, since I am not in the presence of any evidence to show when the appeal was lodged I cannot make a finding that the appeal has been lodged outside delay. I therefore find that for all intents and purposes there is a proper appeal lodged before this Tribunal and consequently the present application for injunction also stands.

5. Who is a "Person Aggrieved"?

Learned counsel for the respondent submitted that since **section 117(14) of the Local Government Act 2011** refers to a person aggrieved by the decision of the Council where an application of Building and Land Use permit is not approved may appeal to the Environment and Land Use Appeal Tribunal, the applicants do not fall within the meaning of 'person aggrieved' and hence cannot lodge an appeal. It would be rather surprising if the legislators catered only for one category of people, that is, those who stand to benefit from a development and not for those who would be prejudiced by same. While the wording of the law has in fact been correctly cited by counsel for the

respondent, the law should be read in its totality. Counsel referred just to that part of the law which dealt with the situation whereby a person sought to apply to the Council for a BLUP and the recourse that he/she has should his/her application be rejected. **Sections 117 (7) (b), (8) (b) and (12) of the Local Government Act** referred by the respondent's counsel, simply provide for the various instances when a person's application for a BLUP may be rejected. That is why the foregoing sections of the law stipulate that in such scenarios where the person who has not been granted the BLUP and is therefore aggrieved by the decision of the Council, can appeal. Otherwise the law in relation to the granting of BLUPs and the procedure for appeal are regulated by several Acts, namely the **Local Government Act 2011** which should be read in conjunction with **The Town and Country Planning Act** and **the Environment and Land Use Appeal Tribunal Act 2012. Section 7 and 25 of the Town and Country Planning Act** clearly refers *to "Any person aggrieved by a decision of the local authority...may appeal..."* Therefore, when the law is read in its totality it can be clearly seen that an aggrieved person can be any person who feels aggrieved by a decision of the Council, whatever be that decision. It is precisely for this reason that there exists a mandatory legal requirement in the form of notification procedure, which allow for people in the vicinity to take cognizance of the proposed developments so that they may raise objections if they so wish and their right to appeal is also safeguarded under the law. I am therefore not convinced by this point raised by the respondent.

6. Merits of the application

(i) Applicants' case

The Applicants must satisfy this Tribunal that the issue at hand is causing hardship to them and hence there is a serious issue to be tried. The applicants have filed affidavits in which they have in essence expressed concerns, as contiguous neighbours to the development site, regarding issues of noise pollution, health, traffic hazards and qualitative degradation of the location. In submission, counsel for the applicants extensively addressed each issue and referred to the planning guidelines to substantiate their case. In short, their case rested mainly on the prejudice that would be caused to them and they would be denied the right to peaceful enjoyment of their property.

(ii) **Respondent's case**

The respondent's case rested mainly on the fact that the area in lite is a mixed use one and not an exclusively residential area and therefore, the development cannot be said to disrupt the overall amenity. The respondent sought to make the point that the applicants did not come with clean hands because a number of them were operating businesses from their homes in the locality and finally, should the relief be granted that would cause prejudice to all interested parties especially the children who have already joined the school & nursery. It is not disputed that the school and nursery are already operational.

(iii) Co-respondent's case

The co-respondent essentially gave the reasons which motivated the Council to consider the application of the respondent favourably. In its affidavit it is also averred that the area is a residential, commercial and industrial one, and that the OVEC, which is an educational institution is operating in front of the respondent's premises and uses the roads of Morcellement Bellevue to access its premises. Otherwise the stand of the Council is that it will be abiding by my decision.

7. Decision

(i) A serious issue to be tried

The Applicants must satisfy me that the issue at hand is causing hardship to them and that there is a serious issue to be tried. The applicants filed affidavits in which they have expressed their various concerns as contiguous neighbours, as stated earlier. The applicants' affidavits made extensive reference as to why the application of the BLUP should not have gained planning acceptance and counsel for the applicants referred to the governing of legislation and planning instruments applicable to the facts of this case. These issues were all hotly contested by the respondent. While I have been satisfied that there is a serious issue to be tried, I believe at this stage these issues cannot be effectively determined by relying on affidavit evidence. These are meant to and will have to be determined on the merits.

(ii) Adequacy of damages

However strong the case may appear to be, if damages would be an adequate remedy to the applicants and the respondent would be in a financial position to pay the applicants, then the position in law is that no injunction should be granted. It is clear that damages would not be an adequate remedy in this case because the issue at stake here is the prejudice that will be caused to the applicants if they are denied the right to a peaceful enjoyment of their property, a right that cannot be adequately compensated in monetary terms. I pause here to make a point. It was rather surprising that none of the affidavits of the applicants contained the usual averment with regard to the undertaking to provide damages. It is even more surprising that the respondent did not insist upon such an undertaking being given. As a rule in order to obtain an injunction, the applicant should normally give an undertaking as to damages to be provided to the respondent in the eventuality that the Tribunal finds in favour of the respondent in the main case.

(iii) Balance of convenience

In order to ascertain where the balance of convenience lies, I have to consider whether there will be a substantial non-compensable disadvantage to one party whichever way my decision goes. Since the respondent is carrying out a business which generates income, it is clear that should an injunction be granted, she will be at a disadvantage but one which is compensable. But the peculiarity of the present case is that the business of the respondent is closely and directly related to the lives of other interested parties. On the other hand, should I decide not to grant the order prayed for, will that weaken the position of the applicants to a **substantial** non-compensable disadvantage?

According to Lord Diplock in the case of American Cyanamid v/s Ethicon Ltd [1975] A.C 396 both the benefit and the burden of the remedy lie in its expedient essence: cases are decided promptly, pending the final trial, upon incomplete affidavit evidence that "has not been tested by oral cross-examination". He stated that the object of this form of relief is "*to protect the plaintiff against injury by violation of his right for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial*".

I could not agree more with Justice Domah when he said *"One cannot put a price to the peace and quiet enjoyment of citizens in their homes.":* **Suhootoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273.** Besides it is a right enshrined under ***section 4 of our constitution*** under the right to life, which also means quality of life. The applicants

have given several reasons, as mentioned above, to justify the present application. The respondent, on the other hand, explained that she has been lawfully granted a permit and has started operating the school and nursery. She has obtained the relevant clearances and in order to mitigate any nuisance in terms of noise she has stated that the children will mostly be indoors and will be on breaks only twice a day. The Council has, for its part, also inserted a condition to the BLUP which is meant to keep a check on the noise level. The respondent's contention is also that, the area being a mixed use one, which is confirmed by the Council, it cannot be said that the development will disrupt the amenity on account of it being located in an exclusively residential area. In her affidavit, she went on further to state the applicants did not come with clean hands since a few of them also operate businesses from their homes. In reply to this, the applicants stated in their final affidavit that the respondent also did not come with clean hands since she also runs a similar school elsewhere. The principle is that "He who comes to equity must come with clean hands". Now since it is the applicants who are the relief seekers, it stands to reason that they should come with clean hands. From the facts placed before me, and which have not been denied by the applicants, I am of the view that the applicants should have disclosed that they are also "working from home". It would then be for me to appreciate whether such type of home working has any disruptive effect on the overall amenity of the residential character of the locality. This being said, I still have to address my mind as to which party will face a **substantial** non-compensable disadvantage. One's right to a peaceful enjoyment of one's property should not be understated or trivialised in anyway. On the other hand, quite apart from the pecuniary loss that will be suffered by the respondent should the application succeed, the disruption likely to be caused to children, parents and staff is a relevant consideration. Indeed the applicants at paragraph 11 of their first affidavit recognise that once the school /nursery starts operating, it may be problematic to close it in view of the hardship likely to be caused to the children and their responsible parties. I totally agree with this view of the applicants. For such young children, the induction period and formative schooling is a rather important milestone in their lives which I believe can best be achieved with minimum disruption. Consequently, the prejudice to be caused to the respondent and by extrapolation to all the children attending the school/nursery, parents who would have to seek schooling elsewhere, as well as staff, would accordingly outweigh that of the applicants. I therefore find that the balance of convenience tilts in favour of the respondent. If the school/nursery is closed down, even temporarily, it may cause irreparable damage to the respondent's business, which cannot be compensated in money's worth.

(iv) Status quo

Having reached the above conclusion, it is accordingly appropriate and desirable to maintain the status quo pending the determination of the appeal case. I therefore decline to grant the order prayed for. No costs.

I certify as to counsel.

Jayshree RAMFUL-JHOWRY

Vice Chairperson

22 December 2014

For Applicant: Mr Doorga, of Counsel

For Respondent: Miss Naraidoo, of Counsel

For Co-Respondent : Mr Peetumber, of Counsel