

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2088/22

In the matter of :-

Majara Group Ltd.

Appellant

v/s

Municipal Council of Curepipe

Respondent

RULING

1. This is an appeal against the decision of the Respondent [“the Council”] for having rejected the application of the Appellant for the construction of a building at Dr. Ernest Harel Street, Floreal, comprising of ground plus 5 floors including a lower ground floor comprising of five commercial units and covered parking at the lower ground floor and 22 residential apartments at upper ground, first, second, third, fourth and fifth floors and 65 parking spaces. The matter was set for Hearing to the 2nd May 2022 when the attorney appearing for the Respondent, Mrs. Ragavoodoo, moved for a postponement to file a Statement of Defence outside the statutory time frame. Appellant’s counsel, Mr. V. Ramportab, objected to the motion. Before we proceed with the merits of the objection, it is apposite for us to at this stage to consider the chronology of events which led to the objection.

I. CHRONOLOGY OF EVENTS

2. As per the record of the Tribunal, the appeal was lodged at the registry of the Tribunal on the 25th February 2022. The return from the registered usher evidencing good service of the Notice of Appeal and statement of case with all annexed documents on one Mrs. Taruna Raghoonundun, Office Management Assistant, at the registry of the

Municipal Council of Curepipe on the 28th February 2022 was filed at the registry of the Tribunal on the same day, that is, 28th February 2022.

3. On the 3rd March 2022, the registry of the Tribunal informed all parties by email including the Council and its planning inspector that the case was to be called pro-forma by email on 22nd March 2022 for the Statement of Defence ['SOD'] to be filed by 10 am. No SOD was filed by the Respondent and an entry was made in the file to that effect on 25th March 2022.
4. On the 28th March, the registry of the Tribunal informed the parties by email that no SOD was filed with a request to communicate the SOD by the 5th April 2022 at 10 am, day when the case was returnable. No SOD was filed by the Respondent by the 5th April 2022. An entry was made to that effect in the file on the 11th April 2022 and the matter was postponed anew for the SOD to be filed.
5. On the 12th April 2022, the registry of the Tribunal sent an e-mail copied to the registry of the Council, its planning department and its planning inspector, informing the Council that the SOD was still awaited and that case was fixed pro-forma to the 19th April 2022.
6. On the 19th April 2022, no SOD was filed. The matter was considered before a different bench and an entry was made in the file that an email was received from Mr. Rampoortab, objecting to a postponement. The case was fixed pro-forma to the 10th May 2022 to suggest dates for hearing the appeal. On 21st April 2022, the registry of the Tribunal sent an email to all parties to inform them accordingly.
7. On Friday 22nd April 2022, an email was received from counsel for the Appellant stating that the Managing Director of the Appellant company was scheduled to travel back to Dubai where he is posted and requested that the hearing be fixed to any day prior to the 10th May 2022. Consequently, on Monday 25th April 2022, the request of Appellant's counsel was considered and the pro-forma day to suggest dates for

hearing was brought forward to the 27th April 2022. An email was sent by the Tribunal to all the parties to that effect on the same day, that is, 25th April 2022.

8. At the sitting of Wednesday 27th April 2022, it was noted that there were 2 emails from Mrs. Ragavoodoo dated 25th April 2022, both stating that her services had just been retained by the Respondent and she moved for a postponement to file SOD. An email was also received from Mr. Rampoorab moving that the case be fixed for hearing as per his suggested dates since there were no dates suggested by the Respondent. The Tribunal considered the motion of Mrs. Ragavoodoo and rejected her motion on the basis that at the sitting of the 19th April 2022, there had been an objection from Appellant's counsel to any postponement and the matter was then fixed to suggest dates for Hearing and being given that no SOD was filed, despite good service by the usher on the Council on 28th February 2022. The case was fixed for Hearing to the 2nd May 2022 at 1.30pm, as per the request of the Appellant. An email was sent to all the parties to this effect on Thursday 28th April 2022.
9. At the hearing on Monday 2nd May 2022, the Respondent's attorney moved for a postponement anew to file the SOD after tendering her apologies to the Tribunal and the Appellant's counsel stating that there was a confusion as regards the instructions which led to no SOD being communicated. This was met with objection by the Appellant's counsel. Submissions were then offered. We have duly considered the submissions of Counsel for the Appellant and attorney for the Respondent.

II. THE LAW

10. **Section 5 (4) (ad)** of the **Environment and Land Use Appeal Tribunal Act 2012** provides: *"Any party served with a copy of the notice of appeal, statement of case and any witness statement shall, within 21 days of receipt thereof, forward his reply and comments thereon to the Tribunal, with copy to the appellant."* According to the previous decisions of the Tribunal, the word "shall" in this context is to be read as directory and that the Tribunal has a discretion to allow pleadings outside the time frame in exceptional circumstances when it is justified to do so.

11. The record shows that the Notice of Appeal with statement of case were served by the registered usher on the Council on the 28th February 2022 and despite several postponements granted to the Council and several communications issued by the Tribunal to various points of contact at the Council, up to now no SOD has been filed. Infact on the hearing day, 2nd May, Mrs. Ragavoodoo even stated that she was moving for a postponement as the SOD was still in draft form and had to be vetted by Counsel for the Respondent. We view the actions of the Council as a serious abuse on its part. Even if there had been some confusion between the Council and its legal advisors, it does not explain why the Council is outside the timeframe by 2 months, since a communication on behalf of the Council was only forthcoming for the first time through an email from Mrs. Ragavoodoo on the 28th April 2022. Even if the services of the legal advisors were retained at a late stage, the Council could have communicated its stand to the Tribunal that the appeal was resisted and it could have requested for a postponement to retain services of legal advisors. But the Council remained totally oblivious to any communication from the Tribunal until the 25th April when the pro-forma day was brought forward to suggest closer hearing dates that a first communication came from the Council, which was not in acknowledgement of the communication from the Tribunal but rather to inform that legal services were just retained and a postponement was sought to file the SOD without any time frame being specified.

12. The irony is that the Council is now seeking a postponement in the interest of justice despite 2 months having elapsed from the time when it was apprised of the notice of appeal and still no SOD is on record. Had the Council acted diligently and been ready to file its SOD even before the trial started, it would have been an issue for the Tribunal to consider and may have possibly weighed in the Council's favour. Granting postponement to the Respondent at this stage will protract the decision on the merits since the SOD is still not ready. It is certainly not for the party because of whose laches the proceedings are protracted, in this case the respondent, to raise the issue of prejudice to be cause to it. If at all, it should have been the line of argument for the Appellant, to raise the issue of prejudice in case the Tribunal decides to grant the postponement at this stage.

13. In the present case Counsel for the Appellant has stated in his email to the Tribunal in his request for a very early hearing date as the representative of the Appellant has to travel to Dubai. In our view, if a postponement is granted in this case, the Appellant will be prejudiced in that its representative needs to soon fly back to Dubai, where he is posted. If the Appellant's Managing Director has to fly back to Mauritius at a subsequent case for the purposes of this case, this will not only cause inconvenience but also incur expenses to the prejudice of the Appellant should a postponement be granted. The Council was given several chances to file its SOD since the 22nd April 2022 but it chose not to take it for reasons best known to it. The Appellant and the Tribunal were left in the dark as regards the Respondent's stand. The unexplained delay by the Respondent in communicating its stand or its SOD to the Tribunal and the Appellant, if condoned, would set a bad precedent. It is in that spirit that the Tribunal will not revisit its decision to reject the motion of postponement by the Respondent of the 27th April 2022 as this will imply that the Tribunal is allowing an abuse of its process, which it cannot condone. Besides the Tribunal had already entertained the objection of Mr. Rampoortab to the postponement at the sitting of the 19th April 2022 and the matter was fixed pro-forma to suggest dates for hearing.

14. The lack of diligence on the part of the Council can be gauged also in the fact that once the case was fixed for merits, this was accepted by the Respondent without any reservation. An email was sent by the registry of the Tribunal on Thursday 28th April 2022 stating that the case was fixed to be heard on Monday 2nd May 2022 at 130pm. It is only at the hearing that a motion for postponement was made anew for the SOD which was still in draft to be filed after it was to be vetted by the Respondent's Counsel and this with the request for filing of the SOD to be done well outside the statutory time frame. It is important to understand that the rationale behind having time lines set in the law to comply with procedural requirements is so that there is finality to the pleadings so that the case can be heard on its merits with expediency. Even on the day of the hearing the Council failed to provide a set time by when it could possibly file its SOD, thereby failing to display any eagerness on its part to restore any lost time. Non-compliance with the time frame to file the SOD was neither due to the Appellant's fault nor to that of its legal advisors.

15. As a matter of law, a person who is served with a notice of appeal and who wishes to resist the appeal shall, do so within the time frame provided by statute and as provided in the statute and if he fails to comply with those provisions, he is deemed to have elected not to resist the appeal. In GUNNESS v RAMNAUTH MS & ORS 2011 SCJ 260 their Lordships observed that our case law abounds with decisions on the effect and consequences of non-observance of the formalities of appeal. The well-established principle is the need to strictly observe and adhere to the provisions of the law relating to the prescribed procedure and delays in appeal. It was noted on the other hand, that our Courts have, nevertheless, been prepared, in exceptional circumstances to exercise its discretionary powers to relax the rules where a miscarriage of justice or prejudice might otherwise result. We agree with counsel's submissions that laches on the part of the Respondent should not be to the prejudice of the Appellant. In the present scenario, there is a danger of the Appellant's case being protracted with the risk of its representative being unavailable when so required by the Tribunal or when the case is fixed for hearing to another date and the probable added expense of having to travel from Dubai for this case. On the other hand, the Council could not explain to us on how prejudice will be caused to its case when it remained dormant for 2 months.

16. For all the reasons set out above, we find that the objection was rightly taken. The motion of the Respondent is set aside. The case is to proceed on its merits. We note from the pleadings that Outline Planning Permission has already been granted to the Appellant since May 2021. The Council can still cross examine the Appellant, can raise points in law and also offer submissions. The case is fixed for Hearing.

Ruling delivered on 4th May 2022 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. S. MOOTHOSAMY

Member

Mr. P. MANNA

Member

