BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 129A/12

In the matter of :-

Shah Suhootoorah & Ors

Appellants

v/s

Municipal Council of Vacoas-Phoenix

Respondent

IPO:

Al-Rahman Co. Ltd

Co-Respondent

RULING

The present argument arises after it came out in evidence that the Respondent had authorised the Co-Respondent to install and use machinery at a total of 16,500 watts, while the latter had only given public notice for the installation and use of machinery at 1,000 watts. It also came out that during the hearing at the Council; parties were all under the impression that the machinery to be installed and used would be at 1,000 watts.

Counsel for the Appellants contended that the wattage of the machinery was relied upon as an indicator not only of the scale or capacity of the proposed activity, but to suggest that nuisance would be minimal. He thus moved the Tribunal to declare the decision of the Respondent to be null and void on this issue. His motion reads as follows:

> *"Given the uncontroverted evidence that the consultation process on the application was undertaken on the basis of a notice of proposed installation of machinery for a total of 1000 watts and that the final decision was taken to authorise the installation*

of machinery for a total of 16500 watts without interested parties having been given the opportunity to address the change, the appellants move that the consultation process be deemed flawed and the decision declared null and void. It is the appellants' contention that where there is a fundamental difference between the terms of the application consulted on and the proposed terms of the final decision to write thereon, there is a duty to re-consult and afford interested parties the right to make further representations failing which the consultation process is tainted inconclusive and the final decision of no effect".

Counsel for the Respondent and Co-Respondent resisted the motion and arguments were offered. Counsel for the Appellants invited the Tribunal to address three questions, namely: (i) whether the Respondent had a duty to consult; (ii) whether the Respondent had a duty to re-consult after the 'material' change in the proposed wattage of the machinery; and (iii) what would be the legal consequence if there was no re-consultation.

In the course of arguments, the Tribunal raised a fourth question, which it considers ought to have been addressed first, namely whether the Tribunal has the jurisdiction to decide on the types of questions raised by Counsel for the Appellants and to declare the decision of the Respondent null and void on the grounds raised as per his motion.

On the fourth question, Counsel for the Appellants relied on the case of ***Bangash v The Town and Country Planning Board &Ors (2011) SCJ 24***for the proposition that the Tribunal should not be overly concerned with the distinction between its appellate jurisdiction and the realms of judicial review. In that case, their Lordships of the Supreme Court held:

"Although an appeal is more concerned with merits and review is more concerned with legality, in practice an appellant will often wish to raise questions which strictly are questions of legality such as violation of natural justice or some objections to a tribunal's jurisdiction. According to Administrative Law by Wade 6th edition, at page 946 "it is important that this [an appeal] should be freely allowed, since otherwise many cases could not be fully disposed of on appeal." Again, in R v Kingston upon Thames County Court and another [2002] EWCA Civ 1738 where the Court held that

"The purpose of an appeal system, in our view, is not simply to correct wrong decisions as far as they concern the parties to the dispute; there is also a public purpose which is to ensure confidence in the administration of justice and, in appropriate cases, to clarify the law, practice and procedures and to help maintain the standards of first instance courts and tribunals." (The underlining is ours)."

The above passage of the judgment reflects to some extent the experience of this Tribunal that in certain cases, it may be difficult to dissociate questions of legality and procedure from the Tribunal's determination of the merits of decisions of local authorities, which are, as all public bodies, no doubt to be guided by the law as well as broader principles of fairness, natural justice and reasonableness. Suppose a local authority has, in determining an application for a BLUP, failed to have regard to relevant considerations expressed in law. The Tribunal would in such instances have jurisdiction to entertain an appeal but only where the failure to consider relevant matter impinges on the merits of the application. This Tribunal cannot per se intervene simply upon a claim of procedural impropriety without the Appellant also averring that as a consequence, the ultimate decision is flawed.

From our reading of the judgment of ***Bangash v TCPB***, it is also clear that it is important that appeals are allowed and heard freely so that the Tribunal may then properly determine the matter. This is precisely what is provided under *section 4 of the ELAT Act*, the enabling law of the Tribunal, which provides for its jurisdiction. We find it convenient to reproduce section 4 hereunder.

(1) The Tribunal shall -

(a) hear and determine appeals-

(i) under section 54 of the Environment Protection Act;

(ii) from a decision of a Municipal City Council, Municipal Town Council or District Council under section 117(14) of the Local Government Act 2011;

(iii) under section 7B of the Morcellement Act; and

(iv) under sections 7 and 25 of the Town and Country Planning Act; and

(b) exercise such other jurisdiction as may be prescribed in any relevant Act.

Clearly, pursuant to s.4, this Tribunal is an appellate jurisdiction, empowered to *"hear and determine appeals"*. In that regard, we would agree with the submissions of Counsel for the Respondent that there do not appear to be any compelling reasons why the Tribunal should not hear the rest of the evidence and finally determine the appeal. This reasoning would align with that of Counsel for the Co-Respondent when he stated that there is nothing which limits what the parties can put to the Tribunal, as he quoted, *'[i]n every case, it must be for the Court as a matter of discretion to decide how in all circumstances its jurisdiction can best be exercised to meet the justice of the case..."*.

For present purposes, importantly, there is not enough evidence before the Tribunal to decide whether, as a matter of fact, an increase in wattage would indeed create or accentuate nuisance to neighbouring properties, as Counsel for the Co-Respondent has persuasively argued. And as pointed out by Counsel for the Respondent, the issue of wattage is only expressly addressed in the 10th Schedule of the Local Government Act for payment of licence fees only. There also does not appear to be any specific legal provision for a notice to be put up in respect of electrical equipment. In addition, quite tellingly, Counsel for the Appellants had to accept that the Tribunal had not had the benefit of an expert deponing on wattage.

Finally, the arguments offered on the question of consultation and re-consultation are also inconclusive. The Tribunal notes that Counsel for the Appellant himself accepted upon questioning by the Tribunal that it was not possible to say whether there was a real possibility, as opposed to a purely minimal possibility, that the outcome of the consultations would have been different had the Appellants been re-consulted in respect of the increase in wattage.

For these reasons, the point in law raised is set aside and the Tribunal orders that the case is to proceed on the merits.

Ruling delivered on 30th June 2016 by

Mrs. J. RAMFUL	**Mr. V. Reddi**	**Mrs. A. Jeewa**
Vice Chairperson	**Assessor**	**Assessor**