

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

**ELAT 382/13**

**In the matter of:**

**Roland Haus Co. Ltd**

**Appellant**

**v/s**

**Minister of Environment and Sustainable Development**

**Respondent**

**IPO:**

- 1. Globe Prism Ltd**
- 2. The Permanent Secretary, Ministry of Housing and Lands**
- 3. District Council of Riviere du Rempart**

**Co-Respondents**

**RULING**

1. The present matter is yet to be heard on its merits. Following two rulings delivered on points in law, Counsel appearing for the co-respondent no.2 now moves the Tribunal to strike out Ground 1 of the grounds of appeal on the basis that it has no jurisdiction to adjudicate on matters stated therein and she also raises an objection to evidence being adduced in relation to Ground 1. Counsel for the Respondent and that of the Co-

respondent no.1 also joined in the motion while counsel for the appellant resisted the motion. Co-respondent no.3 decided to abide by the decision of the Tribunal. Arguments were offered.

2. We have duly considered the submissions of all counsel. The issue in dispute here is whether this Tribunal has the jurisdiction to hear Ground 1, which was submitted to amount to a review of the powers of the Minister. Ground 1 is reproduced below:

*"The Respondent was wrong to have issued an EIA Licence in as much as the area upon which villas were proposed to be built on stilts is domaine public which cannot be alienated or prescribed for the purposes of the undertaking, as per the law. Free and unimpeded public access cannot be denied to lands of such status. In the circumstances, no development including the undertaking can lawfully be implemented on the said land and barachois."*

3. As stated previously, this is an appeal lodged pursuant to **section 54 of the Environment Protection Act 2002** [the 'EPA'] before the Environment Appeal Tribunal against the decision of the respondent for having granted an Environment Impact Assessment ("EIA") Licence to the co-respondent no. 1 for the construction of a hotel. The case was subsequently transferred before this Tribunal following the enactment of the **Environment and Land Use Appeal Tribunal Act 2012**. **Section 54(1) (a) (i)** EPA states  
*"(1) The Tribunal shall hear and determine appeal against-*  
*(a) any decision of the Minister-*

(i) *...on an EIA under section 23;*"

**Section 23 of the EPA** in essence sets out the power of the Minister to approve, reject an EIA and also provides the procedure in situations where he is unable to take a decision.

4. The wording of the Ground 1 seeks in essence to challenge the legality of the decision of the Minister of Environment which, as we understand the appellants to be saying, was made on a basis that it was wrong in law. The simple question that this Tribunal needs addressing, therefore, is whether it has jurisdiction to hear issues pertaining to the legality of a decision taken by the decision-making entity.
  
5. This Tribunal, being an appellate body, decides on the merits of an appeal. There is a distinction to be made between deciding a case on its merits and reviewing the way in which a process was carried out. When hearing an appeal, the Tribunal's role is to determine the correctness of the findings as opposed to the legality. A review on the other hand looks at whether due process was followed or whether the decision making body had the power to decide in the first place. In the present instance, what we understand the Appellants to be saying is that the basis upon which the Minister of Environment took his decision was founded on illegal grounds since the undertaking is meant to be carried out on an area found on the public domain, as admitted by all, which is not permitted by law to be alienated nor prescribed since it will have for effect to impede free access by the public, and this cannot be.

6. Now, it may well be that this ground is a valid point but the issue is whether this Tribunal has the jurisdiction to adjudicate upon it. We do not believe so. The discretionary power of the Minister of Environment, as set out under **section 23 EPA**, gives him the power to decide freely on the approval of the EIA. Since the power he exercises is conferred to him by law, this Tribunal is not mandated to review the scope of those powers or the jurisdiction of the Minister even if the claim is that his decision was flawed in that it was based on a so-called illegally obtained lease granted by the Minister of Housing and Lands. **Administrative Law, 7<sup>th</sup> Edition, Wade And Forsyth** – *“It is inherent in all discretionary power that it includes the power to decide freely, whether rightly or wrongly, without liability to correction, within the area of discretion allowed by the law.”*

The question we are being asked to adjudicate on is whether the Minister had the power to decide what he did. If he did not, then that means he acted beyond his powers and therefore acted ultra vires, the remedy of which can only be obtained by way of judicial review before the Supreme Court. In **Fuller V Fotch (1695) Carthew 346**, Holt CJ spoke of *“this diversity, (viz.) that if commissioners had intermeddled with a thing which was not within their jurisdiction, then all is coram non judice, and that may be given in evidence upon this action; but ‘tis otherwise if they are only mistaken in their judgment in a matter within their conusance, for that is not inquirable, otherwise than upon an appeal.”*

7. The jurisdiction of this Tribunal, as an appellate body, is to look at the decision of the minister and decide on the basis of what was placed before him, whether the conclusion reached was correct. If not, then this Tribunal would make the correct assessment. While it can be argued that this is a review of the decision of the Minister, the distinction to be made here is that we are mandated to review the final decision of the Minister as opposed to his decision-making power. Therefore, cases before the Tribunal are heard on the assumption that the Minister of Environment had the power to decide, albeit, that power may have been wrongly exercised, Ground 1 as couched essentially appears to be challenging the legality of the decision-making power of the Minister. A decision making body is given powers on the existence of certain conditions; there are certain preliminary questions that it must decide before it can proceed to the merits.
  
8. We therefore agree with the contention of Counsel appearing for the co-respondent no.2 in that this is not within the remit of the Tribunal under **section 54 EPA**. This Tribunal has to decide whether the EIA should have been granted for the undertaking or not. In other words, it is akin to a fresh decision being taken on the merits of the application independent of the decision of the Minister on the application.
  
9. In view of our finding, we do not deem it necessary to adjudicate on other issues submitted. For all the reasons set out above, the motion of co-respondent no.2 is granted. The case is to proceed on its merits.

Ruling delivered on 8<sup>th</sup> July 2016 by

**Mrs. J. RAMFUL-JHOWRY**

**Vice Chairperson**

**Mr. MOTAH**

**Assessor**

**Mr. BUSAWON**

**Assessor**