

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 445/13

In the matter of:

A. Karim Luckhun

Appellant

v/s

District Council of Moka

Respondent

IPO

Profel Alumium Ltd represented by Arshad Luckhun

Co-respondent

RULING

The present appeal is against the decision of the Council for having granted to the Co-respondent a Building and Land Use Permit ('BLUP') for an existing building to be used for the purposes of manufacturing of 'other' fabricated metal products [that is, a metal workshop] at L'Esperance, Quartier Militaire. The decision of the Executive Committee of the Respondent was communicated to the Appellant, who had objected to the Council against the development, vide a letter dated 7th May 2013. The matter is yet to be heard on its merits before the Tribunal.

Counsel appearing for the Co-respondent raised a point in law at the sitting of the 3rd May 2016 as follows:

The Tribunal will not be able to determine this case in the absence of an expert report and therefore the case should be set aside.

Counsel appearing for the Appellant objected to the motion and the matter was argued. The Council's stand was to abide by the decision of the Tribunal. We have duly considered the submission of both parties. In essence, the submissions made on behalf of the Co-respondent is that the Appellant's case rests predominantly on the issue of noise nuisance and that in the absence of an expert report on noise, this issue cannot be adequately determined by this Tribunal and that the Appellant wasted the time of the Tribunal by stating that an expert report would be filed but that it was finally not forthcoming.

Under section 4 (1) of the Environment and Land Use Appeal Tribunal Act 2012,

*"The Tribunal shall **hear and determine** appeals ...*

(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..."

The Law therefore provides that the matter must be heard and determined. As such at this stage, the case is yet to be heard and therefore, evidence is yet to be adduced. This being the case, can this Tribunal take it to mean, ex-facie the statement of case of the Appellant, that the crux of the case being an issue of noise level, this cannot be done in the absence of an expert report? We do not subscribe to this reasoning. There are several issues raised apart from noise nuisance which includes whether the Council's decision was in compliance with the planning instruments and issues of smell nuisance were raised in the notice of appeal. The statement of case cannot be taken to be evidence at this stage nor can this Tribunal surmise on the evidence, or on the quality of the evidence that is likely to be adduced by the parties during the hearing. The Tribunal therefore cannot take it as a matter of fact that any report or testimony from the expert of the co-respondent or any other expert for that matter, as being the truth without it standing the test of cross-examination. Even if a report is put in, it will be for the Tribunal to decide on the weight to be attached to such evidence. Similarly, the Tribunal cannot pre-judge issues of credibility of witnesses or quality and quantity of the evidence emanating from the testimony of witnesses.

Following submissions of Counsel for the Co-respondent, we have gone through the record and indeed the record shows that the Appellant's counsel, Me. Seeworam, had stated at some point that the Appellant wished to file an expert report but ultimately he informed the Tribunal that it would not be done and gave a reason for not doing so on account of the Appellant's limited financial means. This situation, although agreeably did delay the process before the Tribunal, cannot be used to jeopardize the Appellant's right to be given a proper hearing before the Tribunal.

For all the reasons set out above, we find that the point taken by the Co-respondent's counsel is pre-mature as it entails the Tribunal pre-judging issues. The motion is therefore set aside and the matter will be called proforma for the matter to be fixed for hearing.

Ruling delivered on 9th December 2016 by

Mrs. J. RAMFUL
Vice Chairperson

Mrs. B. Kaniah
Member

Mr.M.A. Busawon
Member