IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[Application under s. 4 (2) of the ELAT Act 2012]

ELAT C1007-2/15

In the matter of:

Yan Hookoomsing & Ors

Applicants

v/s

Le Chaland Hotel Ltd

Respondent

In the presence of:

District Council of Grand Port

Co-Respondent

Ruling

The present application is one for injunctive relief sought by the applicants against the respondent for the construction of a hotel at Le Chaland. The co-respondent is the authority that granted the Building and Land Use Permit ("BLUP") to the respondent. The matter is yet to be heard on the merits, all counsel having elected that I hear the preliminary points in law first and deliver a ruling. In the course of submissions, one of the issues debated was with regard to paragraph 21 of Mr Hookoomsing's first affidavit dated 3rd November 2015 sworn on behalf of all seven applicants. The paragraph addresses the issue of an undertaking in damages and is reproduced hereunder.

" 21) I aver that I am currently employed as a Corporate Sustainability Manager at Hong Kong and Shanghai Banking Corporation Ltd situate at Ebene. I aver that I am not in a financial position to provide any sort of pecuniary undertaking to the Respondent or Co-Respondent. I aver and verily believe that my financial stability ought not affect my position in regard to what is the (essential) of justice in the matter and would therefore humbly pray that the Honorable Tribunal exercise discretion and waive this requirement in the Interest of Justice."

Counsel for all 3 parties addressed me rather lengthily on this issue both in their written and oral submissions. I have duly considered all the points raised and submissions. In short, the stand of the respondent and co-respondent on this point is that the applicants having failed to provide an undertaking in damages, being a condition precedent for injunctive relief, the present application cannot hold. Their argument revolves around paragraph 21 above whereby Mr. Hookoomsing appears to be making an averment relating solely to his personal situation and not on behalf of the applicants. Their contention is that the averment is made in rather vague terms, that he is not in a financial position to give an undertaking in damages and that the averment is silent on the stand of the other applicants on this issue. It was also argued that the co respondent had taken note of the contents of paragraph 21 of the applicants' affidavit and without admitting the contents put them to the proof but that the applicants' subsequent reply to this was simply to reiterate the contents of their affidavit. The applicants' stand is that they are not in a financial position to provide any undertaking in damages and that the affidavit dated 3rd November 2015 was infact sworn by Mr Hookoomsing on their behalf as well. In the interest of justice however, Counsel for the applicants moved that the applicants then present be allowed to give *viva voce* evidence to enlighten the Tribunal as to their financial means. Counsel for the respondent and co-respondent objected to the motion on the ground that this would have for objective to cure a defect in the application of the applicants and that the viva voce evidence would have the effect of forestalling the initial objections taken, hence it should not be allowed. My attention was drawn to a few authorities, which I have considered.

Let it be clear that at this juncture I am to rule on a motion by Counsel for the applicants on whether or not to allow the applicants to give *viva voce* evidence on their stand relating to an undertaking in damages and as to their financial means for the purposes of their own application. I do not deem it necessary to reproduce each argument offered on the point and against it, but it suffices to say that I have considered them all. It is important that the parties understand that the powers vested in me under **section 4 (2) of the Environment and Land Use Appeal Tribunal Act 2012** are equivalent to those of a Judge in Chambers who sits for the purposes of determining an application for injunctive relief pending the hearing of the main case. The rationale for this provision is to equip the Tribunal with a panoply of powers with regard to applications that were previously dealt by the Judge in Chambers prior to the coming into force of the **2012 Act** when appeals were heard before the Town and Country Planning

Board. The point that I seek to make here is that an application for injunction before me is to be dealt with in no different manner than if it were before a Judge in Chambers. **The Supreme Court (Judge in Chambers) Rules 2002** made under **The Courts Act** and **published in G.N No.203 of 2002** provides guidance on the procedure for an application before the Judge in Chambers and the discretionary powers of the Judge is also set out in parts. What is of particular interest is **Rule 8 (c) of the Rules** which stipulates that *"The Judge, may, at the request of one of the parties or acting proprio motu, order that all or any of the parties shall personally attend the hearing of the application in Chambers whenever he considers that such presence will help in the determination or disposal of the application"*. This obviously means that the Judge clearly has a discretion to order any party to enlighten him on any aspect of the application which will help him to determine the application, either on his own volition or at the request of a party and he may do so in the course of the hearing. I am therefore of the view that I do hold the same discretion in the matter.

This being said, the question that I need to consider is whether I need to exercise this discretion in the present matter. The issue ultimately boils down to one of undertaking in damages. The respondent and co respondent have submitted that the averment at paragraph 21 of the applicants' first affidavit, as it reads, seems to suggest that it pertains to the personal circumstances of Mr. Hookoomsing. I agree. But the general tenor of the affidavit does not suggest so nor do I believe I have good reasons to overlook the fact that in the same duly sworn affidavit, at paragraph 2 it is stated that he has been authorized by the Applicants nos. 2, 3, 4, 5, 6 and 7 to swear the affidavit and make the present application. This state of affairs, in my opinion, does lack clarity. I do agree with submissions of learned counsel for the respondent that Mr.Hookoomsing's averment at paragraph 21 is vague with regards to the stand of the other applicants. The counsel for co respondent submitted that when the applicants were put to the proof of the averment of this paragraph, the reply obtained was that the averments were maintained. I cannot agree more that this situation does call for clarity. But the situation that I am faced with is that on the one hand the respondent and co-respondent seem to be suggesting that by law there has to be an undertaking in damages by the applicants which they have failed to give and on the other hand there has been no reason given as to why the applicants should be dispensed from giving such undertaking except an averment drafted in vague terms which seems to come from only one applicant. The respondent submitted in essence that any defence from the applicants will forestall the issue raised. It would appear that the qualm of the respondent and co respondent is that if evidence is forthcoming from the applicants, it would give them the opportunity to give reasons why they should be dispensed from giving such an undertaking. In this context the cases of **Monroe v State Bank of Mauritius 2008 SCJ 73** and **Bank of Mauritius v Chadda & Ors 1997 SCJ 171** were referred to.

I believe that there is a distinction to be made between clarification of matters before the case is heard on its merits and amendment after the case has commenced on the merits and which seeks to bring in a totally different defence. This point was also made in a ruling delivered by Justice Hamuth before the Commercial Division of the Supreme Court in the case **Hems Apparels v State Bank of Mauritius Ltd & Ors 2009 SCJ 419**. In this case to a motion for amendment that the respondent sought to make through an affidavit, the form of which was being challenged by the plaintiff, the learned judge had this to say, "The focus is on the fact that the Court is not here to punish parties for their mistakes in the conduct of their cases, but to decide cases in accordance with their rights...There is a distinction to be made between an amendment which would clarify the issues and one which is in the nature of a totally different defence from that pleaded to be raised by amendment at the end of the trial even on terms relating to an adjournment and as to the defence paying the costs thrown away.." This case, although, not relevant factually to our present case, does I believe show the tendency of our courts to make a clear distinction between amendments sought for changing the initial cause of action and those which seek to clarify existing issues. Incidentally, Me. Aboobakar appeared on behalf of the respondents in this case.

Coming back to the present case, I believe that this is not a question of evidence. The motion being debated is not one which relates to the evidence on the merits but rather a procedural aspect of whether an undertaking must be given and whether that undertaking can, in substance, be given orally. The fact of giving an undertaking (or not giving one), does not go to the substance or merits of the case. It goes to the procedure; and any procedural defect can be cured by the filing of another affidavit on the question of the undertaking. I believe that it would not be in the spirit of the **Environment and Land Use Appeal Tribunal Act 2012** to be unduly legalistic and get bogged down with procedure. Afterall the case has yet not commenced on the merits and no prejudice can at this stage be caused to the respondents. Our Supreme Court also subscribes to these principles especially since the case of **Margaret Toumany & Anor v Mardaynaiken Veerasamy [2012] UKPC 13** where it was observed that our courts, and moreso our Tribunals, should be less technical and more flexible in their approach to jurisdictional issues and objections. The signal sent out from the Law Lords was that our legal system should not be unduly technical to the point that the main issue is overshadowed. They stated that mistakes in the documentation should be identified and corrected as soon as it is practicable and "the court should proceed without delay with the substantive issues raised before it on the merits." The point that the Respondents and Co-respondents seem to be making is that the issue of the undertaking in damages has been scantily addressed and that too only by applicant no.1. It has also been submitted that if they cannot give an undertaking, they will have to satisfy me that they can be dispensed with it under the category of "special circumstances'. These two issues though related are in my view separate issues and the latter issue is premature at this stage. This is why the case of **Belize Alliance of Conservation Non-**

Governmental Organisations v Department of the Environment & Another [2003] UKPC 63 need not be considered here.

The present issues are preliminary issues which the respondents have raised themselves and to which the applicants are seeking to address and clarify. In the interest of justice and so that the rights of the applicants are not jeopardized, I believe that all the applicants should be allowed to enlighten me and all parties as to their financial means. This course of action will neither jeopardize the rights of the respondent and co-respondent nor will it allow the applicants to bring in a new or alternative cause of action in anyway. One should bear in mind that the issue has been addressed by Mr. Hookoomsing in paragraph 21 of the applicants' first affidavit. The issue of undertaking has been addressed. His averment has been described as "sparse" with no indication about undertakings by other institutions on behalf of the applicants or for that matter no indication from the other applicants themselves. This therefore does call for clarification. I am here guided by the reasoning of the Law Lords in the Privy Council case of **Dhoorarika v The Director of Public Prosecutions [2014] UKPC 11**, they had addressed their minds on the issue of fair trial to the appellant. They referred to part of the proceedings that took place before the judge where following the exchange of affidavits and when the case came for hearing the appellant's counsel sought to call the appellant but the judge prevented him from doing so on the ground that the correct procedure was by way of affidavit. The Lords of the Privy Council held "In the opinion of the Board the court should have considered whether justice required that the appellant should have been given the opportunity of giving oral evidence in circumstances where his good faith was in issue and where, if he was convicted, he would or might have been sent to prison. If the court considered that question it would surely have concluded it was not sufficient to say that all relevant material must be in the affidavits. For these reasons the Board concludes that the trial was unfair to the appellant." Here, the case before us has not been heard on the merits yet. Only preliminary points in law have been argued. I fail to see what prejudice will be caused to the respondent and co-respondent. As stated above, it would appear that the qualm of the respondent and co respondent is that if evidence is forthcoming from the applicants, it would give them the opportunity to give reasons why they should be dispensed with the requirement of giving such an undertaking. The respondent submitted that the applicants are seeking to forestall the issue. I do not subscribe to this reasoning. Allowing the motion of the applicants will allow them to give their respective stands as to their ability to provide an undertaking and if not, provide reasons why they cannot do so. It will be for me, as a subsequent exercise, to decide whether they may be dispensed from this undertaking or not. The 2 cases cited by the respondents, I do not believe they are of much relevance in the present context. These relate to parties seeking to change their defence or make amendments to the pleadings that would be tantamount to changing the initial cause of action, that is, which go to the merits of the case. These, unlike the present case scenario, have nothing to do with the procedural point. I therefore disregard them.

For all the reasons set out above, the motion of the applicants is allowed in the interest of justice. Finally, I am also guided by **rule 8 (b) of the Supreme Court (Judge in Chambers) Rules 2002**, where it is stipulated that the judge hearing the application may exceptionally allow any party to the case to file an affidavit or other document after the hearing has been fixed, having regard to a few factors including the nature of the subject matter contained in the affidavit or other document and any relevant consideration amongst others. I am, thus, of the view that in the present case, all the applicants may clarify their stands on the issue of undertaking in damages either by choosing to give viva voce evidence to which they will have to be subjected to cross examination or to give it in the form of a further affidavit to which the other parties may have a final right to reply by way of counter affidavit specifically on the averment of the applicants.

The matter is therefore fixed proforma for the applicants to inform of their stand.

Jayshree RAMFUL-JHOWRY

Vice Chairperson

19 February 2016

<u>For Applicant</u>: Me. Ramsahok with Me. Hematally

<u>For Respondent</u>: Me. Aboobakar, Me. A. Moollan, Me. Ramburn and Me. Carrim

<u>For Co-Respondent</u> : Me. Dodin