BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1764/19

In the matter of:

ECO-SUD

Appellant

v.

The Minister of Environment, Solid Waste and Climate Change

Respondent

In the presence of:

1. **Pointe d'Esny Lakeside Company Ltd.**
2. **Ministry of Agro-Industry and Food Security**
3. **The Ministry of Environment, Solid Waste and Climate Change**

Co-Respondents

RULING

The appeal is lodged against the decision of the Minister (Respondent No.1) to grant an EIA Licence for an "Inland Integrated Residential Development on two plots of land of total extent of 709,648.26 squatre metres" to Pointe d'Esny Lakeside Co. Ltd. (Co-Respondent No.1). A Notice of appeal has been lodged at the Tribunal on the 28th February 2019. The first Statement of Case was filed by the Appellant on the 29th February 2019. Amended Statements of Case were subsequently filed, the last one dated 3rd August 2021.

Preliminary objections have been raised *in limine litis* by the first Co-Respondent, Pointe d'Esny Lakeside Co. Ltd., the first one being that 'Ex facie the Amended Statement of Case and the Grounds of Appeal, the Appellant has no *locus standi* to enter the present appeal inasmuch as it has failed to show that, firstly, it is aggrieved by the decision to grant the EIA licence to Co-Respondent No.1 and, secondly, such decision is likely to cause it undue prejudice, as provided by section 54 of the Environment Protection Act'. The second preliminary objection is that 'the Appellant has not been validly authorised to file the present appeal. There is no valid resolution entitling it to file and lodge the present appeal'. Co-Respondent No.1 therefore moves that the appeal be dismissed with costs.

The Respondent (the Minister of Environment, Solid Waste and Climate Change) and Co-Respondent No.3 (the Ministry of Environment, Solid Waste Management and Climate Change) have also raised the preliminary objection that the Appellant does not satisfy section 54(2) of the Environment Protection Act inasmuch as it has failed to show that it is aggrieved

by the decision to grant the EIA licence and that the decision is likely to cause undue prejudice as provided by section 54(2)(b) of the Environment Protection Act. They have moved that the appeal be set aside for these reasons. Co-Respondent No.2 (the Ministry of Agro-Industry and Food Security) has raised the same preliminary objections as the above.

The matter was set for arguments on the preliminary objections. On that date, counsel for the Appellant made the motion for the issue of *locus standi* which had been raised in the preliminary objection be taken together with the merits. This was objected to by the Respondent and Co-Respondents. The Appellant has argued that it should not be penalised by the simple fact that it is the other party that elected to raise the point *in limine*. Its own position is that the issue of *locus standi* should not be thrashed out before hearing evidence, failing which the Appellant would be at difficulty to establish its standing.

The position of the Respondent and Co-Respondents is that the preliminary objections have been raised *'ex-facie'* the appeal and that the plea *in limine* has been raised whilst accepting the Appellant's statement of case and other pleadings at its best. Based on that, the Appellants cannot proceed with the appeal on the two grounds as raised. Reference was made to the case of **Rama v Vacoas Transport Co. Ltd 1958 MR 184** where the Reviewing Authority highlighted that *"objections cannot properly be heard in limine unless the objector accepts, for the purposes of the argument only, all the facts alleged by the plaintiff but argues that, even accepting them, his opponent cannot succeed"*. This, as per the opposing parties to the appeal, justifies that the plea *in limine* has to be argued at the outset and without hearing evidence at this stage.

Counsel for the Respondent relied in support of her position on the case of **Avigo Capital Managers PVT Ltd. v Avigo Venture Investments Limited 2019 SCJ 158** where the Supreme Court (Court of Civil Appeal) has made a pronouncement on this issue in clear terms: *"Strictly speaking, it makes no sense to refer to a plea in limine as being taken on the merits. The latin words in limine literally mean "at the threshold" and plea in limine is one which is taken as a preliminary point. There can accordingly, in strict logic, be no such thing as "taking a plea in limine on the merits. What Courts and law practitioners have really meant upon agreeing that a plea in limine be 'taken on the merits' is that the point or points raised in the plea in limine will not be argued as preliminary prior to the hearing of the whole evidence in the case but will be raised and debated subsequent to the production of all the evidence in the case"*. Furthermore, it was highlighted in the case of **Avigo Capital Managers PVT Ltd.** (supra) that *"Points which are more appropriately raised in limine are those which, by reliance on the pleadings only and without having recourse to the production of evidence, or by production of a significantly limited amount of evidence in relation to the point raised in limine, could dispose of the case and avoid protracted hearing of the whole evidence in the case"*.

It is our view that the plea *in limine* relates to the standing of the Appellant to bring the appeal before this Tribunal. This, having a direct bearing on the seizure of this jurisdiction, is *'par excellence'* a matter to be decided at the outset. There have been instances where the issue of *locus standi* had been taken after evidence was adduced, namely in the case of AHRIM v. Ministry of Social Security and Environment and Sustainable Development i.p.o Growfish International (Mauritius) Ltd. & Ors. where the plea *in limine* on *locus standi* was addressed

at the close of the case and in submission. In that case, all parties had agreed to this course of action, which is not the case here.

As regards the merits of the plea *in limine* itself, we have given careful consideration to the submission of counsel for the Appellant and the line of authorities relied upon by her, namely the case of **J. F. Chaumiere & Anor. v. The Government of Mauritius 2001 MR 177**, referring to the dictum of Lord Wilberforce in **Ex Parte National Federation of Self-Employed and Small Businesses Ltd. 1982 AC 617:** *"standing should not be treated as a preliminary issue but must be treated in the legal and factual context of the whole case..."*, the case of **Betsy v. Bank of Mauritius 1992 SCJ 199**: *"...we consider that it makes good sense not to determine the standing of the applicant at this stage in isolation from the merits of this application and in the absence of all the evidence that might yet be produced by any party"* and **Kishan Quedou v. The State of Mauritius 2005 MR 123** whereby the appeal was allowed and a wide interpretation was given to the personal interest of the Appellant over a 'domaine public'. We have taken particular note of the submission that when we are dealing with public law and challenges to decisions of Government authorities and in the realm of environment, the issue of *locus standi* should be taken on the merits. Our attention was however drawn to the fact that the above-mentioned line of authorities relates to the context of applications for judicial review, which is a public law remedy whereas the appeal process before this Tribunal is statute driven. A parallel drawn between the present appeal process and the cases of **IUS VITAM ASSOCIATION v. The State of Mauritius 2017 SCJ 1**, which was a Constitutional redress under section 17 of the Constitution and the case of **Tengur v. Ministry of Education 2002 SCJ 48**, another application for redress under section 17 of the Constitution, therefore statute based, the issue of *locus standi* raised in both cases was taken as a plea *in limine*.

In the present case, the Tribunal can only intervene if its jurisdiction is seized by a party who is allowed by the statute to knock at its door. Reference is made here to the provisions of section 4 of the ELUAT Act which confers its jurisdiction to the Tribunal to hear and determine appeals under section 54 of the Environment Protection Act (EPA) (among others). Section 54 of the EPA sets out that *"where the Minister has decided to issue an EIA License, any person who:*

> *(a) is aggrieved by the decision and*
> *(b) is able to show that the decision is likely to cause him undue prejudice, and*
> *(c) has submitted a statement of concern in response to a notice published under section 20*
> *may appeal against the decision to the Tribunal*

The newly added sub-section (c) is a further hurdle that has been brought through an amendment made to the EPA by the Finance Act 2020. These are now the statutory criteria for appeals to be lodged before the ELUAT. Unless these criteria are satisfied, the Appellant will fall short of having the required standing to proceed with the appeal before the ELUAT.

A perusal of the notice of appeal and statement of case filed by the Appellant shows that it has described its objectives as consisting of, inter alia, to protect the environment and to promote the balance between development and protection of the environment. It averred that it has therefore, a legitimate interest in the protection of the natural environment within the territory of Mauritius. The Appellant then detailed out the consultation process that it

had had with the Minister and the different authorities and went on to question several aspects the EIA licence granted to Co-Respondent No. 1.

Nowhere in these 'pleadings' does the Appellant disclose any averment that it is an 'aggrieved party', nor if or how it has suffered 'undue prejudice'. The only nexus between the Appellant and the project is, as per the statement of case, that it has a legitimate interest in the protection of the environment. The terms 'legitimate interest' has a particular legal connotation. It does not suffice to say that being given that the objectives of the Appellant Association consist of, inter alia, to protect the environment, thus it has a legitimate interest.

The ELUAT has made a pronouncement on the status 'derived' from section 2 of the EPA in the case of **Agir pour l'Environnement v. The Minister of Environment & Ors [ELAT 1909/19]**: *"...Section 2 of the EPA lays down a general duty of care on citizens of Mauritius for the environment....this cannot be read as an extension of the specific provisions made by the legislator on who has the capacity to lodge an appeal before the ELUAT. Section 2 also does not supersede section 54(2) of the EPA.....the Appellant has to meet the hurdles set out in section 54(2) of the EPA to be able to bring the general concerns of the citizen within the jurisdiction of the Tribunal".* The Appellant to aver, and establish, that it is aggrieved.

In a ruling given by ELUAT in the case of **David Sauvage & Ors. v. Minister of Social Security, National Solidarity and Environment and Sustainable Development [ELAT 1946/19]**, the Tribunal held that: *"For there to be sufficient interest an Appellant must be able to show that there is a nexus between the proposed development and him in that he must be able to demonstrate the impact that the proposed development is likely to have upon him, irrespective of whether or not it may affect other people but he has to demonstrate that it will affect him"*. No averment of the impact of the project 'quoad' the Appellant has been made. In the same manner the Appellant has not made any averment as to the undue prejudice 'quoad' itself that is required to be shown for it to meet the threshold that is required by the statute for it to enter this appeal.

We agree and endorse the position that the protection of the environment is a matter of concern for all citizens of this country. Indeed, it should be the case, and this is a planetary concern. Yet, in the face of the existing provisions of our legislations, the jurisdiction of ELUAT to hear appeals is statute based. Any party must meet the criteria laid down in those legislations for it to be heard. The Appellant has shown its interest and objectives in the protection of the environment. But its standing (within the definition of section 54 (2) of the EPA) to lodge an appeal before this jurisdiction is not shown.

We shall not consider the third criterion relating to the statement of concern, as this has been enacted after the phase of public consultation for this particular project. We also find no need to address the second part of the plea *in limine*, namely the lack of a valid authorisation, namely the absence of a valid resolution entitling it to file and lodge the appeal.

Based on the above, we find that the plea *in limine* has been rightly taken. The Appellant has not established that it has *locus standi* to proceed with the appeal.
The appeal is accordingly set aside.

Delivered on 6th October 2021 by:

Mrs. V. Phoolchund-Bhadain, Chairperson .....

Mr. Pravin K. Manna, Member .....

Mr. Sujoy Busgeeth, Member .....