BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1878/19

In the matter of :-

Liladhur Gossagne Sewtohul

Appellant

v/s

District Council of Pamplemousses

Respondent

IPO

1. Bardwaj Jekarahjee

2. Namnarain Jekarahjee

Co-respondents

RULING

1. This is an appeal against the decision of the District Council of Pamplemousses ['the Council'] for having refused to the Appellant the granting of a Building and Land Use Permit ['BLUP']. The Appellant, a barrister, raised a two-limbed point in law at the outset which are reproduced hereunder:

   (i) He moves that the statement of the co-respondent be excluded from the evidence of the hearing because the prescribed delay to file same was not observed.

   (ii) He moves that the appeal be allowed because of the reason put forward by the respondent in the electronically generated refusal letter, is prima facie null and void.

2. The motion as regards the second limb was resisted by the Respondent and Counsel for the Respondent while not resisting the first limb, offered submissions. As regards the Co-respondent no.1, after having been accorded time to seek legal assistance, he reverted that he will be abiding by the decision of the Tribunal and the co-respondent no.2 left default. We have duly considered the submissions of both counsel on the issues raised. We do not intend to reproduce any submissions, save where we deem it fit.

(i) Under the first limb: Prescribed delay to file statement of defence not observed.

3. Under the first limb of the point in law, the Appellant offered a three-fold argument to the effect that the statement of defence should have been filed within 21 days of receipt of the statement of case but that the statement of defence of the co-respondent was filed 3 months later, the wording of the law as regards the statutory time frame should be read as a mandatory time frame and that the Tribunal should not consider the prejudice being caused to the Co-respondent.

4. **Section 5(4)(a) (ad) of the Environment and Land Use Appeal Tribunal Act 2012 ['ELUAT Act']** provides *"Any party served with a copy of the notice of appeal, statement of case and any witness statement shall, within 21 days of receipt thereof, forward his reply and comments thereon to the Tribunal, with copy to the appellant."* While we agree that the word "shall" has been used, we do not agree that in the present context it should be read as being imperative. If that was the case then it could have resulted in an undesirable state of affairs whereby each appeal lodged before the Tribunal ran the risk of being heard without the version of one or more parties. This could not have been the intention of Parliament in setting up this Tribunal to hear matters of a public law nature or having public law consequences.

5. In the Supreme Court case of **Quality Soaps Ltd & Anor v M.C.C.B Ltd [1999] SCJ 221** their Lordships decided that the provision of the law whereby the word "shall" is used in that case could only be taken to be directory and not mandatory. In the case of **Globe Prism v The Environment and Land Use Appeal Tribunal IPO Roland Hauss Co. Ltd & Ors [2020] SCJ 99**, it was the contention of the Applicant that section 5 (7) of the ELUAT Act 2012 precludes the Tribunal from extending appeal hearings beyond 90 days without the express consent of the

parties and without a valid reason. s. 5 (7) provides "The Tribunal shall make a determination not later than 90 days after the start of the hearing of the appeal, except where there is a valid reason, and with the consent of the parties". [stress is ours] Their Lordships citing the case of **Quality Soaps** *supra,* observed *"...the provisions of section 5(7) of the ELUAT Act may only be construed as directory, and not mandatory, and cannot possibly preclude the Tribunal from hearing and determining the appeal if it is so minded..."*

6. We have looked at the drafting language used in the preceding provisions under **s.5(4)(a)(aa),(ab) and (ac) of the ELUAT Act,** if the word "shall" were to be read as imperative, it would hinder the proceedings and hence defeat the appeal process before the Tribunal. We, therefore, find that the statutory time frame provided under the **s.5(4) (a) (ad) of the ELUAT Act** is to be construed as being directory and not mandatory. Furthermore, we note that at the time that the Co-respondent filed his statement of defence, there was no objection raised by the Appellant. This being said, we agree with the submissions of Counsel appearing for Respondent that the Appellant seems to be taking conflicting stands in that he chose to have join the Co-respondents as parties and yet chooses to object to their stands and replies being on record. The Appellant did not have to join the Co-respondents but he chose to. Albeit the Co-respondents are objectors, the avenue is always open to the Respondent to call them as witnesses to substantiate the case for the Respondent. Therefore, the Appellant is invited to take a stand as to either have the case proceed with the Co-respondent no.1 being party to the case and have his statement of defence on record or to remove him as a party to the case altogether. The Respondent has already stated that it will not have any objection to this course of action.

(ii) Under the second limb: The reason in the refusal letter is null and void

7. The reason for refusal as stipulated in the refusal letter that was communicated to the Appellant on 6th September 2019 is that *"Proper consent and ID cards from neighbours not submitted for the proposed second floor is at less than 2 metres from the plot boundaries. Consent submitted dates back to 2010. The attached ID cards are not valid and neighbours are complaining about the construction."* It is the contention of the Appellant that the

Respondent has considered the complaint of the neighbours to reject the application of the Appellant and that these objectors should have had recourse to the appropriate forum, which is not the Tribunal, to deal with the objections following the *obiter* in the Supreme Court case of **Baumann v The District Council of Riviere du Rempart [2019] SCJ 311.**

8. We do not agree with the Appellant's interpretation of Baumann *supra*. From our understanding of what their Lordships stated in *Baumann* it is that only someone who has been notified that his application for OPP or BLUP has not been approved is considered a "person aggrieved" within the meaning of **s.117(14) of the Local Government Act 2011 ['LGA']** for the purposes of lodging an appeal before this Tribunal. Therefore, it follows from this reasoning that objectors who are aggrieved by the fact that an applicant has received a BLUP cannot lodge an appeal before the Tribunal as they are not considered as "person aggrieved". However, the law does allow the Council to take on board objections, hence the procedure of notification of a proposed development on a notification plate and by way of publication in the newspapers precisely so that the Council can take on board any objections. The **LGA** does allow the Council to convene meeting to hear objectors. The rationale behind this is for there to be sound planning decisions taken, it is important to take on board how those who are in the neighbourhood will be impacted by the new development. This is particularly apt in residential areas where it may interfere with those who have lived in the neighbourhood for years and subsequently have their peaceful enjoyment of their property disrupted. This can be gauged from policies in relation to developments within residential areas such as **Policy ID2 of the Outline Planning Schemes** which allows the Council to take on board whether nuisance is likely to be caused by the proposed development and whether there are objections from neighbours within a 50-metre radius. Therefore, taking on board objections from neighbours by the Council is part and parcel of planning considerations regulated in our planning instruments such as the Planning Policy Guidance and the policies in the Outline Planning Schemes.

9. This leads us to the next point as regards whether the objectors should have had recourse before another forum. We do not agree that the Council tried to offer the objectors an avenue to be heard before the Tribunal. The Council, having considered the application on the basis of planning considerations as per planning instruments, came to the conclusion that the

application did not satisfy the criterion as regards the consent or objections from the neighbours the moreso as it is within a residential neighbourhood and the issue is one of setback from the adjoining properties of those neighbours. This can also be seen in the statement of defence of the Respondent. The Council was entitled to look at the issue of neighbour consent and the merits of their complaints. Whether any reasonable Council would have come to the same conclusion is a different issue which will be judged on the merits of the case before us and we will not surmise on the issue. On the face of it, however, the Council cannot be taxed for having taken on board the objections which are, in our view, planning considerations. The Council was entitled to and should state the reason for refusal. As stated earlier, the Council may wish call the objectors as its witnesses to substantiate its grounds of refusal or it may choose not to. At the end of the day, it is merely an exercise of substantiating their grounds of refusal and averments with the adequate or most appropriate evidence by the decision-maker as opposed to it being a question of offering an avenue to the objectors to appeal before the Tribunal. Issues must not be mixed. It is the Appellant who is challenging the decision of the decision-maker, he has the control of his proceedings and he chose to put into cause the objectors, thus giving them the opportunity to be heard and have their version placed before the Tribunal with the right of cross-examination. Had the Council rejected the application on the basis of other planning considerations, the Council would still have to prove its averments and align them with the grounds of refusal by adducing evidence.

10. Finally, the Tribunal is mandated under **s.4 of the ELUAT Act 2012** to <u>hear and determine</u> appeals from decisions of the Council. This implies that the Tribunal cannot simply allow the appeal without hearing evidence and the parties. This would be tantamount to a failure by the Tribunal to carry out its functions as statutorily mandated. In the case of **<u>Globe Prism</u>** *supra*, their Lordships observed *"On a careful reading of the Act it is clear that the combined effect of sections 4 and 5 is that, once an appeal has been lodged, it has to be heard and determined by the Tribunal, unless it is summarily dismissed for one of the reasons set out in section 5(8) or is settled."* The Tribunal cannot come to the conclusion that the reason set out in the electronically generated refusal letter is "null and void" as this Tribunal sits on appeal where we have to hear and make a determination. We find no merit on this point in law.

11. For all the reasons set out above we find that the points in law raised are devoid of merit and accordingly set aside. The case is to proceed on its merits. However, the matter is fixed pro-forma should the Appellant wish to take a stand on the joinder or non-joinder of the co-respondents. No order as to costs.

Ruling delivered on 20th December 2021 by

Mrs. J. RAMFUL	**Mr. R. SEEBOO**	**Mr. R. ACHEMOOTOO**
Vice Chairperson	**Member**	**Member**