BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1909/19

In the matter of:

Agir Pour l'Environnement

Appellant

v.

1. The Minister of Environment, Solid Waste Management and Climate Change
2. The Ministry of Environment, Solid Waste Management and Climate Change

Respondents

In the presence of:

1. The District Council of Savanne
2. Ministry of Housing and Land Use Planning
3. Ministry of Agro-Industry and Food Security
4. Spa on the Shores Limited

Co-Respondents

RULING

1. The appeal has been initiated by the Appellant against the decision of Respondent No.1 (The Minister of Environment, Solid Waste Management and Climate Change) for having issued an EIA Licence to Co-Respondent No.4 (Spa on the Shores Ltd.) for the extension of 'Shanti Maurice Resort and Spa' situated at Riviere des Galets, Chemin Grenier. As per the statement of case, the appeal has been brought under section 54 (2) of the Environment Protection Act (hereinafter referred to as EPA).

2. The Respondents, as well as Co-Respondents No.2, 3, have raised a preliminary objection to the effect that the Appellant has not satisfied the requirements of section 54(2) of the EPA, namely that the Appellant is not an 'aggrieved party' and he has not averred that he has suffered 'undue prejudice' as required by section 54(2) of the EPA.

3. The provisions governing appeals before the Environment and Land Use Appeal Tribunal (hereinafter referred to as ELUAT) are laid down in, firstly, section 4 of the ELUAT Act, which confers jurisdiction on the ELUAT to hear and determine appeals brought under section 54(2) of the EPA. Secondly, section 54(2) EPA, which provides that "Where a Minister has decided to issue an EIA licence, any person aggrieved by the decision and is able to show that the decision is likely to cause him undue prejudice may appeal against the decision to the Tribunal".

4. The Appellant has stated in its statement of case (SOC) that it is a registered association having amongst its objects the protection of the environment and is directly concerned with the conservation of wetlands and other natural resources in Mauritius. In its reply to the statement of defence (SOD) put in by the Respondents and Co-Respondent No.2 and 3, the Appellant stated that has locus standi to enter the appeal in as much as many of the issues raised in the appeal involve public or community interest rather than traditionally recognised private rights. Furthermore, it is a public interest organisation and by entering the present appeal it is protecting the public interests of the present and future generations. The Appellant also relied on section 2 of the EPA, its reading of this section being that it includes the Appellant as an interested person to enter this appeal.

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7. Preliminary Objection:
We have considered the submissions counsel for the respective parties. At the outset, we make an observation on whether the objection raised should be dealt with at the preliminary stage or after adducing evidence. Reference was made by counsel for the Appellant to the case of AHRIM in support of his motion to adduce evidence. We note that the issue of the failure to meet the requirements of section 54(2) of the EPA had been raised as a preliminary objection by the Respondents and Co-Respondents No.2 and 3. The Appellant did not object to this course of action, nor did he state that evidence would be adduced for the purpose of the arguments. This differs from the case of AHRIM (supra), where all parties had agreed to make submissions on the preliminary objection on locus standi after adducing evidence. We have taken note of the reliance placed by the Appellant on the case of

Chaumière and anor v. Government of Mauritius[1] where the court referred to English cases and pointed towards 'the increasingly liberal approach to standing on the part of the court' and the position that 'standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case'[2] and the case of **Quedou v The State of Mauritius**[3] referring to " English law has set down the guideline that questions as to standing should not be dealt with at leave stage, which safeguards against the adoption of a more restrictive approach regarding access to courts". It is also noted that both were cases that were application for leave for judicial review where the applicant has to show an arguable case for it to proceed. In the present matter, the matter is an appeal lodged under statute where section 54(2) EPA sets out the preconditions for the appeal to be entertained by this jurisdiction. The preliminary objection seeks to bring a bar to the appeal, and this, ex facie the pleadings. No objection had been raised to submissions being made to thrash out the preliminary objection at the outset. Submissions having already been made by the Respondents and Co-Respondents. The motion of counsel to adduce evidence would tantamount to an attempt to cure the very point that was raised in objection.

8. Jurisdiction under section 54(2) EPA:
   Section. 54(2) of the EPA provides that: *"Where the Minister has decided to issue an EIA licence, 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, may appeal against the decision to the Tribunal".* The two prerequisites that open the doors of the jurisdiction of the ELUAT are clearly laid down in the abovementioned provision. The Appellant has to aver that he is an aggrieved person and to show same and he has to aver and show that there is likelihood of undue prejudice.

9. Aggrieved party:
   The Appellant has averred in its statement of case that it is an interested party in this decision. It has been submitted on behalf of co-respondent No.4 that the Appellant has averred that it is an 'interested party' and failed to aver that he is an 'aggrieved party'. Although we understand the 'nuance' that the co-respondent wants to show, we are not convinced that by the mere fact that the Appellant is an 'interested party' disbars it from being an 'aggrieved party'. These two are not, in our view, mutually exclusive. Although section 54(2) EPA refers to 'aggrieved party', the general requisite for one to have locus standi is that one has 'sufficient interest' in the matter. The requirement of 'sufficient interest' has been recognized by courts[4]
   Ex-facie the pleadings (paragraph 9 of the statement of defence), the Respondent has highlighted that the notice of public consultation was given by the Respondent and the Appellant has never submitted any comment on the EIA report on the said project. This has not been rebutted by the Appellant in its reply and does raise an interrogation on the 'interest' that the Appellant had in this EIA.

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[1] Chaumière & Anor v Government of Mauritius 2001 MR 177

[2] Ex parte National Federation of Self-Employed and Small Businesses Ltd. cited in R v. Secretary of State For Foreign And Commonwealth Affairs ex parte The World Development Movement [1995] 1 WLR 386 at p 395

[3] Quedou v The State of Mauritius 2005 MR 123

[4] R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2) 1994 4 All ER 329

We concur with the ruling given by the ELUAT in the case of **David Sauvage & Ors. V. Minister of Social Security, National Solidarity and Environment and Sustainable Development**[5] which states 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. It may or may not affect other people but he has to demonstrate that it will affect him"*. The Appellant has not averred this. The Appellant seems to labour in its action for public and community interest as stated in its averments (paragraph 4 above). Case law has time and again laid down that public interest litigation is alien to the Mauritian jurisdiction.[6] This position has been again reiterated by the Supreme Court in the matter of **Rouben Mooroongapillay & Dr. Vinaigum Veeraragoo v. 1. The State of Mauritius & others i.p.o World Health Organisation & Larsen and Toubro Ltd. April 2021**, where the Judge in Chambers declined to grant an order in the nature of an injunction and stated that "The application is in the nature of public interest litigation which is not applicable in Mauritius".

We distinguish from the determination given by the ELUAT in the consolidated cases of **AHRIM v. Ministry of Social Security, National Solidarity and Environment and Sustainable Development & Anor i.p.o Growfish International (Mauritius) Ltd. & Ors. and The Sea Users Association & Others v. Ministry of Social Security National Solidarity and Environment and Sustainable Development & Anor i.p.o Growfish International (Mauritius) Ltd. & Ors.** [7], where this Tribunal allowed the appeal to proceed and ruled that the Appellants had locus standi on the ground that both AHRIM and Sea Users Association were acting to protect the interests of their members. This is not the case in the present matter. The Appellant has unequivocally stated in its reply to the statement of defence of Co-Respondent No.2 that it is a public interest organisation and 'by entering this appeal the Appellant is in fact protecting the public interests for the present and future generations'.

10. Undue prejudice

In the same manner, ex facie the pleadings, in the grounds of appeal as couched, there is no reference to the impact of the breaches therein on it. The Appellant has failed to show likelihood of undue prejudice 'quoad' itself. This is an essential requisite as per section 54 (2)(b) of the EPA for the jurisdiction of the ELUAT to be seized. Absence of this criterion is fatal.

11. Environmental Stewardship:

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[5] David Sauvage & Others v The Minister of Social Security, National Solidarity and Environment and Sustainable Development & Anor ELAT 1746/19

[6] S. Tengur v. The Ministry of Education & Scientific Research & The State of Mauritius i.p.o The R.oman Catholic Education Authority and Y. Dinnoo v. The Ministry of education & Scientific Research & The State of Mauritius i.p.o The RCEA, The Ministry of Education and Human Resources & Anor. v. La Societe de l'Histoire de l'Ile Maurice & Others i.p.o Marbobois Ltee & Anor 2016 SCJ 445

[7] AHRIM v. Ministry of Social Security, National Solidarity and Environment and Sustainable Development & Anor v. Growfish International (Mauritius) Ltd. & Others ELAT 1502/17 and The Sea Users Association & Others v. Ministry of Social Security, National Solidarity and Environment and Sustainable Development & Anor v. Growfish International (Mauritius) Ltd. & Others ELAT 1507/17

The Appellant has referred lengthily to its locus standi derived from section 2 of the EPA. This section provides as follows: "Environmental stewardship: It is declared that every person in Mauritius shall use his best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius".

The Appellant's stand is that, firstly, section 2 of the EPA is a blanket provision and secondly, section 54(2) EPA cannot curtail the general provision contained in section 2 of the EPA. Furthermore, the Appellant contends that the recognition of the general responsibility of the citizen that this section places upon it, being an association working for the protection of the environment and for the conservation of wetlands and other natural resources, this confers to it the 'locus standi' to lodge the present appeal.

We have reviewed the pronouncements referred to by the Appellant on this:

In **Ricot v. Mauriplage Beach Resort Ltd.**[8], it was held that "although the Act was passed to ensure adequate protection of the environment for the general public benefit, there is nothing which prevents a particular member of the public who suffers special prejudice from a decision under the Act to seek relief for the protection of his legitimate personal interest...." (*underlying is ours*).

In **IUS AD VITAM Association v. The State of Mauritius & Others**[9] the Supreme Court reiterated the need for a plaintiff to have the required locus standi to enter a case for constitutional redress under section 17 of the Constitution. Reference was made to the case of Tengur (supra) which maintained the position that 'public interest litigation is alien to out jurisdiction'.

Reference was also made to the judgment of the Judicial Committee of the Privy Council in **Mirbel v. The State of Mauritius** [10]. Lord Phillips stated that: "Section 17(1) of the Constitution is designed to afford an additional or alternative remedy for someone who contends that one or more of the fundamental rights that he enjoys under Chapter II of the Constitution have been, or are likely to be infringed. The section provides for a personal remedy for personal prejudice. It is not an appropriate vehicle for a general challenge to a legislative provision or an administrative act, brought in the public interest. This is made clear by the phrase "in relation to him" in section 17(1)."

In the case of **Tacouri v. Feroze Mohamud & Ors**[11], the importance of section 2 was outlined: "Section 2 in the House Rules of the drafting of Mauritian Laws is the definition section. The legislator's decision to make an exception thereto and replace it by a national pledge and move the definition section to section 3 is indicative of the high importance he attached to the commitment. Both the citizen and the State have taken the pledge contained in section 2 that they would use their "best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius".

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[8] Ricot & Ors. v Mauriplage Beach TResort Ltd. i.p.o. The Director of Department of Environment EIA Desk & Anor 2004 SCJ 329

[9] IUS AD VITAM Association v. 1. The State of Mauritius 2. The Attorney General 3. The Ombudsperson for Children 2017 SCJ 1

[10] Marie Jean Nelson Mirbel & Others v. The State of Mauritius & Others 2010 UKPC 16, applied in The Ministry of Education and Human Resoiurces & Anor. V. La Societe de l'Histoire de l'Ile Maurice & Others i.p.o Marbobois Ltee & Anor 2016 SCJ 445

[11] Mr. Preetam Tacouri & 9 Others v. Mr. Feroze Mohamud & Others 2010 SCJ 13

What is important for us to consider is whether, as submitted by the Appellant, the general pledge as contained in section 2 of the EPA is a ground that would justify a departure from the restrictive approach to 'public interest litigation' as propounded in the authorities mentioned above.

We have given due consideration to the submission made by counsel for the respondents and co-respondents respectively.
We note the case of Ricot (supra) lays down the requirement of *'personal prejudice'* suffered by the person challenging the decision. The judgment of Mirbel (supra) also refers to *'personal remedy for personal prejudice'*.
We agree with the submission of the Respondents which is to the effect that section 2 of the EPA lays a general duty of care on citizens of Mauritius for the environment, and that 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 may have the interest of the community and the future generation, as it has spelt out in the statement of case. But it still has to meet the hurdles set out in section 54(2) EPA to be able to bring the general concerns of the citizen within the jurisdiction of the Tribunal. This, the Appellant has failed to do.
For these reasons, despite the wide scope of the declaration on environmental stewardship under section 2 EPA, this does not exempt the Appellant from meeting the requirements laid down in section 54 (2) EPA. We concur with the submission made on behalf of Co-RespondentNo.1 that the authorities relied upon by the Appellant deal with judicial review which by definition involve a public law right which may have been breached and an arguable case has to be shown, as opposed to the present situation where the criteria for assessing locus standi have been clearly set out in statute, namely section 54(2) EPA.

For all the reasons given above, we allow the preliminary objections raised by the Respondents and Co-respondents. The appeal cannot proceed and is set aside.

Delivered by:

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

Mr. P. Manna, Member .....

Mr. S. Busgeeth, Member .....

Date 7 May 2021