BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 2083/22

In the matter of:

Mr. Rishikesh Hurdoyal

Appellant

v.

1. **The District Council of Flacq**
2. **Alteo Properties Ltd.**

Respondents

Ruling

The Appellant has lodged the present appeal against the decision of Respondent No.1 for having refused to grant a permit for the construction of a reinforced concrete building at ground and first floors for residential purpose and the erection of a boundary wall along the public road only in the village of Trou d'Eau Douce.
As per the decision of the District Council, communicated to the Appellant through the National electronic Licensing System, the decision of the Permits and Business Monitoring Committee dated 25th June 2021 had been taken under section 117 (8) (b) of the Local Government Act 2011.
The hearing proceeded as per the grounds of appeal raised by the Appellant. At the very outset, counsel for the Respondent drew attention to the fact that the appeal had been entered under the wrong section of the Local Government Act, namely under section 117 (8)(b), which relates to an application made by a micro-enterprise or a small enterprise registered under the Small and Medium Enterprises Act. Counsel for the Appellant moved to cure this defect by amending the section and replacing it by section 117(14) in the Statement of Case. This was not objected to by the Respondents and the amendment was granted and the hearing proceeded.

It is at the stage of the cross examination of the representative of the Respondent, Mr. Bundhoo, that the motion, subject matter of the present argument was raised.
It came out in the evidence of Mr. Bundhoo that the Appellant had made a first application in around May 2021 for the construction of a residential house. This had been rejected, the refusal having been made under section 117 (8) (b) of the Local Government Act. Mr. Bundhoo explained that reference to this section was a typing mistake. A second application for a permit was made by the Appellant in January 2022. The witness was thoroughly cross examined on the grounds for declining the second application. It came out that the said refusal was again made under section 117 (8) (b) of the Local Government Act.

Section 117(8) of the Local Government Act provides for the procedure to be followed for an application for an Outline Planning Permission and a Building and Land Use Permit made by a microenterprise or a small enterprise registered under the Small and Medium Enterprises Act 2017 and sub-section (b) relates to the notification of the applicant in writing should the application be declined. Clearly this section, referred to in the decision communicated by the National Electronic Licencing System (NELS), does not apply for the assessment of the Appellant's application, which is one for the construction of a reinforced concrete building for residential purposes. This discrepancy has been explained by Mr. Bundhoo as a typing mistake.

In the light of the evidence thus adduced, the Appellant made a motion that the appeal be allowed and that the BLUP applied for be deemed to be granted being given that his application for BLUP to Respondent No.1 was processed under the wrong section of the law.

Counsel for Respondent No.1 objected to the motion on two grounds: firstly, that the motion comes very late in the date and, secondly, counsel relied on the amendment that the Appellant had made to the Statement of Case at the initial stage of the hearing, to which the Respondents had not objected.

We have given due consideration to the submissions made by the Appellant and counsel for Respondent No.1, Respondent No.2 having aligned itself on the latter's submissions.

Firstly, it must be pointed out that there is no legal impediment for a party to raise a point in law at any stage of the proceedings. This principle has time and again been propounded by courts. (Vide case of **Jekarahjee B v The State of Mauritius [2009 SCJ 227]** where the Supreme Court held that *"it is an established principle that a defence in law can be raised at any stage of the proceedings before the judgment..."*. Reference was made to the case of **De Lamothe v Government of Mauritius [1895 MR 88]** cited in the case of **Ww. Baruth v Bundhun [1959 MR 153]**, the relevant quotation from that judgment being as follows: *"It is evident that a defendant cannot be deprived of the right to raise a defence in law at any stage before judgment, and this, irrespective of whether the defence will succeed or not..."*

Secondly, by counsel for the Respondent made reference to the fact that the Appellant had himself entered the wrong section of the law in the Statement of Case filed for the present appeal, and that the other parties had not objected to his motion to amend his Statement of case to insert the correct provision. Therefore, it would be unfair for him to raise the said point at this stage.
We have considered the submission in support of this proposition. Indeed, the Appellant did move to amend his Statement of Case to delete section 117(8) (b) and replace it by section 117(14) and no objection had been raised. Yet, we find no correlation between this amendment and the fact that the decision of the Council makes reference to Section 117(8)(b). The fact that the Respondents had agreed to the amendment made to the Statement of Case does not cure the defect in the decision taken by the Respondent under the wrong provision of the Local Government Act. These are two distinct issues. Counsel for Respondent No.1 also submitted that the merits of the present application have to be looked into and that sections 117 (7)(b)

and 117(8) (b) only differ to the extent of the delay in assessment of the application and, as such, this is not fatal.

In the case of **Margaret Toumany and Anor v Mardaynaiken Veerasamy 2012 UKPC 13**, the Judicial Committee of the Privy Council highlighted the need for courts to be more flexible in their approach to jurisdictional issues and objections. The present matter differs. Unlike a simple procedural flaw, it is the basis of the decision (the legal provision under which the Council acted) that is questioned. The representative of Respondent No.1 gave the explanation that this was a typing mistake and it was submitted by counsel that this does not go to the root of the appeal.

Although this is not part of the issue before us, we note that a similar mistake has occurred on two successive occasions in respect of two applications submitted by the same applicant (whilst keeping in mind that it is only the second application that is presently under appeal). Being given that Respondent No.1 is a public body, whose decisions have far-reaching consequences, it cannot be said that no prejudice has been caused to the Appellant. The basis of the decision, as communicated to the Appellant, and which is the subject of the appeal, is defective. This, in our view, goes to the root of the decision and it has the consequence of rendering the decision itself defective.

The consequence of this defective decision is what brings us to consider the second limb of the motion of the Appellant, which is that the application is deemed to be approved.

For the application to be deemed to be approved, there are certain requisites. These are:

1. No decision has been communicated within two days of the due date,
2. The applicant pays the relevant fees
3. The applicant pays the penalty fee if required.

These are laid down in Section 117 subsection (11) (a) which provides as follows:
"*Subject to paragraph (b), where an applicant has not been issued with a Building and Land Use Permit or has not been notified that his application has not been approved under subsection referred to in (7) or (8), as the case may be, within two working days of the expiry of the due date, the application shall, on payment of the fee referred to in subsection (10) and, where applicable, on payment of the penalty fee referred to in section 127A(5)(a), be deemed to have been approved...*"

In the present matter, a decision has been communicated to the Appellant and the latter, being dissatisfied with the decision has appealed against it. This decision is now ruled to be defective. Although the decision is void *ab initio*, we cannot stretch it to say that this could give rise to the operation of section 117 (11) (a) of the Local Government Act (LGA) and this would have a retrospective effect. The nullity of the decision has only been raised now, after the appeal has been lodged and the hearing having reached this stage. Also, we cannot overlook the fact that the Appellant has admitted, in the course of the hearing, having done his construction without a BLUP and this amounts to an 'aveu judiciaire' which cannot be retracted.
Furthermore, for the operation of section 117 (11) (a) of the LGA, the applicant ought to have paid the required fees. There is nothing on record that suggests that the Appellant has done so.

Being given the defect in the decision as communicated to the Appellant and that the decision is thus void *ab initio*, we have no alternative than to uphold the first ground raised and allow the appeal on that ground. We find that there is no need to look into the other three grounds of appeal.
Furthermore, we refer the matter back to the District Council for it to consider the conditions that it deems necessary to impose and the relevant fees and penalty if applicable.

Ruling delivered on 15th May 2023 by:

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

Mr. R. Acheemootoo, Member .....

Mr. M. S. Suffee, Member .....