

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

ELAT 298/12

**In the matter of:**

**NUNKESHWAR BAROSAH &ORS**

**Appellant**

**v/s**

**MAHANAGAR TELEPHONE (MAURITIUS) LTD & Anor**

**Respondent**

**IPO**

**THE MOKA/FLACQ DISTRICT COUNCIL**

**Co-Respondent**

**RULING**

The present appeal relates to a decision taken by the Town and Country Planning Board [hereinafter referred as the 'TCPB'] for having upheld the decision of the Co-Respondent to grant a Building and Land Use Permit to Respondent, Mahanagar Telephone (Mauritius) Ltd [hereinafter referred to as 'MTML'] for the installation of a Telecommunication Tower at Camp des Pecheurs, a Morcellement.

It should be noted that this is infact an appeal of an appeal which was already determined by the Town and Country Planning Board, and which has not been made a party to the present appeal. A notice of appeal was lodged before the Tribunal together with some annexures.

## THE PARTIES

The matter was first called proforma on the 15.01.13, counsel replacing Me. De Speville for the Appellants stated that MTML and Mr Jugun are the Respondents and that the council is a Co-Respondent. The Tribunal made remarks to that effect and she was asked to seek instructions and sort out the matter. The matter was fixed for 7.2.13. On that day attorney replacing attorney for the appellant reiterated that Mr. Jugun and MTML have been "styled" as Respondents and the Council as Co-Respondent. The matter was fixed for stand. The stand subsequently communicated to the Tribunal on 5.03.13 was that the present appeal is to be maintained. The case was then fixed for mediation/consultation twice which was unsuccessful and at the 5<sup>th</sup> sitting, counsel for MTML raised the point that the Tribunal was the wrong jurisdiction for an appeal against the TCPB. The Tribunal was alive to the fact that the TCPB was not put into cause from the outset when the Appellants informed us in January that the Respondents were MTML and Mr Jugun. How can an appeal be lodged against MTML and a private individual when these are not decision making bodies? But despite having given several opportunities to the Appellants, this was not rectified and it would appear that they did not address their mind to the fact that an appeal in the first place should be directed against the body who took the decision. The Tribunal totally agrees with the contention of Mr Gunesh, attorney for the council that TCPB should have been put into cause but in order not to condone such confusion when lodging an appeal and to prevent further delay and abuse of the process, the Tribunal decided to hear the arguments. From the very outset, this appeal can be set aside on the basis that the proper parties have not been put into cause. It is to be noted that no formal motion to add the TCPB was forthcoming from the Appellants. However, since counsel for the Appellant sought clarification on the law, we would rather proceed to analyse the point argued.

## THE ARGUMENT

It is the contention of counsel appearing for the MTML that the Tribunal is the wrong jurisdiction for an appeal against the TCPB as there is already an appeal before the Judge in Chambers with respect to the same case and therefore the present appeal is an abuse of the process.

The motion is resisted. We have duly considered the submissions of all parties.

The decision that is being appealed against was taken on 30 October 2012, therefore the applicable Act is the *Town and Country Planning Act 1954* as amended and updated in 2012.

The Appellant's counsel submitted mainly on *section 7(8) of the Town and Country Planning Act* to state that the Act provides that a person aggrieved by the decision of the TCPB may appeal to the Tribunal in accordance with the Act. He also referred us to *section 9(3) of the Environment and Land use Appeal Tribunal Act 2012* [hereinafter referred to as ELAT Act] which deals with Transitional Provisions to say that in this case since the matter was no longer pending before the TCPB, the present appeal can be entertained by the Tribunal.

Me. Z Mohamed, Counsel for MTML, submitted in essence that since there already is an appeal with respect to this case before the Judge in Chambers the Tribunal has no jurisdiction to hear the same appeal. He referred to *section 9 (2) of the ELAT Act* to say that the law was very clear on this issue.

Attorney for the Council, Me. Gunesh submitted that the TCPB should be put into cause.

Having considered the appeal, the motion of counsel and submissions, we believe that there are 2 issues to these arguments. Firstly, does *s. 7(8)* infact provide for a person aggrieved by any decision taken by the TCPB to lodge an appeal before the Tribunal? Secondly, once an appeal has been lodged before another forum, can this Tribunal entertain the same appeal?

As far as the first issue is concerned, *section 7(1) of the Town and Country Planning Act* states "*Notwithstanding any other enactment, this section and section 8 shall have effect in relation to any area which is the subject of an Order under section 6.*"

From the very outset, *sections 7 and 8* have been restricted in their application to deal with those parties who are aggrieved by decisions taken in respect of any Order made under *section 6*. *Section 6* deals with the Order by the President to declare an area a planning area. It is important to note that prior to the coming into force of the *ELAT Act 2012*, the TCPB had amongst others, two main functions, one which was to hear and determine appeals stemming from applications for Development Permit to the local authority or Morcellement Board, a function now exercised by this Tribunal, and the other was preparation of outline planning schemes. The latter function is still retained by the TCPB. *Section 6 (1) (a)* provides that where the TCPB is of the opinion that a planning scheme should be made in respect of an area, it shall make representations to the President who will then consult the local authority and may then declare the area a planning area. A planning area essentially means an area where development can take place and if so, it needs to be regulated by planning instruments. In order to demarcate a planning area, there needs to be an outline and this outline is regulated by a development scheme called the Outline Scheme. The TCPB, is empowered under *s.11 of the Town and Country Planning Act* to prepare such schemes.

This being said, our reading of *section 7(8) of the 1954 Act as amended*, when read in conjunction with *s.7(7)* caters for the **specific scenario** where a decision taken by the TCPB can be reviewed by this Tribunal. That is where the President makes an Order declaring an area a planning area for which an Outline Planning Scheme is under preparation at the TCPB and the local authority grants a permit contrary to the scheme under preparation, for instance a permit for a development outside a planning area. In such instances, the Board has the power to inquire into the facts and subject to the Minister's approval, direct the local authority to cancel the permit. Any party aggrieved by this decision of the Board may appeal to the Tribunal under *s.7(8) of the Town and Country Planning Act as amended*.

The present facts can be clearly demarcated from the above scenario and therefore, we subscribe to the view that *s.7(8) of the amended Town and Country Planning Act* does **not** provide a blanket provision for any decision of the TCPB to be contested before this Tribunal. A decision which was taken by the local authority, challenged before and ruled upon by the TCPB cannot be further challenged before this Tribunal as it does not fall within the ambit of its jurisdiction as set out under *s.4 of the ELAT Act 2012*. Moreover, the jurisdiction of the TCPB to hear and determine appeals from local authorities has now passed on to this Tribunal. The Tribunal cannot therefore hear an appeal which was disposed of by the TCPB rightfully exercising powers which now lie with this Tribunal.

We now turn to the second issue which is of academic interest here. It stems as a matter of logic that the self-same appeal cannot run concurrently in 2 different forums. If we have to refer to the law to support this contention, the appeal of the decision of the local authority in this case was heard by the TCPB (as per annex 2 of the Appellant's notice of appeal) on the 10<sup>th</sup> September 2012 by virtue of *s.117 of the Local Government Act 2011* before the Act was amended by *section 8 of the ELAT Act 2012*. Under the old law, all decisions of the TCPB could only be appealed before the Judge in Chambers, by virtue of the *Town and Country Planning Act 1954*. Eventhough the proceedings had not been lodged before the Judge in Chambers at the commencement of the *2012 Act*, this Tribunal, cannot as stated above, hear an appeal against a Board from whom it has taken over its appellate jurisdiction. An appeal cannot lie laterally. In fact the intention of the legislator in inserting the transitional provisions in the *2012 Act* is so that an appeal is dealt with by a single forum. The whole *raison d'être* of transitional provisions is precisely to avoid duplication of process. This being our finding,

we agree with the submissions of counsel appearing for MTML that since the appeal from the decision of the TCPB has already been lodged before the Judge in Chambers, by virtue of *section 9 (2) of the ELAT Act* the matter shall continue to be dealt with by the latter.

For all the reasons set out above, we find that the point in law by Me. Z. Mohamed was rightly taken and we set aside this appeal.

Ruling delivered on 27<sup>th</sup> December 2013 by

**Mrs. J. RAMFUL**

**Vice President**

**Me. V. REDDI**

**Assessor**

**Mr. G. SEETOHUL**

**Assessor**