IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 163/12

In the matter of:

AKM RANA CO.LTD

Appellant

v/s

Municipal Council of Vacoas-Phoenix

Respondent

RULING

The present appeal is against the decision of the Municipal Council for having refused to grant the Appellant, represented by Mr. Masood Rana, a Building and Land Use Permit ('BLUP') for the setting up of a Filling Station and a General Retailer Shop at La Croisee Diolle Vacoas. The ground of refusal was communicated to the Appellant vide a letter dated 6th September 2012 signed by the Chief Executive of the Municipality. The application for BLUP was refused on the ground of unfavourable views obtained from the Traffic Management and Road Safety Unit ('TMRSU') and the Road Development Authority ('RDA') and that the development did not comply with the Planning Policy Guidance ('PPG') on Location and Site of a Filling Station.

On the day of the hearing Me. J. Beeharry, for the Appellant, stated that there was a joint motion that the point in law he wished to raise might dispose of the case altogether. The record does not show any objection by Me. Lobine appearing for the Respondent. For the purposes of the Argument, Me. Lobine tendered Miss Ramroop, Acting Head, Planning Dept of the Municipality for cross examination. She was then re-examined and submissions were offered.

The motion of the Appellant is that the Council has acted illegally through the letter dated 20th June 2012 under the signature of one Mr. Phul, by changing the effective date contrary to the provisions of the Local Government Act and in so doing, the decision of the council to reject, to refuse the application of the Appellant is null and void. Therefore, the Business Facilitation Act

which is incorporated in the Local Government Act should prevail so that the appellant be allowed to pay the required fee and be granted the relevant BLUP.

We pause here to state that Me Beeharry did not clarify whether he was asking the Tribunal to find that the decision taken by the Council was null and void because the latter did not have the power to extend the effective date and/or because the decision it took was outside the 14 day period from the original effective date, that is the 5th June 2012, as per the provisions of **section 117 (7) Local Government Act 2011** which is the applicable law.

We have duly considered the submissions of both counsels and all evidence adduced.

From the outset we wish to state that decision-making body acting outside the powers conferred upon it by law, in other words illegally or *Ultra Vires*, the appropriate procedure is by way of Judicial Review before the Supreme Court. This being said, however, the motion as couched before us requires some clarification on the position in law in relation to the issues canvassed in the course of these Arguments.

Now the crux of the matter is whether Mr. Phul, head of the Planning Department was entitled to change the effective date. From the documents submitted, it appears that the Appellant duly submitted his application which was received at the Council on 5th June 2012 and he was asked in the same letter to call at the Planning Department on 26th June 2012. The Appellant subsequently received a letter dated 20th June 2012 signed by Mr. Phul to state the Council was carrying out consultations with certain Authorities and the reason for it was given and he further stated "..Consequently, the effective date given to your application no longer applies and you will be informed of the progress of your application in due course." This brings us to our first question, what is the effective date and whether this date can be changed?

1. What is the effective date? Definition

The Interpretation Section, **Section 2 of the Local Government Act 2011** (hereinafter referred as **'the LGA'**) describes *' "**effective date**" in relation to an application made under Sub-Part F of Part VIII of the Act, to mean the date by which all the information, particulars and documents specified in the application form are submitted.'*

Unfortunately in the present case a copy of the appellant's application form was not filed before the Tribunal for us to appreciate whether all the required documents and information had been submitted by the applicant, now appellant. However, we do agree with Me Beeharry's submissions on this issue as borne out in evidence. The letters issued by the Council to the Appellant speak for themselves. Should any document or information have been missing,

the Council would not have accepted the Appellant's application. Me Beeharry filed before the Tribunal is a BLUP guide, which generally offers step-by-step guidance to the public as to how to make an application for a BLUP and the requisites and the procedure that the local authority adopts to determine the application. It does not have the force of law but is prepared by the local authority to assist the public. At **step 5** under the sub-heading **Submit your application**, it appears that the Council advises the applicants to call in personally at the Planning Department to submit their applications so that the Council can check whether the form has been duly filled out and all necessary information provided.

The first acknowledgment receipt was undated but bore the stamp of the Planning Department clearly accepted the application of the Appellant that too at the Planning Department. In a rather clumsily drafted way the letter stated "An effective date ***will*** now be given to your application and it will be processed.....within 14 working days". In the very next paragraph he was asked to call at the Planning Department on 26th June 2012. The letter dated 20th June 2012 again talks of the effective date given to the Appellant's application was no longer be applicable. Therefore, we find that there was no confusion in the minds of both parties that the effective date was the 5th June 2012 and that an effective date is only given once the form and all required documents and information as per the application form have been submitted.

The next question that springs to mind is what happens once the documents are handed in, are they reviewed and by whom? To understand the decision-making process at the Council and its processing of an application this should have been canvassed but it was unaddressed by either party. It could have only been answered by the representative of the Council. The law does not clearly state the process, however, some guide lines are offered in the BLUP guide produced.

The next question that then comes to mind is whether once all the documents, information and particulars have been submitted and stamped and the application becomes effective, in other words and effective date is given, can that effective date be changed? If so, on what grounds?

2. Can the effective date be changed? On what grounds?

The **Local Government Act 2011**, while it defines what 'effective date' means, it does not provide expressly any circumstances under which this date can be changed. Since this is the defining Act for the meaning of 'effective date', if there were any circumstances under which the effective date could change, this Act should have provided for it. The importance in determining the effective date is in assessing what is commonly called the "due date". The interpretation section of the LGA does not provide the meaning of due date but it can logically be taken to mean the date by when the Council has determined an application and the decision is due to be communicated. Appellant's counsel did not submit on whether in law the effective

date can be extended in certain circumstances although he sought to elicit evidence on the issue that the effective date cannot be changed. The Respondent's witness gave evidence that **section 117 (3) and (6) of the LGA** did allow for that. We have reviewed the pieces of legislation mentioned in these subsections and we are of the view that they do not provide any guidance on the question of time lines, effective dates and the extension thereof.

Me. Lobine, on this point, sought to convince us that there was a way to interpret **Section 117(7) of the Local Government Act** which was that the time limit of 14 days is extended by implication, given that the decision of the Public and Business Monitoring Committee (PBMC) is dependent upon when the Executive Committee will actually sit. We cannot subscribe to this proposition.

Before going on to read **Section 117(7)** closely, we find it convenient to first refer to the rules of statutory interpretation. The golden rule of statutory interpretation is that the words of a statute must prima facie be given their ordinary meaning. Our Supreme Court has further elaborated on this trite principle in their judgment in State of Mauritius v Jeetun 2006 SCJ 62. In this case, the Court quoted extensively from N.S. Bindra's **Interpretation of Statutes (8th Edition)** that: *"[i]n interpreting a statute an intention contrary to the literal meaning of words of the statute should not be inferred unless the context, or the consequences which would ensue from a literal interpretation, justify the inference that the Legislature has not expressed something which it is intended to express, or unless such interpretation leads to any manifest absurdity or repugnance with this superadded qualification that the absurdity or repugnance must be such that as manifested itself to the mind of the law-maker, and not such as may appear to be so to the Tribunal interpreting the statute."*

That being said, I turn to **Section 117 (7)** is partly reproduced herewith:

'With the exception of an application under subsection (8) and subject to subsections (9) and (10), the Permits and Business Monitoring Committee shall, within 14 days of the effective date of receipt of the application, and after approval of the Executive Committee-

(a) Issue to the applicant an Outline Planning Permission or a Building and Land Use Permit....

(b) Notify the applicant in writing that the application has not been approved and give the reasons thereof.'

Our reading of this piece of law is that within 14 days of the effective date the Permits and Business Monitoring Committee (the **'PBMC'**) must imperatively have taken a decision approved by the Executive Committee and either issue the BLUP or notify the applicant of the

rejection of his application, as the case may be. We find that the use of the comma after the phrase *'within 14 working days of the effective date of receipt of the application'* is significant for it suggests that the phrase is an independent clause that the Legislator intended to apply to both subsections (a) and (b). Thus, **Section 117(7)** is to be read plainly, that is on a literal meaning of the words, to require the PBMC to either issue the Building and Land Use Permit (BLUP) or notify the applicant in writing that his application has not been approved within the 14 working days limit.

It would follow that 'approval', or rather, consideration, at the level of the Executive Committee ought to happen within the 14 working days limit. We do not consider this proposition to be, in the words of our Supreme Court, manifestly absurd or repugnant, as indeed Councils across the country will routinely process BLUP applications within the 14 working days limit. Therefore, there is no justification for adopting any other interpretation that is contrary to the literal meaning of **Section 117(7).**

We are further comforted that this interpretation of **Section 117(7)** is correct as the Legislator cannot then be said to have legislated in vain in imposing a time limit. A contrary interpretation would have led to the inescapable conclusion that the 14 working days limit can simply be discarded by the mere fact that the Executive Committee has decided to sit outside of the time limit. This plainly cannot be the case. The Legislator has in fact expressly provided for when the time limit shall not actually apply. Section 117(13) provides that the time limit shall not apply to an application for an Outline Planning Permission or a BLUP referred to in Sections 117(4)(b), 117(9) and 117(12). This appeal does not, however, concern an application referred to in these latter sections. We believe that our reading of **section 117 (7)** is the correct one and is consistent with the spirit of the Business Facilitation Act and with, in our view, the intention of the legislator viz to expedite applications for development permits.

This being the position in law, we now move on to analyzing the letter sent by Mr. Phul. Can a letter from an officer of the rank of head Planner, unilaterally change the effective date?

Based on our reading of the above law, we find that the effective date cannot be changed be it by a letter of the Council or otherwise. Furthermore, the ground set out for extending the so called effective date is consultation with other authorities, which is not provided for under the law. The PPG sets out that applicant need clearances but there is no provision in the law as such that requires in such circumstances for the Council to get the clearances or to carry out consultations with other authorities for determining the outcome of the application. In fact the Business Facilitation Act was enacted "to provide for a new legal framework which would allow businesses to start operations on the basis of self-adherence to comprehensive and clear guidelines..." which means that it is mainly for the applicants to provide to the Council the

relevant clearances. We fail to see in accordance with which law was Mr. Phul acting to raise that as a ground in the letter dated 20th June 2012 to change the so called effective date.

This leads to the third question that is whether the Appellant is now entitled to obtain his BLUP upon payment of the relevant fee given that the Respondent has not acted as stipulated under **Section 117(7),** within the 14 working days limit. In other words, what then would be the consequence of a failure by a Council to act as stipulated within the time limit?

3. Decision of Council null and void? If so, can BLUP be granted?

Appellant seeks this Tribunal to find that the decision of the Council is null and void, and that the Appellant be allowed to pay the required fee and be granted the relevant BLUP in the spirit of the Business Facilitation Act.

Assuming the decision of the Council was not taken on the due date, as per law, does it mean upon reading of **section 117 (11) of the LGA** and **the Business Facilitation Act**, an application should automatically be granted? Does a failure to give the applicant notice under **section 117 (11)**, deem that the BLUP should be granted on the basis that the application has been approved upon payment of the fee?

What we have understood Me. Beeharry to be saying is that in essence, the BLUP must follow as a matter of course since in the normal course of the process the time frame of 14 days provided under **section 117 (7)** has not been respected and that the Applicant is now legally entitled to pay the fee and get his permit. *Prima facie*, if we are to follow this reasoning it means that in effect the Council is divested of its power to make any decision if it has failed to do so within the time frame.

As already stated above, we agree that as per the wording of **section 117(7)** the 14 day period is mandatory because of the use of the word "shall". While Tribunal accepts this to be the law, it cannot accept, unless expressly provided in the Act, that the Council is precluded from deciding the merits of an application once the 14 days have lapsed assuming that the decision went through the Executive Committee.

At Page 391 Administrative Law, 3rd Edition 1994, By P.P Craig it is stated

'A public body endowed with discretionary powers is not entitled to adopt a policy or rule which allows it to dispose of a case without any consideration of the merits of the individual applicant who is before it: R v/s London County Council exparte Corrie (1918) 1KB 68'

The above is quoted to show that we have infact addressed our minds to administrative law principles that a public body is endowed with discretionary powers when it comes to it dealing with merits of an application before it. We hasten to add, however, that this is not a case where the Council itself has adopted a policy or rule that has fettered its own discretion, but one where there is an express provision of the law that purports to deal with the consequence of the failure by a Council to act as stipulated within the time limit. This is, therefore, in our view, a question of statutory interpretation, which is one well within the remit of this Tribunal.

Section 117(11) provides:

(11) (a) Subject to paragraph (b), where an applicant has not been issued with a Building and Land Use Permit <u>or has not been notified that his application has not been approved</u> under subsection (7) or (8), as the case may be, within 2 working days of the expiry of the due date, the application shall, on payment of the fee referred to in subsection (10), be deemed to have been approved by the Municipal City Council, Municipal Town Council or District Council and the acknowledgement receipt, together with the receipt acknowledging payment of the fee, shall be deemed to be the Building and Land Use Permit. (The underlining is ours.)

On a literal meaning of the words used, **Section 117(11)** will apply irrespective of whether the Council has in fact approved the application in question or not. On this reasoning, **Section 117(7)**, where it is applicable, will allow an applicant to walk away with his BLUP after payment of the relevant fee even where the Council has not in fact approved the application and indeed regardless of the actual merit or validity of the application.

Section 117(11) is, in our view, unambiguous and there cannot be any departure from the literal meaning of **Section 117(11)**, unless of course this interpretation leads to a manifest absurdity. However, we do not consider this to be the case here. As stated earlier, the absurdity must, however, appear as such to the Legislator, and not necessarily to the Tribunal interpreting the statute - vide **Jeetun** (*Supra*).

In perhaps the rare scenario where an application that is evidently flawed is deemed to be approved because of a gross procedural oversight of the Council, there will still be other courses of action that the Council and indeed other interested persons, in particular the neighbours of such an applicant, can envisage to prevent the construction being envisaged to go ahead. While the general position in the first instance would have been for the applicant to satisfy the Council that its application is valid, in situations where **Section 117(11)** will apply, it will then fall onto the Council or other interested persons to demonstrate that the construction envisaged is flawed or in breach of guidelines and laws. We consider that this is what the Legislator must have envisaged as it ensures that the competing imperatives of good administration and business facilitation that saw the inclusion of the time limit in the first place can still be reconciled with those of proper planning and environmental protection.

It follows that the consequence of a failure by a Council to act as stipulated within the time limit will see the application be deemed to be approved upon payment of the relevant fee. We are minded to note here that the law does not provide Councils with the discretion to refuse payment in a situation where **Section 117(11)** applies.

We therefore find that the Appellant's point in law is well taken, except that this Tribunal cannot declare that the decision of the Respondent to refuse the application to be null and void. However, for the reasons set out above, we consider that the Appellant, if he is to pay the relevant fee, is to be deemed to have obtained his BLUP. On the basis of our findings, the matter is therefore fixed for disposal.

Ruling delivered on 14th January 2014 by

Mrs. J. RAMFUL	**Me. V. REDDI**	**Mr. G. SEETOHUL**
Vice President	**Assessor**	**Assessor**