BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : 482/13

In the matter of:

MRS. ARTEE SEERUTTUN

Appellant

v.

MOKA DISTRICT COUNCIL

Respondent

RULING

The Appellant has lodged an appeal against the decision of the District Council of Moka (the Respondent), for having granted a building and land use permit to one Jacques Daniel Bertrand Bussac (the Co-Respondent) for the construction of a wall despite the objections that were put up by her in writing and for which a hearing had not been held at the level of the District Council.

In a statement of defence filed, the Co-Respondent raised a plea in limine whereby the jurisdiction of this Tribunal to hear the present appeal is challenged. The plea in limine litis is based on three limbs:

1. The Co-Respondent is questioning the fact that the Appellant did not style Mr. Bussac as the Co-Respondent in his notice of appeal, nor did he serve the statement of case on him. The notification was done by the Tribunal as an admi nistrative. This was inappropriate.
2. The Appellant has failed to waive her rights to resort to civil courts.
3. Paragraph 10(c) of the Statement of Case is in the nature of an injunction.
4. The Appeal is trivial, frivolous, vexatious and an abuse of the process of the Tribunal.

The plea in limine was objected to by the Appellant and was argued. We have considered the submissions made by Counsel for the Appellant and Co-Respondent respectively, and the Attorney representing the Respondent.

1. The first limb: Procedure for service and notification:

Section 5 of the Environment and Land Use Appeal Tribunal Act 2012 sets out to regulate the proceedings before the present Tribunal (the ELAT). Section 5(3)(b) provides that:

"Any proceedings before the Tribunal shall be conducted with as little formality and technicality as possible", and Section 5(3)(c) provides that the proceedings shall *"not preclude any endeavour by the Tribunal to effect an amicable settlement between the parties"*.

The Tribunal is not bound by the procedures as it obtains before civil courts. Nonetheless, the ELAT has, since its creation in 2012, adopted the procedure of calling on Appellants to inform any person who may be affected by the appeal to notify and put into cause the relevant party. This is not only the procedure that the jurisprudence before our courts has laid down, but is common sense that one cannot make an appeal or bring an action behind the back of those who may be affected by any decision of the Tribunal. Having said this, in addition to requesting the Appellant to do so at the formal stage of the appeal, the ELAT, in the spirit of the non-technical approach and with a view of finding an amicable settlement as required by law, has adopted the cursus of informing, by way of letter, any party who may be affected by the appeal to be present before it so that he may communicate its stand. This transparency in its proceedings is, as stated above, part of the informal and less technical approach that the ELAT has set up. Such practice is customary before the ELAT since its inception.

We also note that the fact that the Co-Respondent has been communicated with the Statement of Case when he attended the Tribunal, following the letter that he received, allowed him to be made aware of the appeal and take a stand. Besides he chose to file a statement of defence in the capacity of Co-Respondent.

The procedure followed differs from a rigid approach followed before the civil court. Yet, it responds to the practice that holds before the ELAT for reasons mentioned above. More importantly, no prejudice whatsoever has been caused to the Co-Respondent by this course of action. For these reasons, the first limb of the plea in limine is set aside.

2. The second limb: Waiver requirement

It has been submitted on behalf of the Co-Respondent that the Appellant has failed to waive her rights to resort to Civil Courts, reference being made here to the provisions of section 54 of the Environment Protection Act.

Section 54 (3) (a) of the Environment Protection Act, as amended by the Environment and Land Use Appeal Tribunal Act 2012 provides as follows:

"Any person who has suffered damage or prejudice, as a result of a breach of an environmental law by another person, may make a claim to the Tribunal where the claim does not exceed 50,000 rupees".

Section 54 sub-section (3) (c) goes on to provide that *"The Tribunal shall not hear and determine a complaint under this Act unless the person making the complaint has voluntarily made a sworn statement.....that he has waived his right to initiate civil proceedings before any Court in Mauritius in respect of the facts that form the subject matter of the complaint"*

We draw attention to the fact that the subject matter of the argument is an appeal that has been lodged against a decision of the local authority in accordance with section 117 of the Local Government Act. It is neither a claim for damages (where the waiver is meant to prevent any litigant from shopping for compensation before several jurisdictions), nor a complaint as referred to under section 54 of the Environment Protection Act (where such a complaint relates to a breach of an environmental law). We therefore find that the second limb of the plea in limine is misconceived and is set aside.

3. The third limb: The prayer is in the nature of an injunction

The Appellant has moved, among others, for an order from this Tribunal against the Co-Respondent to demolish the wall that allegedly encroaches on the land belonging to the Appellant and for the Co-Respondent to remove all obstructions that prevent her from enjoying the sunlight. The Co-Respondent contends that these two prayers are in the nature of an injunction and that the District Court and Intermediate Court have no jurisdiction to grant injunctions, save as to making an order that would be required for the enforcement of the right of the parties as determined by the Magistrate within his jurisdiction.

We are of the view that the jurisdiction of the ELAT is governed by the same principles, section 6 sub-section 2 of the ELAT Act having provided that decisions of the ELAT are

appealable before the Supreme Court in the same manner as an appeal from a final judgment of a District Court in civil matters.

It is to be noted, however, that the ELAT is empowered by section 4 subsection 2 of the ELAT Act 2012 to make orders in the nature of an injunction. Yet, such orders would be related to injunctions which, in the opinion of the Tribunal, are required for reasons of urgency and the likelihood of undue prejudice pending the hearing of an appeal before it. In the present case, the remedy sought is a perpetual order as regards the wall in issue and its effect on the Appellant's property. This remedy is in the nature of a mandatory injunction, which is not within the jurisdiction of the ELAT.

The fourth limb: Does the nature of the appeal amount to an abuse of process ?

Ex facie the statement of case, we find that the contention of the Appellant rests on a dispute as to encroachment on her land, as contained in paragraphs 7 and 8 of the statement of case. The issue of encroachment is not a matter for the ELAT to determine, this Tribunal being an appellate jurisdiction on the decision of the local authority.

Similarly, the prayer sought at paragraph 10(e) to be awarded financial compensation from the Co-Respondent for a wrongful act and from the Respondent for a wrong decision and/ or their negligence amounts to seeking a remedy for an alleged 'faute' from the latter. Such remedy in tort is not within the jurisdiction of this Tribunal. Prayers of this nature before this Tribunal amount to an abuse of the process of the ELAT.

For the above reasons, the third and fourth limbs of the plea in limine are justified. We do not agree with Counsel for the Appellant that a number of prayers have been sought and it is for the Tribunal to select the applicable one and act on it. This approach is tantamount to a fishing expedition and, in itself, amounts to a frivolous process which is an abuse of our process.

We therefore find that the third and fourth grounds of the plea in limine have been substantiated. On the basis of these grounds the plea in limine is granted. The appeal cannot proceed for these reasons. The appeal is accordingly set aside.

Delivered on 31 July 2015 by:

Mrs. V. Bhadain	**Mrs. A. Deewa**	**Mr. S. Karupudayyan**
Chairperson	**Assessor**	**Assessor**