BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 382/13

In the matter of:

Roland Haus Co. Ltd

Appellant

v/s

Minister of Environment and Sustainable Development

Respondent

IPO:

1. **Globe Prism Ltd**
2. **The Permanent Secretary, Ministry of Housing and Lands**
3. **District Council of Riviere du Rempart**

Co-Respondents

RULING

1. This is an appeal against the decision of the respondent for having granted an Environment Impact Assessment ("EIA") Licence to the co-respondent for the construction of a proposed hotel development, which has been qualified as a 5-star Eco Resort Project at Butte a L'Herbe, Calodyne. At the outset, Counsel appearing for the co respondent no.1, raised a preliminary objection in law that this Tribunal has no jurisdiction to hear the appeal. There are 2 limbs to her motion, which are set out in broad terms below:

(i) The **Environment and Land Use Appeal Tribunal Act 2012** (hereinafter referred as "ELAT Act" and which is the governing law of this Tribunal) provides for a new jurisdiction as compared to the jurisdiction of the defunct Environment Appeal Tribunal in that, following the consequential amendments it has brought to the **Environment Protection Act 2002** ("EPA"), it now under **section 54 (2)** requires the Appellant to show how he is aggrieved by the decision and how the decision is likely to cause him undue prejudice.

(ii) As per **section 54 (3) (c) of the Environment Protection Act 2002**, as amended by the ELAT Act, there is a requirement of a complaint to be made prior to this Tribunal hearing the matter, which does not allow any discretion on the Tribunal to start a case without this voluntary sworn statement being made, its importance being that it serves as a waiver by the appellant to seize any other court once it seizes the jurisdiction of this Tribunal.

2. To understand this point, it is important to set out the chronology of events and the law. The Counsel for Co-respondent no.1 submitted lengthily on the points raised. The other parties maintained that this Tribunal has jurisdiction to hear the matter and submitted accordingly. The co-respondent no.3 chose to abide by the decision of the Tribunal. While we do not intend to overburden this ruling with the submissions of each party except where we deem it necessary to do so, it suffices to say that we have duly considered the extensive submissions of counsel.

A. <u>Chronology of main events</u>

(1) On 20th April 2010, the co-respondent no.1 was granted an EIA licence for the proposed construction of a hotel.

(2) On 19th May 2010, the appellant lodged an appeal against the respondent at the Environment Appeal Tribunal pursuant to **s. 54 (2) of the Environment Protection Act 2002.**

(3) On 1st October 2012 the **Environment and Land Use Appeal Tribunal Act** was proclaimed.

(a) This case, initially scheduled before the Environment Appeal Tribunal, was forwarded to the Environment and Land Use Appeal Tribunal.

(b) The **s. 54 of the EPA 2002** was repealed and replaced by a new **s. 54**.

B. The Law: Environment Protection Act 2002

S. 54 of the EPA 2002 deals with the jurisdiction of the Tribunal. This section was repealed and amended with the coming into force of the ELAT Act 2012.

- Old law: **s. 54 EPA 2002**

"(1)...

(2) Any person may appeal within 30 days of the decision, direction, order or notice referred to in subsection (1) in such form and manner as may be prescribed by the regulations."

- New law: **s. 54 EPA 2002** as amended by the **ELAT Act 2012**.

"(1) .....

(2) 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.

(3) (a) Any person who has suffered damage, 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.

(b) The Tribunal may, on a claim being made under paragraph (a), make such order as it thinks fit, including an award of damages, against the person who has caused the damage or prejudice.

(c)(i) The Tribunal shall not hear and determine a complaint under this Act unless the person making the complaint has voluntarily made a sworn statement, in such form as may be prescribed, that he has waived his right to initiate civil proceedings before any Court of Mauritius in respect of the facts that form the subject matter of the complaint.

(ii) A waiver referred to in subparagraph (i) shall constitute a bar to subsequent civil proceedings being initiated by the complainant before any Court of Mauritius in respect of the subject matter of the complaint.

(iii) In this paragraph, "civil proceedings" does not include an application made under section 17 or 83 of the Constitution."

Under Limb (i)

3. Typically transitional provisions are inserted in a piece of legislation to ensure continuity of action. **Section 9 of the ELAT Act** deals with the Transitional provisions. **S. 9(3),** which is of relevance, states in essence that if at the commencement of the Act, the hearing of a matter has not yet started before the Environment Appeal Tribunal then that matter shall be heard and determined by this Tribunal. This section does not address any issue of retrospectivity of the Act, nor does any other part of the Act for that matter.

4. Now, it is the contention of the co respondent no.1 that the appellant's statement of case is not compliant with the new requirements of **section 54 (2) EPA 2002** as amended, in that it does not set out in what way the appellant is aggrieved by the impugned decision and in what way the decision is likely to cause it prejudice. According to submissions of counsel for co respondent no.1, it is not until this is complied with that this Tribunal has jurisdiction to hear the matter.

5. We do not subscribe to these submissions. The notice of appeal clearly shows that the appeal was lodged on the 19th May 2010 pursuant to **section 54 (2) of the EPA 2002.** That is the day when the jurisdiction of the Environment Appeal Tribunal was seized. The applicable law will always remain that which was in force at the time that the appeal was lodged. Any subsequent amendments to the law, cannot possibly apply to the detriment or prejudice of a party who had already seized the jurisdiction of the tribunal otherwise the law runs the risk of being challenged for anti-constitutionality. Counsel for the appellant cited, **section 17 of The Interpretation and General Clauses Act 1974** ("IGCA") when clarifying the status and effect of a repealed enactment. It appears to us that **subsection (3) (b)** is the more appropriate reference. It states that the repeal of an enactment shall not affect the previous operation of the repealed enactment or anything duly done or suffered under the repealed enactment. We noted that upon clarification sought by co-respondent no.1, counsel for the appellant referred the Tribunal to **subsection (3) (c),** which is to the effect that the repeal (of an enactment) cannot affect any right accrued under the repealed enactment, the right here being the right of appeal which the appellant claims it has. The view of the Tribunal is that **subsection (3) (c)** is limited to substantive as opposed to procedural rights.

6. We pause here to make an observation. It is not denied that the appellant's land, taken on lease from the government, is situated next to that of co-respondent no.1. The latter's statement of reply at paragraph 4 states *"...the Appellant consists of private home owners who are strictly complaining about losing a view over the barachois..."* It would appear from the co-respondent no.1's own pleadings that development may in some way affect the appellant. Any development on a property, and thereby its land use, will have an impact on the surrounding and vice versa. The point being that on the face of the record, it would seem that the appellant may be affected by a development in the vicinity, hence the *nexus*. The extent to which it may be affected, if at all, can only be determined when the case is heard on the merits and is beyond the scope of this ruling.

7. The 'new' **section 54 (2)** sets out 2 criteria that appellants need to satisfy as from the **1st October 2012** when they lodge an appeal before this Tribunal. This does not apply to appeals lodged under the old **section 54 (2)** because as the law stood back then, these two criteria were not so clearly set out. It is of course a matter of common sense that any person wishing to appeal under the old **s.54(2)** must have *locus standi*, in that he must be able to show that there is a *nexus* between the proposed development and his grief. However, the legislator cannot be taken to have legislated in vain when he included the transitional provisions in the **ELAT Act**. We agree with Counsel appearing for the respondent that the raison d'être of transitional provisions is for continuity of action to the superseding Tribunal. The reason for which they are inserted in the law is to ensure a smooth transition so that matters can be taken over from where they were left off. The point we seek to make here is that if the legislator intended this Tribunal to only hear matters as set out under the new law, then there would be no transitional provisions which would allow this Tribunal to hear cases lodged before the defunct Environment Appeal Tribunal.

8. The objection of co-respondent no.1 does not appear to be strictly related to the jurisdiction as such. It relates more to the form in which the appellant has presented its case rather than their case in substance. We believe that it would not be in the spirit of the **Environment and Land Use Appeal Tribunal Act 2012** to be unduly legalistic and get bogged down with procedure. Our Supreme Court also subscribes to these principles especially since the case of **Margaret Toumany & *Anor* v Mardaynaiken Veerasamy [2012] UKPC 13** where it was observed that our courts, and more so our Tribunals, should be less technical and more flexible in their approach to jurisdictional issues and objections. The signal sent out from the Law Lords was that our legal system should not be unduly technical to the point that the main issue is overshadowed. They stated that

mistakes in the documentation should be identified and corrected as soon as it is practicable and *"the court should proceed without delay with the substantive issues raised before it on the merits."* The point that the Co-respondent no. 1 seems to be making, in our view, not only is not a requirement in law but even if it were, it would be but a mere technical issue which can be rectified so that the substantive issues can be heard.

Under Limb (ii)

9. The second limb to the motion of co-respondent no. 1 relates to a new **section 54 (3) (c) of the Environment Protection Act 2002** *supra* introduced under the consequential amendments of the **ELAT Act**. Counsel for co-respondent no.1 submitted that as per these new provisions of the law, the appellant should have put in, if it had not done so, a sworn statement waiving its rights to seize any other Court once it has lodged an appeal before this Tribunal. Her submission is that prior to the hearing of a matter the complainant has to make a voluntary sworn statement to the effect that he waives his right to seize any other court once it seizes the jurisdiction of this Tribunal so that he cannot have recourse to the same remedy twice on the same subject matter.

10. A holistic reading of the **EPA 2002** as amended, shows that the *"complaint"* in **subsection 3 (c)** relates to a civil suit. In fact the subsection talks of *"right to initiate civil proceedings....in respect of the facts that form the subject matter of the complaint"*. While it would be desirable, for the term *"complaint"* to be given a clearer meaning under the Act, it is our view that this term can only logically be taken to mean **"claim"** as per subsections (3) (a) and (b) but not an "appeal" under subsection (2). Furthermore, the rules of statutory interpretation generally demand a rather holistic reading of the statute such that subsection (3) (c) cannot be read disjunctively from subsections (3) (a) and (b) yet in the same vein be read conjunctively with subsection (2). This being said, some sections may be read sequentially or in conjunction depending on the tenor of the Act. But in the present case, since the subsection (2) relates to an appeal, it does not seem to be connected with the preceding subsection (3) (a) which talks of claim in damages. The law has to be read in a way so as to make sense of it. Now, even if arguably a claim in damages can be related to an appeal under subsection (2), this can only come by as a subsequent claim, not as part of the appeal.

11. As rightly submitted by Counsel appearing for co-respondent no.2, **subsection 3** provides for an independent basis upon which the jurisdiction of this Tribunal may be seized and that is where a claim is made when there is an alleged breach of an environmental law, as described under the **EPA 2002**. The case scenario envisaged here is where a claimant seizes the jurisdiction of this Tribunal to enter a civil claim in damages by alleging that there been a clear breach of an environmental law where he can show that he has suffered prejudice. Provided that the claim does not exceed Rs 50,000 and he waives his right to enter a claim before another jurisdiction, a complainant may have recourse to this Tribunal. We therefore do not subscribe to the submissions of Counsel for co-respondent no.1 on this issue.

12. Counsel for the appellant raised a point regarding the interpretation and application of **section 27 EPA**. Our reading of the law is that it essentially states that where an EIA licence (or the conditions attached) has been approved or granted the government is immune from any civil suit or criminal prosecution but this immunity does not apply to any other party.

13. For all the reasons set out above, we find that the preliminary objection raised by the co-respondent no.1 to be devoid of merit and is accordingly set aside. The case is to proceed on its merits.

Ruling delivered on 20th April 2016 by

Mrs. J. RAMFUL-JHOWRY	**Mr. MOTAH**	**Mr. BUSAWON**
Vice Chairperson	**Assessor**	**Assessor**