

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 775/14 &

ELAT 776/14

In the matter of :-

- 1. Pravind Koomar Ujhoodha**
- 2. Kylashnath Ujhoodha**

Appellants

v/s

District Council of Flacq

Respondent

In the presence of

- 1. Mahanagar Telephone (Mauritius) Ltd**
- 2. Information and Communication Technologies Authority**
- 3. Roodredevsingh Dozekee**
- 4. Oudayrajsingh Dozekee**

Co-Respondents

RULING

1. The present appeal is against a decision of the respondent for having granted a Building and Land Use Permit ('BLUP') in favour of the co-respondent no.1, the MTML, for the installation of a telecommunication tower (10 metres high) over an existing ground plus three floors building, at Royal Road, Lallmatie. The present matter infact relates to two appeals which have been consolidated. At the outset, Counsel appearing for the co-respondent no.2, the ICTA, raised a plea in *liminelitis* that this Tribunal has no

jurisdiction to hear the present appeal and that it should be set aside. The motion was in 2 limbs: (1) The Tribunal has no jurisdiction to grant the relief sought namely the making of a declaration as to whether the decision of the Council was lawful or not; (2) Even if it does grant the relief, the declaration serves no purpose. Co-respondent no.1 and the respondent joined in the motion. Co-respondents 3 and 4, who were absent, had stated at the early stages that they would abide by the decision of the Tribunal. The motion was resisted by the appellant. We have duly considered the submissions of both counsel which were made ex-facie the pleadings as well as authorities referred by them.

2. The prayer as per the statement of case of the appellants which were filed in May 2015, states as follows:

"27. In the light of the various breaches of the law and facts as specified above, the Appellant moves the Tribunal for an Order:-

(c) REVOKING and/or QUASHING and/or SETTING ASIDE and/or REVERSING the decision of the Respondent whereby a Building and Land Use Permit was granted to the Co-Respondent for the installation of telecommunication tower (10 metres high) at Royal Road, Lallmatie on the rooftop of Dozekee Building;

(d) Such other order as justice in this case may require."

3. The crux of counsel's submission on behalf of the co-respondent no.2 is that the prayer sought is more in line with the relief sought in a judicial review action, for which only Supreme Court has jurisdiction. The jurisdiction of the Tribunal is clearly set out in **section 4 of the Environment and Land Use Appeal Tribunal Act 2012** ["ELAT Act"]:

"Jurisdiction of Tribunal

(1) The Tribunal shall –

(a) hear and determine appeals –

(i) under section 54 of the Environment Protection Act;

- (ii) from a decision of a Municipal City Council, Municipal Town Council or District Council under section 117(14) of the Local Government Act 2011;*
 - (iii) under section 7B of the Morcellement Act; and*
 - (iv) under sections 7 and 25 of the Town and Country Planning Act; and*
- (b) exercise such other jurisdiction as may be prescribed in any relevant Act.*

(2) The Chairperson or, in his absence, the Vice-Chairperson, may, in respect of any matter which is due to be heard by the Tribunal, on application made to him by a party, sit alone for the purpose of making such orders, including an order in the nature of an injunction, as he thinks fit, where he is of opinion that, for reasons of urgency and the likelihood of undue prejudice, it is necessary to do so pending the hearing of the matter."

4. The above legal provisions are clear. We cannot read more into the provisions than what has been clearly provided. The Tribunal is to hear and determine cases as per **section 4 of the 2012 Act**. The Tribunal decides on the merits of an appeal. There is a distinction to be made between deciding a case on its merits and reviewing the manner in which a decision was taken. When hearing an appeal, the Tribunal's role is to determine the correctness of the findings as opposed to the legality. A review on the other hand looks at whether due process was followed or whether the decision making body had the power to decide in the first place. It is in that respect that the law provides for judicial review remedies. In the present instance, what we understand the Appellants to be saying is that the manner in which the Council proceeded was wrong in that it failed to send legal notices to immediate neighbours, it failed in its duty by withholding all information on the BLUP of Dozekee Building, it failed in its supervisory role and there was unfairness in the way it treated the appellants, that is, the decision making process was improper.
5. The appellants have challenged the decision of the Council on the basis the due process has not been followed. Ex-facie the statement of case of the appellants, it can be seen

that the relief sought coupled with the averments made are more in line with the type of relief sought in judicial review proceedings, and which is therefore outside the remit of this Tribunal. We agree with the submissions of Counsel for the co-respondent no.2 that the relief sought by the appellants was in line with those of a judicial review application. This Tribunal hears cases on appeal where parties aggrieved by the fact that local authorities have granted or rejected, as the case may be, Building and Land Use Permits (BLUP).

6. It was argued by counsel for the appellants that the appellants have also prayed for “such order as justice of the case may require” and that the Tribunal could use its wide powers under **s.4 (2)** of the Act to make such orders as it deemed fit. We are of the view that **s.4(2)** cannot be read in conjunction with **s.4(1)** as each subsection addresses the different jurisdictions of the Tribunal. For the purposes of hearing a case and making a determination, the Tribunal should be fully constituted as a division within the meaning of **s. 3 (5) (b) of the ELAT Act**, that is with the Chair and two members. Conversely, in very specific circumstances in matters of urgency, the Chairperson may sit alone for the purposes of making such orders, including in the nature of injunctions, where a matter is already pending before the Tribunal. These two subsections, in our view, are to be read disjunctively.
7. The counsel for co-respondent no.2 argued that the declaration sought would serve no useful purpose. It is common ground that the telecommunication tower has already been constructed and is operational. This goes to the fundamental issue: is there a *raison-d’être* of this appeal? The BLUP was granted in 2014, the tower has been erected and been in operation for years. The exercise now would be nothing but academic with no practical purpose.
8. Tribunals and courts have to deal with live practical questions not academic ones: **Ramphul v The Local Government Service Commission (1995)SCJ 79**. We fail to see in what way making a determination on whether the Council was right or wrong to have

granted a BLUP in this case would serve any useful or practical purpose. What has been done cannot be undone. Appellants' counsel argued that in the eventuality that before this instance, the BLUP is found to have been wrongly granted, the appellants would have other recourse such as a pulling down order and she also submitted that continued prejudice was caused to the appellants. We are of the view that we cannot rely solely on some literature to conclude that the appellants will be affected healthwise with exposure to rays and it is not within the remit of this Tribunal to conduct any enquiry to that effect. Therefore we cannot make a finding on the prejudice that will be caused to the appellants. As for other avenues available to the appellants such a pulling down order before another jurisdiction, this would be outside the remit of this tribunal.

9. For all the reasons set out above we find that the point in law was well taken by counsel for co-respondent no.2. The preliminary point is upheld. The matter cannot proceed before this Tribunal.

Ruling delivered on 7th December 2017 by

Mrs. J. RAMFUL-JHOWRY

Vice Chairperson

Mr. Cheong Wai Yin

Assessor

Mr. Imrit

Assessor