BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT/1007/15

In the matter of:

MR. YAN HOOKOOMSING & OTHERS

Appellants

v.

THE DISTRICT COUNCIL OF GRAND PORT

Respondent

In the presence of:

LE CHALAND HOTEL LIMITED

RULING:

1. The Appellants have lodged a notice of appeal before the ELUAT on the 15th October 2015 against a decision of the Respondent dated 23 September 2015 and notified to the Appellants on the 28th September 2015 (as per the notice of appeal filed).

2. The Appellants moved to add as Co-Respondent Le Chaland Hotel Limited (hereinafter referred to as LCHL) on the 2nd March 2016 (after an earlier motion made on the 27th October 2015, withdrawn and subsequently reiterated on 3 November 2015). On 2nd March 2016, the Respondent did not object to this motion, the statement of case

of the Appellant was filed, with an undertaking to serve same on other parties. The notice of appeal together with copies of the statement of case and annexes was served on LCHL on the 4th April 2016. By a letter dated 19th April 2016, Attorney for LCHL filed an objection *'to the appeal quoad LCHL to proceeding any further by reason inter alia of the fact that: (a) The appeal has been served upon it outside the delay provided by law and/or (b) it has been joined as a party outside the delay provided for by law, so that the appeal and/or the appeal quoad it may therefore not be entertained by the Tribunal'.* This was reiterated by motion of counsel on the 21st April 2016 before the Tribunal.

3. The issue to be determined is whether this Tribunal will entertain the appeal in view of the fact that the Appellants have moved to put into cause, and served the notice and grounds of appeal on, LCHL outside the delay of 21 days provided by section 5(4) of the ELUAT Act.

4. Section 5(4) of the Act provides that "*every appeal under section 4(1) shall, subject to paragraph (b), be brought before the Tribunal by depositing, with the Secretary, a notice of appeal in the form set out in the Schedule, setting out the grounds of appeal concisely and precisely, not later than 21 days from the date of the decision under reference being notified to the party wishing to appeal*".

This provision makes reference to three things: (1) The Appellant, being the one who has been notified of the decision subject matter of the appeal, (2) The form of the notice of appeal where the grounds of appeal have to be concise and precise and, (3) the time frame for depositing the notice of appeal with the Secretary, thus, lodging the appeal.

The law is silent on the issue of service of the notice of appeal on the interested parties, be it the Respondent or any other interested party. Counsel for LCHL submitted that section 5(4) ELUAT Act should be read along with judicial guidance given in the cases of **Arnaud Lagesse v. Town and Country Planning Board & Others and Vincent Harel v Town and Country Planning Board & Others 2000 SCJ 235** (hereinafter referred to as **Lagesse v TCPB**) followed in the case of **Nuckcheddy and Others v. TCPB i.p.o Bhimajee Govinda 2012 SCJ 152**.

7. We have given careful consideration to the submissions made on this position as well as those of the Appellants and Respondent.

8. In **Lagesse v TCPB 2000 SCJ 235**, the issue was the omission by the Appellant to put into cause the local authority, which had granted a development permit, before the TCPB and subsequently before the Judge in Chambers. It is not necessary for us to go into the details as to the lacuna of the procedures followed at the TCPB and which were highlighted by the Court. The bottom line is that the local authority was out of the appeal process against the decision of the TCPB before the Judge in Chambers. The Court of Appeal stated that:

".... A close reading of the provisions of the Act shows that when the Board hears an appeal, it is both in the interest of the local authority which wants to retain control of the qualitative and quantitative aspects of land development under its jurisdiction as well as those of land developers who want to promote a project, which are involved. Therefore the interested parties throughout remain the applicants for the development permit and the local authority. The latter cannot be merely ignored when it comes to the appeal before the Board and before the Judge in Chambers". The ground of appeal that there was no need to make the District Council a party to the appeal was dismissed in both cases. Furthermore, the Court of Appeal approved the decision of the Judge in Chambers to hold that failure to put into cause the Council within the delay provided by law was fatal to the Appellant's case.

9. The issue in the present argument is the delay in serving the notice on LCHL which is an interested party. It has been submitted by counsel for LCHL that the notice, having been served outside the statutory delay, is fatal and the appeal cannot proceed quoad it/ or cannot proceed altogether. Reliance was placed on the case of **Nuckcheddy and Others v. TCPB i.p.o Bhimajee Govinda 2012 SCJ 152,** where the Learned Judge stated that:

'the interested parties throughout remain the developer and the local authority and that the statutory delay to put them into cause must be observed. Failure to comply with the statutory delay is fatal 'as decided in Lagesse and anor. v Commissioner of

Income Tax 1991 MR 46.' In **Lagesse v. TCPB** (supra) the Court stated that: "*As far as the question of delay is concerned, on the authority of* ***Lagesse & Anor v. Commissioner of Income Tax [1991 MR 46]*** *we find that when the appellants decided to put into cause the Council, they were outside the statutory delay of one month provided under Section 25(3) of the Act.....Failure to put into cause the Council within the delay provided for by law was fatal to the Appellant's case".*

10. The cases of Lagesse and Nuckchady (supra) are under the Town and Country Planning Act, which was the 'predecessor' of the ELUAT Act in relation to appeals against decisions of local authorities. The relevant section of the Town and Country Planning Act was section 7(6) which provides that:

"*Any person aggrieved by a decision of a local authority under this section may, within 2 months of receipt of the decision, appeal to the Board which may hear a representative of any party to the appeal .....".* This enactment is silent on whether the Appellant should notify the other party or parties, and if so, within what delay.

11. We have given due consideration to these authorities. We are alive to two important elements that differentiate the present appeal from the circumstances of Lagesse and Nuckchady:

Firstly, in those two cases, there had been a failure on the part of the Appellants to put into cause the interested parties, who had been ignored or excluded from proceedings in which they had a stake. Here, what the Appellants seek to do is to bring the interested party within the proceedings by serving the notice of appeal and statement of case on them, so that they become aware of the Appellant's case and are able to have their standpoint considered by the Tribunal.

Secondly, there has been compliance with the statutory delay in lodging the appeal against the Respondent, the District Council of Grand Port. Section 5(4) of the ELUAT Act makes no reference to the other parties who are put into cause, nor is there any provision that expands the time frame of 21 days to the service on other parties. We are of the view that had the intention of the Legislator been that this delay should be applied for service of the notice or statement of case, be it on the Respondent or Co-

Respondent, it would have provided for this in the enactment. In fact, the Legislator has felt the need to enact provisions with respect to the time frame for parties served with a notice of appeal to react:

The new sub- sections 5 (4) (ad) and (ae) inserted in the ELUAT Act by Act 18 of 2016 makes provision for a statutory delay of 21 days for the recipient of a notice of appeal, statement of case and witness statement (which is also a new provision) to forward his reply and comments to the Tribunal and copied to the Appellant. A similar statutory delay of 21 days has been added for the Appellant to give his reply and comments. The intention of the Legislator to provide for these statutory delays is clear.

11. In the absence of legislative provision to that effect, should we apply the ratio in Lagesse to the present case? The position in the Court of Appeal decision in Lagesse v TCPB (supra) is based on the audi alteram partem rule and calls for an inclusion of the developer, who is the recipient of the decision under appeal. Counsel for LCHL rightly stated that it is an obligatory party in this appeal. If the objection made by LCHL Ltd. is upheld, this will lead to an exclusion of this 'obligatory party' from the present proceedings. It is an unconceivable position that the appeal proceeds behind the back of the developer in breach of the audi alteram partem rule.

12. Furthermore, we do not subscribe to the position that LCHL which, whilst not being a party to the appeal (if the objection is upheld), purports to put a halt to the appeal. If such was the case, in what capacity would LCHL cause the appeal to stop? We find that LCHL cannot claim to be an obligatory party on one hand (being the permit holder, and by virtue of the audi alteram partem rule) and, on the other hand, say it cannot be a party due to delay, and yet dictate the fate of the appeal process against another body (the District Council). We do not share the view that the issue of delay (if it were applicable), which is a technicality, can override a fundamental rule of natural justice.

13. The appeal is directed against the decision of the District Council of Grand Port as Respondent. The Respondent did not object to the joining of LCHL as Co-Respondent, nor did it raise the issue of delay in its statement of case and before the Tribunal.

14. The practice as it obtains before the ELUAT is that of accepting appeals lodged within 21 days. Joinder of parties (objectors or permit holders) is generally accepted, even at a later stage. This is in line with **Rule 19(1) of the Supreme Court Rules 2000**:

"Any misjoinder or non-joinder of parties shall not defeat any cause of action and the Court may deal with the matter in controversy as far as regards the rights and interests of the parties actually before it", and **Article 56 of the Code de Procedure Civile**:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties..... The Court may, at any stage of the proceedings, either upon, or without, the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties .....who ought to have been joined, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause matter, to be added.....").

15. In the case of **George Ah Yan & Bruno Savrimootoo v. District Council of Grand Port ipo Le Chaland Limited** (Cause Number ELAT 995/15) heard before this Tribunal, the ELUAT took a strict reading of section 5(4) of the ELUAT Act and limited the application of the delay of 21 days to the lodging of appeal only. Service effected outside the statutory delay, was not considered as a bar to joining the Co-Respondent to the appeal. The case of Lagesse was distinguished because Lagesse concerned the authority that issued the permit and had been left out of the appeal. Here, the issue is the joinder of an interested party, the permit holder.

16. Counsel for LCHL referred to the cases of **Island Insurance Co. Ltd and Historic Marine Ltd. v P. Ramroop 2004 SCJ 30,** and **Petchaymootoo v Mauritius Telecom & Others** (supra). In Petchaymootoo the issue was one of joinder of a defendant being time barred on the basis of a 'prescription' of an 'action personnelle' and in Island Insurance Co, Ltd, v Ramroop the action was time-barred due to the application of Rule 19 (4) of the Rules of the Supreme Court. We are of the view that the operation of Rule 19(4) of RSC 2000 and Article 56 of the Code de Procedure Civile, which both have the

effect of launching the proceedings to start quoad a party from the time of service of the notice on the party, have no effect on the present matter, being given that the statutory delay provided in the ELUAT Act is not applicable for service but is for the lodging of the appeal.

17. We have also considered the submission on behalf of LCHL that there has been no discretionary power bestowed in the ELUAT Act that allows for consideration of special circumstances that would allow an extension of the delay of 21 days. The notice was served on LCHL 191 days after the decision. We reiterate the position as stated above that the issue of extension of delay does not arise as no such delay is provided for in section 5(4) of the ELUAT Act with regards to the service on third parties. Although we do not condone that the service be done with such delay, this is not strictly a ground to prevent the matter from proceeding and the long delay does not empower us to set out a delay that the Legislator did not envisage. This position is by no means a suggestion that the service of a statement of case, and thus joinder of a party, can be an open-ended exercise. We do take into account that proceedings have not yet started. LCHL will have the opportunity to put in its statement of case. A contrary position would mean that an appeal be heard against the principle of natural justice of audi alteram partem.

18. Counsel for the Respondent has submitted that the Tribunal has no jurisdiction to hear an appeal against the decision as formulated in the notice of appeal (namely 'the construction of phase one of Le Chaland Resort Hotel.....'. We do not subscribe to this view for the following reasons: The Respondent has by way of letter informed the Appellants that it had approved the application for a BLUP for the construction of phase one of Le Chaland Resort Hotel....The letters sent to the Appellants, each one bearing a different date, informed them of their right of appeal before the ELUAT. In spite of the fact that the particulars of the decision as stated in the notice refers to 'construction of phase one of Le Chaland Resort Hotel' (no reference being made to the BLUP itself), this does not exclude that the appeal is under the provisions of section 117 (14) of the Local Government Act.

19. We do not concur with the position that this appeal cannot proceed on account of the delay in putting LCHL into cause. For all the reasons as explained above, we set

aside the objection raised by LCHL to be joined as a party to the present appeal. The motion to add LCHL as Co-Respondent is granted and the appeal is to proceed.

Ruling delivered by:

Chairperson: Mrs. Vedalini Bhadain

Assessor: Mr. Pravin Manna .

Assessor: Dr. Ranjeet Bhagooli ....

Date: 27th April 2017

27/4/17