BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 670/14

In the matter of:

ALEXANDER OXENHAM & OTHERS

Appellants

v.

DISTRICT COUNCIL OF PAMPLEMOUSSES

Respondent

In the presence of:

1. **EVACO LTD**
2. **EVACO BEACH CLUB LTD**
3. **THE DIRECTOR OF TOURISM AUTHORITY**
4. **THE MAURITIUS REVENUE AUTHORITY**

Co- Respondents

RULING

The Respondent has raised a plea in limine litis to the effect that the present appeal was lodged outside the prescribed delay in as much as the building and land use permit (BLUP) has been issued on the 22 December 2011 and the appeal was lodged on the 29th April 2014.

Co-Respondents No.1 and 2 have also raised an objection in law which is two-fold, firstly that the appeal has been lodged outside the statutory delay, and secondly, that the appeal before this Tribunal cannot be a re-hearing of the case but can only be a review of the decision of the Respondent, as such, evidence cannot be adduced in determining the present appeal. The other issues that the Co-Respondent raised relate to the lack of jurisdiction of this Tribunal to hear evidence from persons who had not been parties before the Respondent.

The stand of Co-Respondents No. 3 and 4 is that they will abide by the decision of the Tribunal.

1. Preliminary observations:

Before addressing the issue of delay, we make two preliminary observations regarding the above points raised on jurisdiction and procedure before the Environment and Land Use Appeal Tribunal (ELUAT). The jurisdiction of this Tribunal to hear appeals is listed under under section 4(1)(a) of the ELAT Act. Section 5(4)(a) sets out the procedure to lodge an appeal and provides for a delay of 21 days from the date of a decision being notified to a **party** wishing to appeal to lodge his notice of appeal. Then section 5(4)(b) goes on to provide that in cases where the decision is not required to be notified under the relevant Act, a delay of 42* days is provided to **the person wishing to appeal** and this delay runs from the date from which public notification of the decision is given. (**this delay has been reduced to 21 days by an amendment brought by Act 18 of 2016)*

The drafting of section 5(4)(b), more particularly, the reference to 'a person wishing to appeal' as opposed to a 'party' as referred to in section 5(4)(a), provides the basis for allowing persons who are not parties to an application to be notified of the decision, and be able to appeal it. Under this provision, the ELUAT has followed the cursus to allow **objectors/ third parties** to appeal, but they must be aggrieved by the decision of the respective authorities as listed in section 4(1) of the ELUAT Act. Bearing in mind that the legislator does not legislate in vain, we take the stand that the cursus followed by the ELUAT is in accordance with section 5(4)(b) of the ELUAT Act and section 117 of the Local Government Act.

Secondly, the procedure before the ELUAT is for the Tribunal to hear evidence from parties who lodge appeals before it, such that it amounts to a hearing of the respective versions of those parties before making an assessment of the propriety of the decision reached by the Respondent. Being a specialist Tribunal, the proceedings before the ELUAT are inquisitorial and are of a 'fact finding' type. The Tribunal also adopts an informal and multi disciplinary approach in the conduct of hearings. These two observations are in response to the second limb of the Co-Respondent's objection in law.

2. The issue of delay

The Appellants contend they have been notified of the BLUP in the course of a hearing at the Mauritius Revenue Authority (MRA) in relation to an application made by Co-Respondent No.1, Evaco Ltd., for a liquor licence on 4th April 2014. This, according to them, is the explanation for the appeal being lodged three years after the decision of the Respondent to grant the BLUP.

Two issues are to be considered here. Firstly, whether factually the date of the hearing was when the Appellants had knowledge of the BLUP and, secondly, whether the 'information' obtained by the Appellants in the course of a hearing at the MRA amounts to a 'public notification' within the definition of the ELUAT Act.

The factual situation:

The Appellants aver in their statement of case that it was on the 4th April 2014 that they were apprised that a decision of the Permits and Business Monitoring Committee to grant a BLUP to Evaco Ltd.

Annex 5 to the statement of case however shows that the Appellants had served a notice "mise en demeure" on Evaco Ltd and on the District Council to object to the development by Evaco Ltd. as far back as the 15th and 16th December 2011 respectively. The purpose of this notice was a formal objection to the works being "illegally and unlawfully carried out" without prior obtention of the necessary permits from the District Council. This indicates that the Appellants had knowledge of the development. The Appellants being immediate neighbours to the site, could not plead ignorance that a project was under way, the construction being done 'au vu et au su' of one and all. Furthermore, Annexes 6 and 7 to the statement of case indicate the Appellants have objected by way of a letter dated 10th December 2012 to Co-Respondent No.4, the MRA, to the issue of a licence as 'Retailer of liquor and alcoholic products – Restaurant'. The Appellants therefore had prior knowledge of the activities of Evaco Ltd.

The sensible approach is that of assessing the reasonableness and fairness of allowing the appeal at this stage. In this respect, the guiding principle as it holds in judicial review cases, namely the 'promptness' of the application is applicable here. Applications for judicial review which were not made promptly have led to refusal of relief unless there are good reasons for extending the time or if it is unlikely that the persons affected by the grant of the relief would suffer hardship or prejudice (*Environmental Law, 8th Edition by Bell, Mc Gillivray and Pedersen, Oxford University Press, page 343: "Generally the courts have taken a strict line over the question of delay in environmental cases. The speed or otherwise of an application would appeal to depend largely upon whether an affected third party would have suffered prejudice. This might include such things as its spending large sums of money after being granted permission, such as commencing development. The applicant can minimize the extent of this prejudice by putting the affected third party on notice of potential proceedings").*

All the facts as stated in the statement of case for the Appellants lead towards showing that the Appellants have not been prompt in entering the present appeal, despite the initial reaction to the development by sending the 'mise en demeure' and subsequently

the protest to the granting of the liquor licence. Co-Respondents No.1 and 2 have, as shown in the documents annexed to the statement of case, gone past the stage of construction and operation of their business entity, by applying for a liquour licence among others. Entertaining the appeal in these circumstances would tilt the balance of unfairness and prejudice in favour of Co-Respondent No.1 and 2. We are of the view that it is in the public interest to do so. On the other hand, It is open to the Appellants to seek other avenues for redress in case of breach of the conditions attached to the BLUP which the Respondent has granted with conditions.

Public notice of the decision:

The central issue is whether the information obtained by the Appellants at the MRA be said to represent a 'public notification'? Counsel for Appellants qualified it as being an 'incidental notification' and stated that that there was no legal mechanism set up to notify them of the decision to grant the BLUP, the relevant part of the Planning and Development Act not having been proclaimed).

It is our view that section 5(4)(b) of the ELUAT Act cannot be stretched to cover cases which have not been contemplated by the legislator. The absence of a mechanism for notification of third parties does not empower us to create the norm that a proclamation is meant to cater for. We find that the information gathered by the Appellants in the course of an 'incidental hearing at the MRA cannot be said to be a 'public notification' that would trigger the delay of appeal set out in section 5(4)(b) of the Act. The attempt to 'catch up' with the delay years later by the use of section 5(4)(b) of the ELAT Act would be an abuse of the process of this Tribunal.

For all the above reasons, we do not find it appropriate that the present appeal proceeds. It is accordingly set aside.

Delivered on 22nd February 2017 by:

V. Bhadain	**V. Reddi**	**B. Kaniah**
Chairperson	**Assessor**	**Assessor**