BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C1213-3/16

In the matter of:

Abdool Farade Nunnoo

Applicant

v/s

1. **Central Electricity Board**
2. **The City Council of Port Louis**

Respondent

In the presence of:

1. **Director, Department of Environment,**
Ministry of Environment and Sustainable Development
2. **Ministry of Energy and Public Utilities**

Co-Respondent

RULING

1. This is an application for an interlocutory injunction sought by the applicant to stop the construction of a building pending the determination of the main case. The City Council of Port Louis ("the Council") is the authority that granted the Building and Land Use Permit ("BLUP") to the Central Electricity Board ("CEB") for a development proposal. This is described in the **Annex 1** of the affidavit filed by the respondent no.2 dated

17th November 2016, as the re-development of St. Louis Power Station with installation of Powerhouse, GIS Sub Station, Tank Perm and Fuel Oil Treatment Building at the Industrial Area, Plaine Lauzun. The matter is yet to be heard on the merits, all counsel having agreed that I hear the preliminary points in law first and deliver a ruling.

2. At the outset Counsel appearing for co-respondents no.1 & 2 raised a point in law that the present application is flawed in law for lack of a pending main case and should therefore be set aside. Counsel for the respondent no. 1 also joined in the motion and submissions of the co-respondents. It was also the contention of respondent no.1 that the applicant in this case, who is the President of the *Movement Civique de Plaine Lauzun* ("MCPL") has entered an injunction case before the Judge in Chambers of the Supreme Court in the name of the MCPL on the same set of facts and against the same parties and is therefore making an abuse of the process of the Tribunal and should be set aside. The applicant objected to both motions. I have duly considered the submissions of all counsel as well as the affidavit evidence on record. I do not intend to overburden this ruling with the submissions of each counsel except where I deem it necessary to do so.

I. NO MAIN CASE

3. The Proecipe of the application lodged by the applicant's attorney stipulates that it is for a summons to issue pursuant to **section 4(2) of the Environment and Land Use Appeal Tribunal Act 2012['ELAT Act']** calling upon the respondents and co-respondents to appear before the Chairperson or Vice Chairperson sitting alone. The relevant section of the law is hereunder reproduced:

"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 the 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. It is the contention of the co-respondents and the respondent no.1 that there is no pending main case before the Tribunal and therefore there cannot exist an ancillary application for injunction to the main case. The applicant's counsel explained that there is an appeal case pending before the Tribunal in the name of Abdool Farade Nunnoo v The City Council of Port Louis bearing **ELAT no. 1213/16** as borne out in **Annex E** to the applicant's affidavit, a letter dated 16th August 2016 that emanates from the Tribunal convening the parties. Counsel for the Council, which is a party to the appeal case and is also a respondent in the present application before me, confirmed there is an appeal with Mr. Abdool Farade Nunnoo as appellant that is pending before the Tribunal to which the other co-respondents and respondent no.1, that is the CEB, are not parties. Counsel appearing for the respondent no.1 finally submitted on the position of respondent no. 1 and the co-respondents: since **Annex E** to the applicant's affidavit mentions only one respondent, there was no main case against the co-respondents and the CEB. It was also stated by Mr. Appado, Attorney for the Council, at the sitting of the 30th November 2016, that the CEB was not a party to the main case.

5. On the basis of above, mainly the confirmation of most parties, it appears that the position is that there is a main appeal case of **Abdool Farade Nunnoo v/s The City of Port Louis** lodged before the Tribunal bearing **ELAT no. 1213/16** to which apart from the Council, the respondent no.1 and the co-respondents are not parties. My attention was drawn to a copy of a previous order made by me in connection with an application for injunction bearing **ELAT no. C1213/16,** in which the applicant was *"'Movement Civique de Plaine Lauzun', represented by Abdool Farade Nunnoo as its chairman and acting in his personal name"* against the same parties. The contention of respondent no. 1 is that it refers to a previous similar application (connected to a main case) bearing similar ELAT number. Counsel for the applicant and for the Council explained that the MCPL is no longer an appellant following its withdrawal. The connected application was also

withdrawn. I cannot otherwise draw any inference from this document in the absence of any clear evidence.

II. NO MAIN CASE AGAINST THE CO-RESPONDENTS AND RESPONDENT NO.1

6. The question is whether the present application should be set aside on the basis that the co-respondents and the CEB have not been made parties to the main case and are therefore not privy to any other proceeding apart from this application? As far as the co-respondents are concerned, they had, at the sitting of the 14th November 2016, moved to be put out of cause for lack of prayer against them. True it is that the applicant's affidavit contains averments *quoad* the co-respondents but no prayer as such, but the fact remains that the co-respondents reconsidered their positions to remain as parties to this case upon the insistence of the applicant. They have been enjoined as parties in this case due to their involvement in the monitoring and policy decision making process, as per the applicant's version. The fact that they are not parties to the main case cannot *per se* be a ground to set aside the application before me. That will be an issue of rejoinder of the parties to be addressed in the main case. In any case, I cannot pre-empt at this stage what will be the fate of the appeal case.

7. The position of the respondent no. 1 is not entirely similar to that of the co-respondents. The CEB is the promoter which has been granted the BLUP. It is therefore obvious, that the outcome of the present application will have a direct bearing on the development being carried out by the CEB in the operation of the BLUP. Granting an injunction will bring the development to a halt pending the outcome of the main case. Therefore, the rights of the CEB are the ones that are to be balanced against those of the applicant. The respective rights of the parties cannot be decided at the end of the main case. At this point in time, it is a fact that the respondent no. 1 is the holder of a BLUP which is the subject matter of the central issue being contested. As mentioned above, I do not know what the fate of the main case will be; the CEB may or may not

ultimately be a party to it, but due process demands that the CEB needs to know why in the context of this application, it is being prevented from erecting a building.

8. The applicant has averred that the proposed development undertaken by respondent no.1 is in breach of the Planning Policy Guidance ("PPG") as regards the acceptable buffer zone of a power plant from sensitive uses comprising residential dwellings and educational facilities. The applicant should have been pleaded more specifically how the provisions had been breached and what is the consequent prejudice that is being or likely to be caused to the applicant, or any imminent risk of disease or health hazard he was being exposed to in order to justify the imposition of a prohibitory injunction. The averments made by the applicant were vague. He may be having a grievance but it was not adequately pleaded to justify why the construction of the building should stop. It appears that the applicant is aggrieved by the development that will take place therein. However, it was not readily apparent what the grievance of the applicant is with regard to the construction of the building. There has been no evidence or submission as to whether any erection of a structure or modification to the land on the site *in lite* would be prejudicial to the outcome of the main case. I should not have to speculate about this. It should be readily apparent from the originating process, the supporting affidavits and the submissions made in support of the application.

9. The St Louis Power Station has existed there and been in operation since 1955, as per the respondentno.2's affidavit. If the building of the St Louis Power Station has been in existence on the locus since 1955, in what way will the construction of the building by the CEB on that site cause any prejudice to the applicant, or to the fate of the appeal? This is not borne out in the affidavit of the applicant. Does it therefore mean that there was an existent building on the locus? I cannot speculate on these important issues which have neither been addressed in the affidavits of the applicant nor have they been submitted on. These issues were addressed in the affidavit of the respondent no.2 to which the applicant chose not to put in an affidavit in reply as yet. On the other hand, this is clear evidence of the interest that CEB has in the matter and consequently, the

prejudice likely to be suffered by the latter if an injunction is granted, which could have far reaching consequences as regards the rights of the CEB.

10. True it is that the applicant need not at this stage prove its case to the extent of proving the merits of the main case but there is still some evidence that needs to be placed before this jurisdiction of the Tribunal for its appreciation. The injunction prayed for is of a prohibitory nature directing a party to refrain from acting in a certain manner, here, stopping the CEB from constructing a building. But this remedy has to be reasonably suited in itself to abate the threatened harm. The order must also be such that it serves a purpose and is an adequate remedy to address the irreparable damage or harm that is imminent. The onus is on the applicant to satisfy the judge that the act of the respondent no. 1 will cause damage and prejudice that it is urgent that such an order be made. This was not clearly borne out in the affidavit of the applicant.

11. The respondents are clearly affected parties by an injunction order if it is granted and it appears that the applicant is well aware of this for having elected to have the matter heard *inter partes* right at the outset. Afterall, injunctions are powerful tools that can have far-reaching consequences on the parties involved. There is undisputed evidence that the St Louis Power Station lies on the Industrial Area of Plaine Lauzun. This gives a clear indication as to the nature of the occupation of the site; it is an industrial zone. It is also borne out in the evidence that the St Louis Power Station has been in operation since 1955 supplying electricity over the island. This also speaks volumes about the planning history of the site. Although at this stage no pronouncement can be made on which parties will ultimately be enjoined in the main case, I am fortified in my view that great hardship or prejudice is likely to be caused to the respondent no.1 if this injunction is granted because the rights of the latter will be severely curtailed in that the CEB would be precluded from proceeding with any further construction work pending the determination of the appeal case. This will be on the basis of allegations of potential breach of planning instruments, which has been very vaguely and inadequately defined,

the moreso as the CEB is not a party to the main case and is therefore not privy to the proceedings in the appeal case which concerns the BLUP granted to it.

12. The works have been ongoing for 4 months before the present application for injunction was lodged. The applicant has not acted promptly and consequently the respondent no.1 proceeded with the construction work at an accelerated rate, as per the applicant's version. It stands to reason that a project of this magnitude which entails supply of electricity to the whole island, the costs incurred and cost implication are equally huge. Therefore the burden likely to be borne by the CEB (as opposed to the benefit to the applicant seeking the injunction) will have a bearing on the merits of the cause of action in the main case. The granting of an injunction at this stage, after construction has already started, will have consequence of not just creating great inconvenience but also prejudice in that it will affect dramatically the rights of the respondent no.1 in an irreversible manner.

13. Since I am bound by the evidence placed before me, which are in this case by of way affidavits and documents filed, there is no clear evidence adduced on the exact BLUP granted for the proposed development. **Annex 1** of the Respondent no.2's affidavit dated 17th November 2016 is simply an acknowledgment receipt issued by the Council to CEB for a BLUP for the redevelopment of St Louis Power Station with installation of Power House, GIS Sub Station, Tank Perm and Fuel Oil Term Building at Industrial Area, Plaine Lauzun. Now, the order requested as per the Proecipe of this application reads as follows

" *An order in the nature of an interlocutory injunction Restraining and Prohibiting Respondent No.1 from proceeding with the Construction of a Building for 'Power Station Buildings at Saint Louis Power Station'* ***in terms of its application published on 17th May 2016 whilst the Building and Land Use Permit (BLUP) issued by Respondent No.2 on 30th June 2016 in fact relates to the installation of 'SG MOTOR/004/2016 for the redevelopment of St Louis Power station with installation of Powerhouse, GIS Sub***

Station, Tank Perm and Fuel Oil Treatment Building at Industrial Area, Plaine Lauzun' *the application of which was never published and this pending the determination of the appeal, which right would, otherwise, be rendered nugatory."*

The order prayed for, as couched seems to suggest that there was an application for a proposed construction of Power Station Building for which the injunction is sought so that the construction is halted pending the determination of the main case. Contrary to the averment of the applicant, it is observed that there is no evidence to show that the **actual application** was for a BLUP for the construction of a Power Station Building. **Annex B** to the affidavit dated 7th November 2016 of the applicant simply shows that the notice stipulated that the CEB will apply to the Council. In the absence of evidence, I will not surmise on the issue to conclude that there is a breach of planning control and hence the injunction must be granted to prevent further breach. Agreeably, the matter is yet to be heard on the merits at this juncture, however the rights of the respondent no. 1 and the rights of the applicant as they come across in the affidavit filed in support of the proecipe must be assessed and weighed. The rights and interests of the parties are relevant matters, in my view, to be taken on board, the moreso as the prayer refers to *"right would, otherwise, be rendered nugatory"*. Whether there is a discrepancy between the notice displayed on 17th May 2016 and the actual application for the BLUP is a different issue, beyond the scope of this ruling.

III. RAISON D' ETRE OF THE INJUNCTION

14. As a matter of law, I wish to consider a point ex-facie the pleadings. Under **section 4 (2) of the ELAT Act,** *supra,* the Chairperson or Vice Chairperson, has the power to grant an injunction where there is an element of urgency and likelihood of undue prejudice present. The applicant 's averments do not in any way show what is the likelihood of undue prejudice in the erection of the building on the site for which the injunction is being sought. But these elements do not transpire from the affidavit of the applicant

which is meant to support the proecipe. The prayer specifically requests an injunction to prohibit and restrain the respondent no.1 from proceeding with the construction of the Power Station Building. The grievance of the applicant does not appear to be the construction of the building *per se* but the development or activities that will ultimately take place therein. The applicant states in his affidavit that the building is intended to house heavy fuel engines. Counsel for the applicant submitted that the injunction is sought to restrain the respondent no. 1 from carrying out 'illegal works'. I have not been enlightened on the 'illegal works' or in what manner is the construction of the building, or for that matter the intended use, will cause prejudice to the applicant. If at all, it may be the operation of the machinery or possible associated emissions as a result of activities being carried out thereon that may cause pollution and inconvenience to the applicant but I will not surmise.

15. The present application was made inter partes, not ex-parte, which is normally applied for where as a matter of urgency it is imperative to restrain the respondent where there is imminent danger of harm being caused due to a potential breach of planning control. The applicants averred that the works have already started at an accelerated rate since 1st June 2016. Therefore, although the BLUP was granted and construction works had already begun since 1st July 2016, as per the averment of the applicant in his affidavit dated 7th November 2016, it is only in November 2016 that this application for injunction was lodged. The applicant's counsel argued that infact there was an application for injunction previously lodged by another applicant in the same case but which was subsequently withdrawn. Where an application was previously lodged and subsequently withdrawn, blame cannot be apportioned to any other party in my view nor can it be a reason in this applicant's case to justify the laches on his part to enter the present application as late as 4 months after construction had begun. The fact of the matter remains that due to inaction on the part of the applicant, construction works have been ongoing for 4 months. Thus, the whole exercise of having an injunction is nothing short of an academic exercise since the building is already under construction

and if it is going at an accelerated rate it is a reasonable expectation that the structure must be up to a certain extent. An injunction is a remedy which, if granted, should achieve its purpose. Is an injunction necessary to do justice in the circumstances of this case? It appears that in the present context, an injunction even if granted will not have its *raison d'etre*.

16. Having reached the above conclusion I do not deem it necessary to consider any other point raised. For all the reasons set out above, the application for injunction is set aside. No order as to costs.

I certify as to counsel.

Jayshree RAMFUL-JHOWRY
Vice Chairperson

1 June 2017

For Applicants: Me. Rama

For Respondent no.1: Me. Chetty with Me. Padayachi

For Respondent no.2: Me. Husseny

For Co-Respondents no. 1 and no.2 : Me. Green- Jhokhoo