BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

In the matter of:

ELAT 1502/17

In the matter of:

ASSOCIATION OF HOTELIERS AND RESTAURANTS (AHRIM)

APPELLANT

v.

1. MINISTRY OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

2. MINISTER OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

RESPONDENTS

And in the presence of:

1. **GROWFISH INTERNATIONAL (MAURITIUS) LTD.**
2. **MINISTRY OF OCEAN ECONOMY, MARINE RESOURCES, FISHERIES AND SHIPPING**
3. **MINISTRY OF TOURISM**

CO-RESPONDENTS

RULING:

The Appellants have objected to the filing of the statements of reply and comments from the Respondents and Co-Respondents of the ground that they have not been filed within the statutory delay of 21 days as provided by section 5(4)(ad) of the ELUAT Act. Submissions were made on whether the Tribunal should accede to the motion made on

behalf of the Respondents and Co-Respondents No.2 and 3 for an extension of time to file their reply and comments.

The stand of Co-Respondent No.1 (hereinafter referred to as Growfish) is that there had not been service of the Statement of case on it and that counsel for Growfish was present before the Tribunal 'out of courtesy', following a letter sent by the Tribunal. The statement of case, along with the witness statement having now been communicated to them, they moved to file their reply within the delay of 21 days from the date when they received copy of the statement of case. They also submitted that, should the Tribunal find that there had been service properly effected on them, they would move for an extension of time to file their reply given the circumstances.

The Appellant has objected to any extension of time being granted on the ground that any such filing at this stage would be done outside the statutory delay.

A number of issues have been raised in the course of the submissions which call for our attention, both on facts and in law:

1. Service on Growfish International (Mauritius) Ltd.

   Evidence was adduced by the usher who effected service on Growfish, who confirmed that he had served the documents on 'Growfish International (Mauritius) Ltd. c/o Multi G. Consultancy Services Ltd.' by leaving true and certified copies thereof with one Valerie Andon, clerk on behalf of the said company found at registered office, c/o Multi G. Consultancy Services Ltd. c/o Boardroom. Miss Andon affixed her signature on the original and accepted service on behalf of Growfish.. The registered address of Growfish as shown on the certificate from the Registrar of Companies (Document CO-R 1) is c/o Boardroom Limited, 165, Allee Brillant Branch Road, Floreal Mauritius.
   Miss Andon deponed to confirm that she was an employee of Multi G. Consultancy Services Ltd., situated at the same registered address as Boardroom Ltd. (which is in fact the company secretary of Growfish). The two companies share an office at the same registered address and as a matter of practice, she used to take delivery of correspondences and documents for both companies and channel them to the respective companies.
   We have found no difficulty in accepting the evidence of the usher that the relevant documents had been remitted to the employee, Miss Andon, found at the registered address of Growfish, who accepted the service.
   Although the registered address found on Document CO-R 1 makes no mention of Multi G Consultancy Services Ltd., it would require a stretch of imagination to say that the service was not good for the sole reason that Miss Andon was not employed by Boardroom Ltd. We accept the evidence of Miss Andon, employee

of Multi G. Consultancy Services, that she did what she normally does in the course of her service, namely to take reception of documents and forward to the respective companies, although she did concede that she was unaware of what followed regarding the document. This would be in the realm of the internal arrangements between those two companies, the details of which are not before us. Moreover, this was followed by a communication by e-mail (Document A2), referred to by Mr. Kwok, where mention is made on the services of legal advisor having been retained to represent 'Growfish as a co-respondent' in the appeal. Growfish therefore had knowledge of the appeal as far back as 24 November 2017 and measures had been taken by Growfish to be legally prepared to deal with the appeal. This has been confirmed in the cross examination of Mr. Fadil Hossen. This brings support to the position of the Appellant on the service effected. We refer to the reasoning of the Learned Judges in the case of ***Societe Immobiliere Oosman v. Ramloll Bhooshan Renovation & Building Ltd. 2016 SCJ 132*** and rely on the versions of the usher and Miss Andon and find no reason to question that Growfish had been duly notified and served with the relevant documents.

2. Service on the Respondents and Co-Respondents

It has been submitted by counsel for the Respondents that no personal service had been effected on Respondent No.2, i.e. the Minister. Indeed, the certificate of service shows that both Respondents have been termed 'Ministry' and a clerk of the Ministry acknowledged receipt of the Notice and Grounds of Appeal for both. This is good service as far Respondent No.1 is concerned. As regards Respondent No.2, the Minister, we take judicial notice of the fact that the general practice, as it holds in departments of Ministries, is for service to be effected on 'preposes' of the Ministry. The discrepancy in the service effected on the Minister is the fact that both were termed as 'Ministry'. This technically supports the position taken by Respondent No.2. that had not been proper service on him and justifies the motion for an extension of time quoad Respondent No.2.

Respondent No.1 and Co-Respondents No. 2 and 3 prayed for an extension of time on a different basis, which is addressed below. At this juncture, we need to highlight that the dates on which the cases were called before the Tribunal were for the purposes of managing the formal matters before the Tribunal. These were not meant to have any bearing on the statutory time frame in which the documents have to be forwarded, nor copied to the Appellant.

3. Discretion and Extension of time.

3.1 Given the above, we have to come to the decision on whether an extension of time ought to be granted to the parties who had been duly served with the statements of case for them to file their reply and comments beyond the 21 days period provided by section 5(4)(ad). We have to address our mind to the question of whether **section 5(4)(ad)** should be read as mandatory or directory?

It is our view that despite the drafting of section 5(4)(ad) in mandatory terms this Tribunal has a discretionary power on the matter for the following reasons:
The Legislator chose to maintain in the ELUAT Act all the other provisions which propound an overall conciliatory approach, namely in ***section 5((3)(b)*** which provides that '*Any proceedings before the Tribunal shall be conducted with as little formality and technicality as possible*', and ***section 5(3)(c)*** which is to the effect that '*Any proceedings before the Tribunal shall not preclude an endeavour by the Tribunal to effect an amicable settlement between the parties'.*

There is no specific provision prohibiting the exercise of a discretion (as in some cases where it is expressly provided for by the Legislator, for example in **Essar Steel Ltd v. Arcelor Mittal USA LLC 2017 SCJ 357** where discretion has been expressly excluded by the Legislator in section 181(3) of the Insolvency Act.) In the present matter, rigidity in the application of the delay, not for the lodging of the appeal, but in providing their reply/comments to an appeal already lodged would be a departure from the other above-mentioned provisions of the ELUAT Act. We take the view that the section 5(4)(ad) can be read as a directory provision, to be consistent with the spirit of the enactment.

In **Ramtohul v. The State 1996**, the guiding principle for a departure from the mandatory approach laid down in **Lagesse & Anor v. Commissioner of Income Tax 1991 MR 46** has been the need for "*sufficient justification for such exercise of discretion...*". In **Duval v. Seetaram 1991 MR 61**, it was held that the Court had the power to entertain a late application if "for example, the fault is that of the Court itself or an officer thereof..."
In **Vishnu Maudhoo v. Geyandhan Ramhota 2010 SCJ 365**, citing the case of Ramtohul, the Court endorsed the position taken by the Court in **Carpenen v. Lakhabhay 1986 MR 176** that " *Time limits prescribed in procedural matters are not always mandatory to the point of thwarting the course of justice".*

It is our concerned view that a refusal to grant the motion for extension of time will amount to hearing an appeal without any 'defence' being put forward by the

Respondents and Co-Respondents. This would result to an injustice being done by the non filing of the defence (Re- **Perrine & Ors. v. Foogooa & Ors. 1967 MR 134**, where, *if the Respondents' motion were granted, the petitioners would forfeit their right to have their petition heard by the Court* and Re-**Beekoo v. Bussier 1950 MR 13**, where the Supreme Court allowed a departure from Rule 6 of the Supreme Court (in relation to delay in an application for Rule nisi) on the ground that "*....to refuse this application might have the result of subjecting the applicant to such injustice as might amount to oppression.*"

The ELUAT has time and again expressed the view that 'technicality should not dictate substance'. This is in line with the line of cases where the Supreme Court has propounded this principle, Re **Quesnel & Ors. v.Dorelle & Ors**. v***1867 MR 61,*** **Tremoulet v. Duclos 1869 MR 87**, Re: **Carpenen v. Lakhabhay 1986 MR 176** and the commentaries of the Judicial Committee of the Privy Council in **Margaret Toumany & Anor v Mardaynaiken Veerasamy 2012 UKPC 13.** We are of the strong view that procedural rules should not be able to defeat substantial rights.

3.1 Having taken this position, should the Tribunal exercise its discretion in the particular circumstances of the present case?
We first note that it has been stated by counsel for Respondents and Co-Respondents that the respective statements of reply have been ready to be filed, save for the objection raised and the arguments now offered. The position of the Respondent No.1 and Co-Respondents No. 2 and 3 respectively is that the consultative process between the Ministries and their requests for legal representation took some time. The position of Co-Respondent No. 1 is based on the stand that there had been no service. This having been ruled upon above, the issue of extension of time 'quoad Growfish' is relevant as well, and Growfish has also stated that its statement of reply and comments is ready to be filed. As regards Respondent No.2, the matter is one of absence of service, thus, the need for an extension of time was required due to the lack of proper service.

Whatever be the case, what we are more concerned with is the impact of not granting the motion for extension of time on the substantive rights of the parties. In the light of the above-mentioned authorities, we do not subscribe to the purely technical approach taken on behalf of the Appellants and overrule the objection raised by it to an extension of time being granted. The objection raised by the Appellant has had the effect of an increase in the delay to proceed with this appeal, which should have been the concern of the Appellant.

It is important to highlight that we distinguish the present decision from the decision of the ELUAT in the case of Sea Users Association & Others v The Minister of Ministry of Social Security, National Solidarity and Environment and Sustainable Development & Anor, IPO Growfish International (Mauritius) Ltd & 6 Others (ELAT 1507/17). In the case of Sea Users Association, a motion was made by the Appellants for an extension of time for filing of witnesses' statements that had not been done at the time of lodging the appeal. The proposed delay was explained to be on the ground that the Appellants needed more time (a period of two months which was extended to four months) for the gathering of evidence in support of the appeal. The rigidity of the new provisions of the ELUAT Act was highlighted by the Tribunal, which emphasized that the request of the Appellants was for time to gather evidence to place before it for the first time (i.e. evidence that was not available before the Ministry at the time of the decision which was subject matter of the appeal). This differs substantially from the present case where time is sought to file reply and comments to the statement of case.

The appeal is to proceed and the matter is fixed for the Respondents and Co-Respondents to file their respective statements.

Delivered by:

Mrs. V. Phoolchund-Bhadain, Chairperson

Mr. P. Manna, Assessor,

Dr. R. Bhagooli, Assessor,

Date: 16th April 2018