IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1514/17

In the matter of:

Soorooj Ramdewor

Appellant

v/s

District Council of Pamplemousses

Respondent

In the presence of:

Nazir Jaunoo

Co-respondent

RULING

1. The present appeal is against the decision of the Respondent for having granted a BLUP to the co-respondent for the construction of a building to be used as workshop for vulcanization, retreading and rebuilding of rubber tyres with the installation of electric engines, at Royal Road, St. Andre.The Appellant objected to the filing of the statement of defence by the Respondent and the co-respondent on account of the fact that they have not been filed at the Tribunal within the statutory time limit of 21 days from the date of service of the notice on the parties by the Appellant via the services of an usher.

2. The Respondent insisted on the filing of the Statement of Defence (SOD). The matter was argued. It was submitted by the Appellant's attorney that the appeal was lodged within the prescribed statutory time limit and notice was duly served on the respondent and the co-respondent as per Supreme Court Usher's return, Mr. S. Ramasawmy on the 13th November 2017 and that it was only at the sitting of the Tribunal on the 30th January 2018, more than 2 months later that the SOD was sought to be filed when the Appellant's attorney objected.

3. The respondent and co-respondent, adopting the same position, argued in essence along the same lines thatthe notice received through the usher provided no returnable date and that the respondent and co-respondent did not know when they had to file their defence until they received a letter from the Tribunal that they had to appear on the 30th January 2018. Counsel argued that the time limit imposed upon the parties to file a reply to the statement of case under the **Environment and Land Use Appeal Tribunal Act 2012** as amended by the **Finance Miscellaneous Provisions Act 2016** is directory and not mandatory although the word used is "shall", as submitted by Appellant's attorney.

4. We have duly considered the submissions of both the counsel and the attorney. We do not intend to overburden this ruling with their submissions save where we deem it fit to do so. We must firstly look at the wording of the law. **The Environment and Land Use Appeal Tribunal Act 2012**, as amended by the **Finance Miscellaneous Provisions Act2016** provides under **section 5 (4) (a)** regarding the proceedings before the ELUAT

"(a) 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.

(aa) Every notice of appeal referred to in paragraph (a) shall be accompanied by –

(i) a statement of case; and

(ii) where necessary, any witness statement, with copy to all relevant parties.

(ab) A statement of case shall contain precisely and concisely-

(i) the facts of the case;

(ii) the grounds of appeal and the arguments relating thereto;

(iii) submissions on any point of law; and

(iv) any other submissions relevant to the appeal

(ac) Any witness statement shall contain a signed statement by a witness certifying that the witness statement faithfully reproduces the facts obtained from the examination of records, statements or other documents or from any other source in relation to the appeal before the Tribunal.

(ad) Any party served with a copy of the notice of appeal, statement of case and any witness statement shall, within 21 days of receipt thereof, forward his reply and comments thereon to the Tribunal, with copy to the appellant."

We note from the above extract that the word "shall" has been used many times in the course of **section 5(4).** The point of debate is whether "shall" is to be considered as mandatory or directory.

In **Laurette v The State [1996] SCJ 296**, which referred to **Lagesse & Anor v The Commissioner of Income Tax [1991] MR 46**, the Court stated "*It would be hazardous to generalize about the mandatory or directory character of time limits for the fulfilling of procedural formalities generally, whether in main or subsidiary enactments, as their particular character may very well depend on the subject matter of an enactment or even on the nature of the particular procedural requirement. For example, delays for the filing of a notice of tender of evidence is not to be equated in character to delays for lodging an appeal and procedural steps themselves are rich on their difference depending on the nature of proceedings or even of the different steps therein.*" What this quote purports to say in essence is that there are different categories of procedural points, some which go to the very root of the appeal while others are not fatal. At the end of the day the Courts and Tribunals must decide on a case to case basis whether the procedural lapse is material enough to warrant the case being disposed of on a procedural point, or not.

5. In **Laurette** *supra*, the Court cited **Lagesse** as regards the guiding principle and stated *".... The guiding principle, it seems to us in procedures governing appeals is that at some stage the finality of judicial decisions should be certain and procedural requirements governing appeals from those decisions should not be disregarded so as to prolong uncertainty and the holding up of the execution of a judgment which a litigant had obtained unless...non-compliance is shown not to be due to acts or, more frequently, the omissions of the appellant or his legal advisers."*The magnitude of the procedural irregularity and the prejudice that it may lead to either party must be weighed up on a balance. It is trite law that in the case of lodging an appeal, the Courts will not hear an appeal lodged outside the statutory time limit. There is an exception to the rule namely where it is satisfied that the appeal has been outside the statutory time frame through no fault of the appellant or his legal advisors. If the courts have recognized that there is to be such an exception even in the case of the lodging of appeals,which go to the very basis of the raison d'etre of the appeal, we fail to see why we need to be overly rigid with the application of the time limit to file the statement of defence which would afterall shed light on the grounds that motivated the respondent to take the decision which is the subject of challenge. If the statement of defence is not on record this would prolong the uncertainty as regards the reasoning behind the impugned decision and would not help in the adjudication of the appellant's own case.

6. The respondent and co-respondent have explained that they have received the notice but that there was no returnable date and that it was following a letter from the Tribunal convening them that they decided to take cognizance of the proceedings and file the statement of defence. As a matter of fact, at the time of the lodging of an appeal and if the papers are also served on the parties at the same time, there will be no returnable date to appear before the Tribunal since the process is done simultaneously. However, the law does state at paragraph (ad)*" Any party served with a copy of the notice of appeal, statement of case and any witness statement shall, within 21 days of receipt thereof, forward his reply and comments thereon to the Tribunal, with copy to*

the appellant." The respondent or the co-respondent should normally have forwarded their reply to the registry of the Tribunal. However, the first time when the respondent subjected itself to the Tribunal, at the first sitting itself, it sought to file its statement of defence and even after the objection raised by the Appellant it insisted on filing its statement of defence. We believe that due process demands that where a litigant has a right that he or she seeks to enforce, as opposed to a frivolous or vexatious claim, it is only fair to allow the parties to be heard so as to meet the ends of justice. This also reduces inefficiency and avoids a waste of time of the Tribunal's process.

7. In **Quesnel &Ors v Dorelle and Ors [1867 MR 61]** the Supreme Court of Mauritius observed, *"It would really be a misfortune to this country, if the law stood thus, that for a formal and technical omission of pure procedure, parties lose forever and without a remedy, real and substantial rights; such is not the law, we hasten to say."* We need to look at the rights at stake. The co-respondent is the BLUP holder and his right to hold a permit is being debated before a forum without him having the opportunity to put in a defence on a purely procedural point, does not appear to achieve fairness in the proceedings. The **ELUAT Act,** at **section 5(3)(b)** provides for an approach which is not unduly formal and overly technical so that the Tribunal, without being unduly legalistic, hears the real issues at hand. In the case of **Toumany and Anor v Veerasamy [2012] UKPC 13,** their lordships have encouraged even the courts of Mauritius to be less technical and more flexible in their approach to jurisdictional issues and objections.

8. This appeal can be heard on its merits and not allowing the decision-making authority to file their defence or the BLUP holder to file their defence would be an unduly legalistic approach especially in the light of the fact that there was a clear intention by the respondent to file its statement of defence nor has it been submitted by the appellant in what way would the filing of the statements of defence outside the statutory time frame cause prejudice to him. When in fact weighed up on a balance it would in our view cause prejudice to the respondent and co-respondent if they are not allowed to put in their defence. The balance, in our view, tips in their favour.

9. In **Quesnel** *supra*, the Court said " *The Judges who have framed those rules retain in their application a certain amount of discretion, they are to be enforced in all cases, but they are to be enforced so as to further not defeat the ends of substantial justice; non-compliance with their provisions ought to be visited with some penalty, but where 'such non-compliance' does not affect the substantial merits of a case, and where the Court is satisfied, not on mere statement of parties but upon proper evidence that the strict application of a rulein a matter of form would work irremediable injury to one of those parties, it lies with the Court to modify the application under the penalty of costs, and this, in the way which would appear to them more conducive to the ends of justice."*In **Cropper v Smith [1884] 26 Ch. D. 700**, Bowen L.J stated at page 710-711, *"Courts do not exist for the sake of discipline, but for the sale of deciding matters in controversy...."*

10. We have borne in mind the submissions of the Appellant's attorney as regards the word "shall" as per the **Interpretation and General Clauses Act ['IGCA']**, however we are of the view that if this word is to be interpreted as having only a "mandatory" nature then the wording of the whole section, when read would have conveyed that such was intention of the legislator. For instance under **section 5 (4) (a) of the ELUAT Act** it is provided that every appeal should be brought before the Tribunal by depositing a notice of appeal *"not later than 21 days from the date of the decision under reference being notified to the party wishing to appeal."* [stress is ours]

11. Furthermore, when **sections 5 (4) (a) (aa)** to **(ad)** are read, if the submissions of the Appellant's attorney are to be accepted, it would imply that the statement of case of the appellant must mandatorily accompany the notice of appeal as well as all witness statements and that all statements of case must contain facts of the case, the grounds of appeal and the arguments that are to be put forward as well all submissions on any point of law and submissions relating to the appeal. If this is taken to be so literally, it

would defy settled legal principles such as "Points of law can be raised at any point in the course of the hearing". This simply cannot be.

12. We cannot subscribe to the contention that the word "shall" must always only have a mandatory nature. It depends on the context, according to us. We also believe that following the guiding principles set out above, the decision rests with the Tribunal to decide on a case to case basis whether a departure from statutory time frames can be allowed depending on the facts and circumstances of the case. We believe in the present case the ends of justice will only be met if the respondent is given the opportunity to explain what motivated its decision, so that any unlawful decision would be a successful ground of contest by the appellant, and the co-respondent being the permit holder has the opportunity to defend his right to hold a BLUP.

13. For all the reasons set out above, the point in law is set aside. The matter is otherwise to proceed. The case is fixed pro-forma for the Respondent and Co-respondent to file their statement of defence.

Ruling delivered on 27th November 2018 by

Mrs. J. RAMFUL-JHOWRY	**Me. G. SAULICK**	**Dr. G. SOMAROO**
Vice Chairperson	**Assessor**	**Assessor**