

**BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL**

**ELAT 692/14**

**In the matter of :-**

**Marie Louise Isabelle Baumann**

**Appellant**

v/s

**The District Council of Riviere du Rempart**

**Respondent**

- 1. Syndicat de Co-proprietaires de Savannah Sparrow Residence**
- 2. A & A Marketing Ltd**
- 3. A. A. Construction Ltd**
- 4. Phil Alain Didier & Co. Ltd**
- 5. Mr & Mrs Parmeswur Dyal Chundusing**

**Co-respondent**

**RULING**

- 1. The present matter having started anew before a freshly constituted bench, Counsel for the Respondent raised a plea *in limine* and moved that the present appeal be dismissed because any determination by the Tribunal will be merely academic in nature. We were referred to the prayer of the Appellant in her statement of case at Page 264 of the Brief whereby she moved that the Respondent's decision to approve the application of Co-respondent no.1 for a BLUP and the subsequent grant of it be reversed and/or otherwise dealt with as the Tribunal deems fit and proper in the circumstances. Counsel submitted that the prayer infact seeks an academic judgment.**

2. Counsel appearing for the Appellant argued that even though the building has already been constructed, the Tribunal is empowered by law to consider the circumstances upon which the BLUP has been granted and whether it was in order with the planning instruments but if not, the Tribunal can reverse the decision of the Council which would render the construction being effected without a valid BLUP allowing her to enforce her legal rights before the competent forum for a pulling down order for the illegal construction. It will then be for the competent forum to determine whether such an order is warranted.
  
3. Co-respondents 2 and 3 concurred with the submissions of the Respondent where as Co-respondents 1, 4 and 5 chose to abide by the decision of the Tribunal. We have duly considered the submissions of Counsel. It is common ground that the residential building comprising of apartments on four levels (as per the Appellant's statement of case is a 12 metre building consisting of 98 apartments including 14 penthouses) has already been constructed and most of them are in use. This goes to the fundamental issue: is there a *raison-d'être* of this appeal? The BLUP was granted in 2014, the building has been constructed and the apartments have been sold out to *bona fide* purchasers who have been occupying the premises.
  
4. In **Planche v/s Public Service Commission & Ors [1993] SCJ 128**, the guiding principle as set out in the dictum of *Lord Justice Clerk Thomson* in **Mc Naughton v/s Mc Naughton's Trs [1953] SC 387,392** is reproduced hereunder: "*Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and they have no concern with hypothetical, premature or academic question, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau.*" Tribunals and courts have to deal with live practical questions not academic ones: **Ramphul v The Local Government Service Commission (1995) SCJ 79**.

5. We believe that a lot of water has flowed under the bridge. We fail to see in what way making a determination on whether the Council was right or wrong to have granted a BLUP in this case would serve any useful or practical purpose. The fact of the matter is that there now stands a 98 apartment block of 12 metres high, the majority of which have been sold and are currently being occupied by 3<sup>rd</sup> parties. This is agreed by all the parties. An appeal lodged under **Section 117 of the Local Government Act 2011**, does not make provision for the freezing of the construction upon the lodging of the appeal. However the law has made provision for parties aggrieved by a certain development, to have it put on halt pending the challenge of the BLUP granted. An aggrieved party who wishes to have a construction halted, for instance, has the opportunity to apply for an injunction to the Chairperson or Vice-Chairperson of the Tribunal under **Section 4 of the Environment and Land Use Appeal Tribunal Act 2012**. Some litigants seize the jurisdiction of the Supreme Court for the same purpose. It appears from the Statement of case of Appellant that she has made such an application to the Supreme Court. Irrespective of the outcome of that application, as matters stand now, we are faced with a "fait accompli" that the Building Block already stands and is in use.
6. A BLUP provides permit for construction and subsequently for the operation of the project. Appellant's statement of case is directed to the construction phase. The penultimate paragraph of the Appellant's Statement of Case provides that the project as constituted is "*contrary to the topography of the neighbourhood and the intended use of the land in lite*" and is "*not suited for the surrounding infrastructure...*" Being given that the construction proceeded without any "sauvegarde" to temporarily stop the construction, we believe that the land cannot be restored to its original state. No retrospective measures, be it a decision from this Tribunal or any other jurisdiction, will be capable of achieving that. There has been a material change in the state of the land, in the topography of the land, from the time the appeal was lodged or perhaps prior to the appeal being lodged. The Appellant averred in her statement of case that the construction started without notification being given to her.

7. Appellant's counsel argued that the case has to proceed and in the eventuality that before this instance, the BLUP is found to have been wrongly granted, the appellants would have other recourse such as a pulling down order. It appears to be rather far-fetched that a 98 apartment building within which third party *bona fide* purchasers have acquired rights, will be pulled down. We cannot subscribe to this view. This situation has to be looked at globally with the acquired third party rights and prejudice being inextricably linked to "the status of the construction". The construction having been completed and from what we have understood Counsel to be saying, most of the 98 apartments have bought and some are inhabited. While this Tribunal cannot *per se* look into third party rights, it can look at the general rights and any prejudice caused to persons affected by the development. The prejudice that will be caused to so many who are now benefitting a peaceful enjoyment of their property is to be balanced against that of the Appellant who resides abroad. Furthermore, the structure itself is of such magnitude, unlike the size of a wall or house illegally constructed, that pulling it down may be a greater source of pollution to the environment and may be a safety hazard to those "surrounding infrastructure". We believe that what has been done cannot be undone.
  
8. We believe some issues are worthy of address *proprio motu*, although they were not raised. Ex-facie the Statement of case and Notice of appeal, the Appellant has made averments regarding suggested facts prior to the granting of the BLUP. She has made reference to flaws in the procedure prior to the granting of the BLUP by the co-respondent no. 1 as well as the respondent. Apart from dealing with matters arising prior to the granting of the BLUP, the tenor of the last five paragraphs before the penultimate paragraph suggests that the "general conditions" attached to the BLUP, if not complied with, will constitute an offence liable to prosecution and conviction; that the BLUP was void *ab initio* and that the Respondent ought to have taken sanctions and actions against the co-respondent no.1. This Tribunal does not look into judicial review matters, nor into criminal matters and it is not a "debating club".

9. On the basis of our analysis, we believe that a determination of this Tribunal will serve no practical purpose. For all the reasons set out above, we find that the point was well taken and the motion of the respondent is granted. The appeal is set aside with no costs.

Ruling delivered on 17<sup>th</sup> April 2018 by

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**Mrs. J. RAMFUL**

**Vice Chairperson**

**Mr. P. MANNA**

**Assessor**

**Mr. G. LEPOIGNEUR**

**Assessor**