IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1531/17

In the matter of:

Rawoo Mexxy Farm Ltd

Appellant

versus

Ministry of Social Security, National Solidarity and Environment and Sustainable Development.

Respondent

RULING

1. The present appeal is against the decision of the Respondent for having refused the granting of a Preliminary Environmental Report ["PER"] for the setting up of proposed cattle fattening farm project at Saint Felix. The letter of refusal dated 16th November 2017 under the signature of Mr. Heeramun, the acting Director of Environment stipulates that following the examination of the application by the PER Committee *"...this is to inform you that in accordance with section 16 (6) b of the Environment Protection Act, the PER **has been rejected**. The proposed development would give rise to environmental nuisances such as odours and flies to the surrounding environment, as advised by the Ministry of Health and Quality of Life."*

2. The notice of appeal was lodged before the Tribunal on the 7th December 2017. The statement of defence of the respondent was filed on 7th February 2017 in which it raised a plea in *limine litis* to sustain its motion to set aside the appeal, as follows:
"(a) it is the Minister who is mandated under the law to approve or reject a Preliminary Environmental Report [PER]; and

(b) section 54 of the Environment Protection Act provides that the Environment and Land Use Appeal Tribunal can hear appeal against decision of the Minister in relation to a PER under Section 16 (6) (b) of the said Act."

3. It is not disputed by Counsel appearing for the Appellant that the correct party to have been joined as respondent to this case was infact the Minister, and not the Ministry. He subsequently moved for an amendment to rectify the pleadings and has urged the Tribunal to exercise its discretion to allow the amendment. We have duly considered the submissions of both Counsel. We shall only make reference to Counsel's submissions where we deem it fit to do so.

4. Counsel for the Appellant in essence submitted the appeal was entered within the time frame prescribed by the **Environment and Land Use Appeal Tribunal Act 2012 ["ELAT Act"]**. According to him, it was a "simple mistake that has provoked this particular situation" and that the issues themselves would not be changed, that no prejudice would be caused to the respondent as the Ministry having as its head the Minister always knew what case it had to meet since they had put in a defence. Counsel also referred us to a line of authorities in support of the fact that the courts are more likely to allow amendment of pleadings where there has been a genuine mistake so as to deal with the real issues at hand. He also referred us to **section 5 of the ELUAT** to support his case.

5. It is important to have a look at the chronology of events briefly leading up to the arguments. Following the filing of the statement of defence by the respondent on the 7th February 2017, the matter was fixed for Arguments to May 2018 on the plea *in limine*. On the 14th May 2018, Counsel for the Appellant, conceding that the preliminary objection was rightly taken, made a motion to amend the pleadings by deleting the word "Ministry" and substituting it by the word "Minister" so that the matter can be heard and the issue in dispute dealt with. The respondent moved to take a stand and subsequently decided to resist the motion for amendment, hence the present arguments.

8. We believe that although the appeal was lodged within the statutory time frame, it was not lodged against the proper party, namely the Minister who is the decision-making body under **s. 16(6) of the EPA 2002**. The provisions of **Section 5(4) (a) of the ELAT Act** clearly spell out that the procedure to lodge an appeal is by depositing with the Secretary a notice of appeal, which clearly implies that it would imperatively need to contain the name of the decision-making body and all appeals are to be lodged not later than 21 days from the date of notification to the party wishing to appeal such that there can be no confusion as regards the time limit allocated to an appellant for the lodging of his appeal. This provision has been drafted in mandatory terms using the words "*shall...be brought*" and "*not later than 21 days*", which show that the intention of the legislator was infact to give to the Tribunal in this specific context no discretion to travel outside the time frame provided by the law. We believe that the drafting language used by the legislator under **section 5(4) of the ELAT Act** is mandatory and not discretionary.

9. The implication of the above provision is that the jurisdiction of this Tribunal has been seized within the statutory time frame, provided that the Tribunal has jurisdiction to hear the case. At the time that the appeal was lodged, the decision-making body was styled as the Ministry, over which the Tribunal has no jurisdiction under the ELUAT Act 2012 . It is only 5 months after the appeal was lodged against the wrong party that the appellant decided to move for an amendment, following the plea *in limine* raised by the respondent. Infact the record shows that even after the Statement of Defence was filed where the preliminary objection was raised, there was no motion for amendment by the appellant at that time. The matter was fixed for argument. No solid explanation was ever advanced as to why this error was to be taken as a genuine mistake, the moreso as the appellant was legally represented from the time the appeal was lodged. **Section 54 of the EPA 2002** supra, stipulates in very clear terms that "*The Tribunal shall hear and determine appeals against a decision of the Minister under section 16 (6)*". [the stress is ours]

10. In the case of **Jacques Monroe v State Bank of Mauritius [2008] SCJ 73** the plaintiff sought to make certain amendments following a preliminary objection being raised in the plea of the respondent. The plaintiff argued that on the authority of **ABC Motors Co. Ltd v Ngan Hoy Khen Ngan Chee Wang [2008 SCJ 25]** the courts have wide powers to allow amendments and that nothing short of prejudice and abuse will prevent a court from allowing it. Sir Hamid Moollan Q.C argued that this was a case where an amendment should not be allowed as it was designed to defeat the plea *in limine* that had been raised. Justice Domah refused to grant the motion on the basis that allowing the amendment would have the purpose of forestalling the determination of the plea *in limine* which raised an issue of limitation of action.

11. We believe that the present situation bears some similarity to the one above which goes to the jurisdiction of the Tribunal. Allowing the amendment will have for effect to forestall an action which is not just time-barred in that it is seeking to join the actual decision-maker outside the statutory time frame, but more importantly it goes to the jurisdiction of the Tribunal. Allowing the amendment outside the time frame would result in the Tribunal giving itself jurisdiction to hear a matter which it did not have at the outset. The Tribunal cannot rectify a procedural defect which goes to the jurisdiction of the Tribunal.

12. In **Boodhoo v Government of Mauritius [1995 MR 63]**, an objection was raised by the defendant to the amendment of deleting the word "defendant" and adding "the Ministry of Information to which the defendant is responsible" in its place. It was argued that it would be tantamount to "introducing a new cause of action in respect of proceedings which have not been instituted within the delay provided by the law". Justice Balancy considered the effect of the amendment and took into account that no previous notice of the new cause of action would have been given within the time frame provided by the law. He concluded "... the statement of case does not disclose a cause of action against the defendant" and set aside the case whilst not granting the motion.

13. The record shows that the notice to be served on the respondent, although there is no return, would appear to have been issued for service to be effected on the Permanent Secretary of the Ministry, Department of Environment. The Minister cannot be equated with the Ministry. If service was effected at the Ministry, it cannot be taken to mean that the Minister was aware of it or that he was at all material times aware of an appeal which although against his decision, was not personally served on him. This reinforces the point we made earlier that allowing the amendment, in this context, would actually be to defeat the plea *in limine* which addresses jurisdictional issues of this Tribunal. Pleadings, that is, what is in substance being pleaded, may infact be amended for the purposes of clarifying the issues that are being canvassed. Likewise in the case of parties, where it is the case of a simple misnomer, courts tend to allow amendments as the parties had no doubt in their minds against whom the case was lodged: **Rodriguez v R.J. Parker [1967] 1 Q.B 116.**

14. In **Ujoodha v The State of Mauritius & Ors [2015] SCJ 365**, the State raised as a plea *in limine* that the correct party had not been put into cause as the decision to terminate the applicant's appointment had been taken by the Honourable Prime Minister. In that case the motion for amendment came six months later. It was argued that if the court grants the amendment, the Court would be in presence of a fresh application against the proper party outside the delay prescribed by law and that the Court should accordingly not grant the motion for amendment. Their lordships decided that the amendment sought goes "*beyond the bringing in of an additional party; it seeks to substitute the decision-making party i.e the State by another party i.e the Prime Minister, which according to the basic principles governing amendment of pleadings cannot be done*".

15. On a close reading of the statement of case, it would appear that the respondent cannot simply be substituted from "Ministry" to "Minister" as submitted by Counsel for the Appellant. Reference is made throughout to the Respondent as the Ministry, including

guidelines issued by the Ministry. Allowing the amendment will, in our view, also trigger other amendments which will cause prejudice to the respondent.

16. For all the reasons above, on the facts of this case we have decided to exercise our discretion not to allow the amendment sought by the appellant and we find that the preliminary objection was well taken. The appeal is accordingly set aside. No order as to costs.

Ruling delivered on 18th January 2019 by

Mrs. J. RAMFUL-JHOWRY	**Mr. MEETOO**	**Mr. SAULICK**
Vice Chairperson	**Assessor**	**Assessor**