IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1588/18

In the matter of:

Dilip Kumar Lallbeeharry and Ors

Appellants

versus

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

Respondent

IPO:

KPMM (Mauritius)Ltd

Co-respondent

RULING

1. The present appeal is against the decision to approve an EIA licence granted in favour of the co-respondent for the proposed construction of a five star hotel at Bel Ombre. The Notice of Appeal was lodged on the 2nd April 2018. The date of notification of the decision as per the Notice of Appeal is the 2nd April 2018 and the date on which the EIA licence was granted as per the document annexed to the Notice of Appeal is the 13th March 2018. The annexed document, which appears to be a computer generated print-out, stipulates *"Notice is hereby given under Section 23(5) of the Environment Protection Act 2002 that the Minister of Environment and Sustainable Development has **approved** the issue of an **EIA Licence** for the following undertakings."* The description of the project is set out as *"Proposed Setting Up of a Five Star Hotel of 198 bedrooms on a plot of state land of an extent of 66,446.90 m^2"*. The project site is given as *"Bel Ombre in the district of Savanne."* Following a motion for amendment of the pleadings by the Appellants' Counsel, which was resisted, the matter was argued.

2. It is important, in our view, to consider the chronology of events leading up to the argument on the point in law. Following the lodging of the Notice of Appeal and the Statement of Case of the Appellants, the matter was called pro-forma on the 11th April 2018, when none of the parties were present. The Respondent filed their Statement of Defence at the Tribunal on the 24th April 2018 wherein a five-limbed plea *in limine* was raised as follows:

"Respondent moves that the present appeal be dismissed in as much as:

(i) *Appellants have not established any clear legal right which they intend to protect;*

(ii) *the appeal does not comply with section 5 (4) (aa) and (ad) in as much as no statement of case and any witness statement has been served on Respondent;*

(iii) *the appeal has been wrongly directed against the Respondent;*

(iv) *the grounds of appeal are not in compliance with section 5 (4) (a) and do not even amount to proper grounds of appeal;*

(v) *the appeal is frivolous and vexatious."*

3. The case was called pro-forma on the 16th May 2018. Me. Bissessur appeared for the Appellants and Me. Reesaul together with Me. Bacorisen appeared for the Co-respondent. The Ministry was represented by State attorney. The matter was postponed on account of the Co-respondent not having been served with the pleadings. Counsel for the Appellant undertook to have the service of the documents effected and the case was again fixed pro-forma to the 30th May 2018 for Statement of Defence of the Co-respondent to be filed.

4. On the 30th May 2018, Me. Bissessur appearing for the Appellants moved to amend the Statement of Case of the Appellants:

"by adding as first Respondent, the Minister of Social Security, National Solidarity and Environment and Sustainable Development;

as respondent no.2, the Ministry of Social Security, National Solidarity and Environment and Sustainable Development;

as Co-respondent no.1, KPMM;

as Co-respondent no. 2, the Ministry of Housing and Lands

as Co-respondent no.3, the Ministry of Ocean Economy, Marine Resources, Fisheries, Shipping and Outer Islands;

as Co-respondent no.4, the District Council of Savanne;

as Co-respondent no.5, the Tourism Authority;

as Co-respondent no.6, The Beach Authority."

Me. Bissessur also moved to amend the Statement of Case by adding new grounds of appeal. State Attorney objected at that stage to any amendment on the ground that the amendments sought by the Appellants were outside the prescribed timeframe and that the new grounds of appeal being proposed were outside the timeframe. The Co-respondent also subsequently objected to the proposed amendment. The matter was argued. We have duly considered the submission of all Counsel.

5. Counsel for the Appellants having moved to amend the heading of the Statement of Case after the filing of the Statement of Defence of the Respondent is a move in response to the plea *in limine*. Therefore it is not disputed by the Appellants, that the correct party to have been joined as Respondent was infact the Minister. 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 on account of the fact that nothing short of prejudice and abuse will prevent the Courts from exercising the discretion to allow amendments. Justice Domah did not 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. We believe this ratio is applicable in the present case where at the time of the lodging of the Notice of Appeal, the Minister was not put into cause and this goes to the jurisdiction of the Tribunal to hear the matter.

6. Under **section 4 of the Environment and Land Use Appeal Tribunal Act 2012**, the Tribunal has the jurisdiction to hear and determine appeals under **Section 54 of the Environment Protection Act 2002.** Since this appeal purports to challenge the decision of granting an EIA licence, it would have to be lodged pursuant to **Section 54 of the Environment Protection Act 2002** as amended, which provides:

"54. Jurisdiction of Tribunal

(1) The Tribunal shall hear and determine appeals against—

(a) a decision of the Minister under section 16 (6), 17 (1), 23 (2), 23 (4), 24 (3) (a), 24 (3) or 25 (1)..." [stress is ours]

7. At the time of the lodging of the appeal before the Tribunal, albeit within the statutory time frame, the Respondent was styled as the "Ministry of Social Security, National Security and Environment and Sustainable Development", as per the Notice of Appeal and the Statement of Case of the Appellants. The Tribunal is willing to overlook the mistake made in the appellation of the Respondent as styled, that is, Ministry of Social Security, National Security and Environment and Sustainable Development where as it should have read Ministry of Social Security, National Solidarity and Environment and Sustainable Development, since it does not cause any confusion in the mind of the bench that the Appellants intended to make reference to the relevant Ministry. However, the averments contained in the Statement of Case or the Notice of Appeal at no point seemed to be directed towards the decision-making body, that is, the relevant Minister. The record shows that service of the Statement of Case was done on an Office Supervisor of the Ministry. The Tribunal cannot satisfy itself on the basis of this that the Minister must have known that an appeal has been lodged contesting his decision.

8. We also take note that the document annexed by the Appellants to their Notice of Appeal, reference to which was made in the first paragraph, clearly sets out that it was the decision of the Minister to approve the EIA Licence pursuant to **section 23 (5) of the**

EPA 2002. Therefore, we do not believe that the Appellants can plead ignorance, nor that the reason given by their Counsel that they were not legally represented at the relevant time can be accepted under the circumstances.

9. It was argued by Counsel representing the Ministry that the motion for amendment came in as an afterthought and has for effect the forestalling of the plea *in limine* raised by the Respondent. From the record, it cannot be contested that the stage at which the motion was made behalf of the Appellants, was after the statement of defence containing the plea *in limine* was already filed. Infact, from the record, the motion for amendment of the parties and for additional grounds of appeal was not made until the second pro-forma sitting of the Tribunal following the filing of the Statement of Defence. This was not only outside the prescribed statutory time as far as filing of additional grounds of appeal are concerned but it also would be tantamount to bringing an action against the Minister, the decision-making body in this case, outside the time frame prescribed by statute for lodging an appeal. In **Ujoodha v The State of Mauritius & Ors [2015] SCJ 365** the State raised a plea *in limine* that the correct party had not been put into cause as the impugned decision was a decision of the Honourable Prime Minister, not that of the State. The appellant moved for an amendment accordingly. Their lordships decided that the amendment would go *"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"*.

10. Even if the amendment was allowed so that the relevant Minister was added as a Respondent, the appeal as couched would still, in our view, not fall within the purview of jurisdiction of this Tribunal. The only submissions of the Appellants as per their statement of case are under paragraph C and are reproduced below:

"C. Submissions

"(i) I humbly submit that Section 32 of the Environment Protection Act (2008) has not been complied with.

(ii) I further submit that Section 32 is a mandatory one pertaining to the granting of the said Licence."

11. From the above, it is noted that the Appellants are seeking to contest the decision under **section 32 of the Environment Protection Act 2008**. The Tribunal takes note that the relevant principal Act is the **Environment Protection Act 2002 ["EPA"]**. There is the **Environment Protection (Amendment) Act 2008** but **section 32** of the Act addresses the repeal and replacement of **section 96** of the principal Act which concerns the powers of the Minister to make Regulations and has no bearing on the jurisdiction of this Tribunal as set out under **Section 54 of the EPA 2002** *supra*.

12. Alternatively, if the Appellants intended to make reference to breach of the parent Act, that is, the **Environment Protection Act 2002** as amended in 2008, which is the law applicable at the time the decision to grant the EIA licence, **section 32**, just as **section96**, is not covered under **Section 54 of the EPA 2002** *supra*, which gives the Tribunal the power to hear and undermine appeals relating to decisions of the Minister. **Section 32** infact relates to "**Liability for spill**" and gives the right to the Attorney-General to bring a claim for damages. The section is reproduced below:

"Section 32 Liability for spill

(1) Without prejudice to any other cause of action or remedy under any other enactment, any person affected in any way by a spill shall have a right to damages from the owner of a pollutant.

(2) Subject to this section, article 1384 alinéa 1 of the Code Civil Mauricien shall apply to an action under subsection (1).

(3) For the purposes of an action for damages under this section—

(a) the owner of a pollutant shall be presumed to be liable for any damages caused by a spill;

(b) the owner of a pollutant which is spilled shall always be deemed to be the gardien of the pollutant;

(c) a pollutant shall always be deemed to be in the custody of the owner of the pollutant;

(d) the burden of proving that the damage was not caused by the pollutant which was spilled, shall always rest on the owner of the pollutant.

(4) Where there are several owners of a pollutant, the action may be directed against all or anyone of them.

(5) Where damage is caused by a spill to the environment, or to any property, object or thing which is not the subject of private ownership, the Attorney-General may claim damages against the owner of the pollutant in accordance with this section."

13. The Grounds of Appeal, as set out in the Notice of Appeal of the Appellants are replicated in their Statement of Case at paragraph B and are reproduced hereunder:

"***B. Background***

1. *Appellants appealed against the said decision on the following Grounds of Appeal, viz:-*

(i) Co-respondent No.1 has been granted an EIA Licence inspite that it has failed to comply with Clause 32 of the List of Conditions for proposed hotel project at Bel Ombre laid by the Ministry dated 7th March, 2018.

(ii) Appellants aver they have never been convened to any particular assembly and/or gathering in relation to the said Hotel Project.

(iii) At no time, had they given authorization to the President and/or any members of the association for the implementation of the said project to take any decision on their behalf."

14. Clause 32 of the EIA Licence, which has been annexed to the Statement of Defence of the Respondent, provides *"The promoter shall hold consultative meeting with fishermen and coastal users of the region concerning the project and the promoter shall resolve any conflict that may arise before, during and after the implementation of the project."* Non-observance of this clause could at best and without going into the merits of the case, be taken to be a potential breach of **Section 23 (9) of the EPA** which provides *"Any person who fails to comply with a term or condition attached to an EIA licence shall commit an offence."* The sanction attached to a breach of this section is a criminal one under **Section 85 (3) of the EPA.** It does not fall within the jurisdiction of this Tribunal to challenge a ministerial decision as provided for under **section 54 of the EPA**. In view of the tenor of the averments in the Appellants' statement of case, we are unable to conclude that the Appellants have properly seized the jurisdiction of this Tribunal in compliance with the provisions of the **Environment and Land Use Appeal Tribunal Act 2012** and **the EPA 2002** and in what capacity.

15. Allowing the amendment will not only have for effect to forestall an action which is not just time-barred in that it is seeking to join the actual decision-maker and put in additional grounds of appeal outside the statutory time-frame without any valid justification but also it goes to the jurisdiction of the Tribunal. Allowing such amendments would result in the Tribunal giving itself the jurisdiction to hear a matter which it did not have at the outset. The Appellants have not averred in their Statement of Case in what way they are aggrieved by the decision of the Minister. They should have been mindful of their cause of action and who the decision maker is. The Minister cannot be equated to the Ministry.

16. For all the reasons set out above, the motion for amendment on both limbs is set aside. The matter is accordingly fixed pro-forma for the Appellants take a stand.

Ruling delivered on the 22nd August 2019 by

Mrs. J. RAMFUL	**Dr. Y. MIHILALL**	**Mr. H. MEETOO**
Vice Chairperson	**Member**	**Member**