BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1691/18

In the matter of:

1. **Aret Kokin Nu Laplaz,**
   as represented by Kashmira Banee
2. **Carina Gouden**
3. **Oormila Sahodree**
4. **Yan Hookoomsing**
5. **Veersen Hurree**
6. **Ashok Subron**
7. **Moonsamy Gounden**

Appellants

v/s

Ministry of Social Security, National Solidarity, and Environment and Sustainable Development (Environment and Sustainable Development Division)

Respondent

In the presence of:

West Coast Leisure Ltd

Co-Respondent

RULING

1. This is an appeal initially against the decision of the Minister/Ministry of Social Security National Solidarity, and Environment and Sustainable Development (Environment and Sustainable Development Division) for granting an EIA licence to West Coast Leisure Ltd.

2. At the very first calling of the case before the Tribunal, at the sitting of the 25th September 2018, Counsel appearing for the Appellants moved for an amendment of the statement of case by deleting the word "Minister" from the heading so that the only respondent would be the Ministry of, Social Security National Solidarity, and Environment [referred as the "Ministry"]. The respondent and co-respondent did not object to this motion.The Ministry subsequently raised a preliminary objection that the wrong party has been put into cause as respondent. The appellants consequently moved to amend the heading of the statement of case again to add the Minister in his personal name. This was met with objection from both the respondent and the co-respondent and is the issue in dispute before us.

CHRONOLOGY OF EVENTS

3. In our view it is important to set out the chronology of events that ledto the preliminary objection raised by the respondent since the time line has a bearing of the issue of adjudication. The appellants' statement of case and notice of appeal were lodged at the registry of this Tribunal on 13th September 2018 and both documents have styled the respondent and decision-maker respectively as "Minister/Ministry of Social Security, National Solidarity, and Environment and Sustainable Development (Environment and Sustainable Development Division)". We note from these documents that the appellants have been legally represented from the time of the lodging of the appeal.

4. As per procedure, the appellants caused the statement of case to be served at the office of the relevant Minister and at the Ministry. The usher's return is evidence of the service effected at these offices as it bears the signatures of the respective Management Support Officers in acknowledgement of receipt and dated 13thSeptember 2018, as borne out at page 14 of the record.The return also shows there had been service at the office of the co-respondent.

5. Subsequent to the appeal lodged, the Tribunal issued a letter, as born out at Page 253 of the record, convening all parties as set out in the appeal to attend the Tribunal on the 25th September 2018 at 10 00 hrs as the case would be called pro-forma. At the calling of the case on that day,Mr. Nikhil Thakoor, counsel appearing for the Appellants made a motion for amendment of the Statement of Case *"so as to delete the word "Minister""* and the Respondent is to be read as Ministry of Social Security, National Solidarity, and Environment. State Attorney who appeared for the respondents and Counsel appearing for the co-respondent having no objection to the motion, Mr. Thakoor moved to file an amended statement of case later that day. The legal representatives of the respondent and co-respondent moved for a postponement to file their statement in reply at the following sitting. The amended statement of case was filed at the Tribunal the following day.

6. On the 3rd October 2018, the next pro-forma sitting of the case, the State Attorney appearing for the Ministry moved to have the statement of defence of the Respondent filed at a later time in the course of the day but gave advance notice to the Appellants, who were present and also legally represented, that the respondent intended to raise a preliminary objection and moved that the Appellants take a stand on the objection. This course of action was agreeable by the attorney who replaced the appellants' attorney for the session. The matter was scheduled pro-forma on the 9th October 2018.The statement of defence of the Ministry, filed on the 3rd October 2018, contains a two-fold *plea in limine* as follows

"Ex-facie the appeal, Respondent avers that

(a) The wrong party has been put as Respondent so that pursuant to section 4 of the Environment and Land Use Appeal Tribunal Act, the Tribunal has no jurisdiction to hear and determine the appeal;

(b) Appellants do not have locus standi "

7. At the sitting of the 9th October 2018, Mr. Thakoor made a motion of amendment to the Statement of Case "to add as second Respondent the name of The Honourable Marie Joseph Etienne Sinatambou, Minister of Social Security, National Solidarity, Environment and Sustainable Development." The co-respondent objected to the motion for amendment on the ground that the motion sought to add a new party outside the timeframe and secondly, the party sought to be added was not *prima facie* a proper party in a case. A proposed amended statement of case was filed. The respondent also communicated their objection at a subsequent sitting to the motion for amendment on the ground that the Minister was being put into cause outside the statutory timeframe.

LEGAL ISSUES

8. We have duly considered the submissions of all counsel. We will not overburden this ruling with the submissions of each counsel except where we deem it fit to do so. 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.** This appeal was 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)..."

The proceedings of the Tribunal are regulated by**section 5** of the **Environment and Land Use Appeal Tribunal Act 2012 ["ELAT Act"]. Section 5 (4)(a)**provides *"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 fromthe date of the decision under reference being notified to the party wishing to appeal."*

Section 5 (4) (b) provides *"Where a decision referred to in paragraph (a) is one which is not, under the relevant Act, required to be notified to the person wishing to appeal, he shall deposit the notice and grounds of appeal with the Secretary not later than 21 days from the date on which public notice of the decision was given."*

9. The appellants in the present case lodged an appeal before this Tribunal on the 13th September 2018 and as per their notice of notice of appeal and statement of case it was following public notification of a decision of the Minister to have granted an EIA licence in favour of the co-respondent, as published in the newspapers dated 24th August 2018.The provisions of **Section 5(4) (a) and (b) of the ELAT Act,** clearly spell out that the procedure to lodge an appeal is by depositing with the Secretary a duly filled out notice of appeal, which clearly implies that it would need to contain the name of the decision-making body as required under paragraph 1 of the Notice, 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 as far as the lodging of the appeal is concerned. We believe that the drafting language used by the legislator under **section 5(4) (a) and (b) of the ELAT Act** is mandatory.

10. It was advanced by Counsel for the Appellant that at the time that the appeal was lodged the Minister had been put into cause within the statutory timeframe. He referred us to the certificate of service by the registered usher as borne out by the record as well as a circular sent by the Tribunal convening the parties, found at P 253 of the brief, in support of his position *"at that point in time, the appellants had put into cause the Minister and the Tribunal was prima facie satisfied that all procedures had been adhered to."*

11. We pause here to make a few points on the issues which did not constitute the core arguments but nevertheless need to be address. The first point is that there is no foundation to the suggestion that "*the Tribunal was prima facie satisfied that all procedures had been adhered to.*" A difference is to be drawn between the Tribunal sitting for the purposes of determining the fate of an appeal and the work undertaken by the administrative staff of the Tribunal regarding the logistics to getting a case to be in shape. Letters issued for the purposes convening parties cannot be equated to the Tribunal coming to an informed view that all procedures have been complied with.

12. The second point is that the prescribed form of the notice of appeal, which has to be filled out under the Schedule of the Act to lodge the appeal shows that the name of the decision-making body has been entered as "Minister/Ministry of Social Security National Solidarity, and Environment and Sustainable Development (Environment and Sustainable Development Division)". We agree with the submissions of Counsel for the respondent to the effect that there can be no body that exists by the name of "Minister/Ministry". This is a rather undesirable state of affairs it would imperatively have necessitated an amendment of the pleadings, hence cause unjustified delay. The record shows that the Appellants have always been legally represented as their grounds of appeal and statement of case have been drafted by their attorney and they also had a counsel. We believe we can derive the fundamentals of this if we follow the legal reasoning of judges of local and foreign jurisdictions.

13. In **Soobhany and Ors v Soobany and Ors [1989] SCJ 428** the defence sought raise a plea *in limine* to challenge the action on the ground that it was time barred by the limitation period of three years provided by Art 1844-14 of the Code Napoleon. The plea in limine was only raised after the case started and the appellant's counsel was halfway through his opening speech. His Lordship citing Lord Griffiths in the case of **Ketteman v Hansel Properties Ltd [1987] AC 189** at Page 220, " *There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence raised for the first time.*"

14. In **Rodriguez v R.J.Parker [1967] 1 QBD 116**, the plaintiff sought to amend a writ and all subsequent proceedings in an accident case by substituting "R.S.P" as the name of the defendant in an action to "R.J.P", an error which came about through a genuine mistake on the part of the Plaintiff's attorney since there were issues involving as to who was the defendant driver at the material time, a father or his son, one had for initials "R.S.P" whereas the other was "R.J.P". It was held where the mistake is genuine and that there could be no reasonable doubt that the intended defendant was the driver at the time of the accident, the Court would normally exercise its discretion in favour of allowing an amendment and that the defendant would not have been prejudiced in anyway.

15. While we strictly do not condone the irregularity, we believe that since there had been good service at both the office of the Minister and at the Ministry of Social Security National Solidarity, and Environment and Sustainable Development and this is evidenced by the fact that the state attorney did put in an appearance at the Tribunal on the 25th September 2019, we are of the view that the Appellants had intended to have as respondents the Minister and the Ministry and that there two bodies had been duly summoned and were aware of the case lodged against them by the Appellants. Hence, in our view, the Minister was a party to the case at the time that the Appellant's lodged their appealbefore the Tribunal although this would have called for some amendment to the pleadings had Mr. Thakoor not moved to remove "Minister" from the Statement of Case.

THE AMENDMENT

16. This brings us to the issue at hand, which is whether the amendment of the statement of case must be allowed to join the Minister as a party to the case again. It is worthy of note that the motion made by the Appellant is to add as second Respondent, *"The Honourable Marie Joseph Etienne Sinatambou, Minister of Social Security, National Solidarity, Environment and Sustainable Development."*The Respondent and co-respondent's submitted in essence that this amendment cannot be allowed which incidentally came as a reaction to the plea *in limine* raised by the Respondent in their

Statement of Defence as the effect of allowing the amendment would be to defeat the objection raised in the plea regarding the jurisdiction of this Tribunal and that if it were to be allowed it would seek to introduce a new party to the appeal outside the statutory time frame of 21 days provided by the **ELAT Act**. The position of the Appellant is that the Minister was a party to the case at all times.

17. 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.** This appeal was 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)..." [the stress is ours]

18. On a strict interpretation of the above provision, the Tribunal shall determine appeals provided that the Tribunal has jurisdiction to hear the case. At the time that the appeal was lodged, we can accept that the Minister was party following our finding at paragraph 15 above. However, at the sitting of the 25th September 2018, there was a clear motion by Mr. Thakoor, counsel appearing for the Appellants to remove the Minister as a party to the case so that the respondent would be only the Ministry. This is borne out by the record at Pages 254 and 255. The motion of the Appellants' counsel was followed by the stand of the other parties and an amended Statement of case was also filed by the Appellants clearly setting out the only respondent as being the Ministry. Looking at the general tenor of the Amended Statement of case, the grievances especially at paragraphs 66, 72 are directed at the Ministry.We are therefore unable to accept the submission of Counsel for the appellant that the Minister was never put out of cause.

19. What stems from the above is that from the time that the Minister, the decision-making body is not a party to this case, the Tribunal would not have jurisdiction to hear the matter. **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 23 (2)",* which is the section conferring the power on the Minister to grant EIA licences.We are however alive to the fact that the appeal before us does infact stem from a decision of the relevant Minister even though he is at this stage not a party to the case and that the substantive issues of the case are within the competence of this Tribunal.

20. As a means of guidance, in **Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice,** 22nd edition, under Chapter 2 at Page 20 which deals with Parties, it is said, *"Formerly the law and practice as to "parties" was of the utmost importance, misjoinder of a plaintiff being ground for non-suit, while non-joinder of a necessary plaintiff was the subject of a plea in abatement. But now "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party;and the court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."* At Page 21, the author sets out all the various instances where the court would allow such amendments and where it would normally not and one such instance is where a relevant period of limitation has expired, a person may not be added or substituted as a party except in certain restricted circumstances.

21. In the present case, we agree with the submissions of Counsel appearing for the Ministry that there is a mandatory time limit imposed by law to lodge the appeal within twenty one days from the date of notification to the party wishing to appeal. The peculiarity of this case is that although the case was entered within the statutory time frame,the appellants' counsel moved to remove the Minister as a party to the case.

22. In our view, it was not a case of omission on their part, it was a voluntary reconsideration on the part of appellants with their legal advisorsof their stand as regards the parties they wishes to put into cause. In **Roland Constantin v Jhuboo [2016] SCJ 500**, a plea *in limine* was raised for the setting aside of action in defamation on the basis that that there was a failure to comply with the statutory time frame. It was held that failure to comply with time limit for appealing is fatal unless it can be shown that the delay was not due to the party appealing or of his attorney.

23. Once the statutory time frame has expired, the Tribunal is bound to look at all the circumstances, without adopting a blinkered attitude, to decide in which way to exercise its discretion bearing in mind any likelihood of prejudice. In **Mauvillac Industries Ltd v Ragoobeer [2007] UKPC 43**, the Court said *"...the legislature has adopted a policy of laying down a fixed time limit...and with the aim of ensuring that both parties know where they stand as quickly as possible..."*

24. 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."*

25. In present case the Minister was initially coupled with the Ministry as a party, then the Minister was removed and further to a plea *in limine* being raised by the respondent, the appellants' counsel sought to re-introduce the Minister. While we agree with

thesubmissions of counsel for the respondent that the motion for amendment on the part of the appellants seeks to defeat the plea *in limine,* we also find very tellingthe constant change of stand on the part of appellants from the time the appeal has been lodged.This is likely to cause prejudice to the other parties. We agree with the submission of learned counsel for the respondent that allowing the amendment would amount to an introduction of a new party to the appeal out of time. It would also prolong matters in that the Minister, if added, would require time to consider its stand and possibly file its statement of defence.

26. We are also alive to the fact that Counsel appearing for the co-respondent raised an objection at the sitting of the 9th October 2018 when Mr. Thakoor sought to amend the Statement of Case to add the name of the Minister on the ground that the party sought to be added is not *prima facie* a proper party in the case. We believe this to be a point well-taken when considering the consequences of allowing the motion for amendment. Allowing the motion of the appellants would have for effect to put in the Honourable Minister in his personal and this cannot be. The Minister is not to be made a party personally but in his official capacity as Ministerof Social Security, National Solidarity, and Environment and Sustainable Development. The Tribunal cannot allow a motion for amendment when the amendment will bring in a wrong party in substance. This may entail further motions for amendment and debate which will amount to an abuse of the process of this Tribunal.There is a stark contrast between allowing amendments in the spirit of allowing clarification of issues for the efficient disposal of the case and allowing amendments because of the flip flopping of counsel.

27. In **Jhundoo v Jhuree [1981] SCJ 98,** the issue revolved around an action being brought against the wrong party. Mr. Jhundoo was being sued as "Manager of Pelle Estate" and when it came to light that "Pelle Estate" did not exist, he was wrongly sued in his personal name. The matter went on appeal and their Lordhips, Rault C.J and Espitalier-Noel, J, had to decide on the issue as to whether the learned magistrate was right to allow that Mr. Jundhoo be added personally as a defendant in the place of "the

imaginary Pelle Estate". Their lordships systematically analysed all the relevant Supreme Court Rules andfor guidance they also turned to the English cases such as **Clay v Oxford [1866] L.R. 2 Exch.54**, which used the governing principles equivalent to the Supreme Court rule 56. In this case the plaintiff was dead and an amendment was sought to substitute his representatives as plaintiffs. The decision of the Court was that it cannot be said that the amendment was *"necessary for the purpose of determining in the existing suit the real question in controversy between the parties"*, nor is this application made between the parties to the suit, for there is no plaintiff, and therefore no existing suit, and no question in controversy between the parties. They went on to say that the Mauritian Courts have looked with severity upon legal advisors who bring actions in the name of or against non-existent bodies: **Friendly Societe H.K. Dewal v/s Gorpatur [1951 MR 23]**. They also made an observation regarding the careless manner in which the plaint had been lodged.

28. We are of the view, the amendment in its form and substance is not *"necessary for the purpose of determining in the existing suit the real question in controversy between the parties"* as The Honourable Marie Joseph Etienne Sinatambou in his personal name cannot be added as a party to this suit.

29. For all the reasons set out above, the motion of the appellants is set aside. The matter is fixed for the appellants to take a stand in the light of this ruling.

Ruling delivered on 31st January 2019 by

Mrs. J. RAMFUL-JHOWRY	**Dr. B MOTAH**	**Mr. P. Manna**
Vice Chairperson	**Assessor**	**Assessor**