IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1746/19

In the matter of:

1. **Jean- Marie David SAUVAGE**
2. **Georges Stephan GUA**
3. **Kuvalayan Kugan PARAPEN**

Appellants

versus

1. **The Minister of Social Security, National Solidarity and Environment and Sustainable Development (Environment and Sustainable Development Division).**
2. **The Ministry of Social Security, National Solidarity and Environment and Sustainable Development (Environment and Sustainable Development Division).**

Respondents

In the presence of:

1. **New Mauritius Hotels Limited**
2. **Les Salines Golf & Resort Limited**
3. **The Ministry of Agro-Industry and Food Security**

Co-respondents

RULING

1. The present appeal is against the decision of the Respondent no. 1 for having granted an Environment Impact Assessment Licence [referred as "EIA"] to the New Mauritius Hotels Limited for the proposed construction of a Resort Hotel at Les Salines, Riviere Noire. The proposal is for the hotel to be built partly on freehold land belonging to the Co-respondent no. 1 and partly on the Pas Geometriques at Les Salines where the Co-respondent no.2 holds rights under a lease agreement with the State of Mauritius.

2. At the outset of the Respondents raised a two limbed plea in *limine litis* to sustain its motion to set aside the appeal, as follows:

"Ex facie the appeal, Respondents aver that the Appellants do not satisfy section 54 (2) of the Environment Protection Act in as much as they have failed to aver that:-

(i) they are aggrieved by the decision to grant the EIA licence to Co-respondent No.1, as provided by Section 54 (2) (a) of the Environment Protection Act; and

(ii) that such decision is likely to cause them undue prejudice, as provided by Section 54(2)(b) of the Environment Protection Act."

3. The Co-respondent nos.1, 2 and 3 also raised the same motion and this was resisted by the Appellants and debated in the course of arguments. We will not overburden this judgment with the lengthy submissions of each counsel except where we deem it necessary to do so, it suffices to say however that we have duly considered the submissions of all counsel and all evidence placed before us by way of pleadings.

4. Under **section 4 of the Environment and Land Use Appeal Tribunal Act 2012 ["ELUAT"]**, the Tribunal has jurisdiction to hear and determine appeals under **Section 54 of the Environment Protection Act 2002 ["EPA"].** This appeal was lodged against the decision of the relevant Minister for having granted an EIA licence under **Section 23**, 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) (b) or 25 (1);

(b) ...

(c) ...

(2) Where the Minister has decided to issue an EIA licence, any person who—

(a) is aggrieved by the decision; and

(b) is able to show that the decision is likely to cause him undue prejudice,

may appeal against the decision to the Tribunal."

LIMB 1: APPELLANTS ARE AGGRIEVED

I. WHO ARE THE APPELLANTS?

5. It is the contention of the Respondents and Co-respondents that the Appellants are not "aggrieved" parties within the meaning of the EPA because they have not shown, individually and personally, in what way they are linked to the proposed development such that they will be affected by the granting of the EIA and that any consultative process that may have taken place prior to the granting of the EIA was not done with the Appellants in their personal name but as members of a group by the name of Rezistans ek Alternativ.

6. The Appellants are infact private individuals and have stated at paragraph 2 of their statement of case that they are "citizens of Mauritius and have a legitimate interest in the protection of the natural environment within the territory of Mauritius." Following a notice for public inspection regarding the EIA report for the proposed development, the Appellants aver at paragraph 8, that they submitted their comments and at paragraph 9 they aver that the Respondents acknowledged receipt of these comments. They also aver that the Respondents invited them to participate in a Technical Committee concerning the EIA licence application and they subsequently informed the Respondent no.2 of their conditions for participating in the Technical Committee. By a letter dated 7th December 2018, the Appellants aver that they informed the Respondents that following an expert assessment of the development proposal, the replacement of the wetland was not a like to like offset measure and asked the Respondents to reject the application for EIA licence. Although the Respondents received the communication from the Appellants, they aver that the EIA licence was nevertheless approved by the Respondent no.1. The Respondents and Co-respondents' have denied this on the basis that any correspondence from the Respondents' side was to Rezistans ek Alternativ, not to the Appellants.

7. The record shows no evidence as to the legal status of Rezistans ek Alternativ. It could be a registered association or an unregistered one or it could simply be a group of people coming together for different purposes as a representative body and giving themselves an identity or a sense of belonging by using the name Rezistans ek Alternativ. In any event, the Courts have taken an increasingly liberal approach on this.

8. In the English case of **R v Secretary of State for the Environment ex parte Rose Theatre Trust [1990] 1 QB 504,** a group of objectors to the redevelopment of the site of the Rose Theatre came together to form a Trust company, which they named as Rose Theatre Trust, to challenge the decision not to list the site of the Theatre as a protected site under the **Ancient Monuments and Archaeological Areas Act 1979**. Justice Schiemann, not according the Trust company *locus standi* but giving consideration to the individuals that formed the company, stated, *"...it would be absurd if two people, neither of whom had standing could, by an appropriately worded memorandum, incorporate themselves into a company which thereby obtained standing."*

9. Another case with somewhat different facts but nevertheless where a similar point was made is in the case of **R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No.2) [1994]4 All ER 329.** In this case, Greenpeace challenged the decision to allow the thermal oxide reprocessing plant (THORP) to start its operations, Justice Otton took note of the fact that some of the members of Greenpeace in the region might be affected by the operations. Infact, to make a different point, in this case the learned judge also recognized Greenpeace's genuine interest in the issues raised as well as the expertise and resources it provided to come to the conclusion that Greenpeace did have "sufficient interest" in the matter.

10. What we do note, however, from the annexures attached to the statement of case of the Appellants is that the public comment to the Respondents for the proposed Hotel Resort at Les Salines by New Mauritius Hotels Ltd was prepared by the three Appellants and duly signed by them.

11. Ex-facie the pleadings, Respondent no.2 sent each of the Appellants acknowledgement letters for the public comments and invitation letters were received by the 3 Appellants to attend a Technical Committee with respect to the EIA for the proposed Hotel Resort and they have communicated and caused to be forwarded to the Respondents and the EIA Committee, what they may have perceived as valuable information, being an assessment of the development proposal on the site *in lite* by one Dr. Grundling, an expert in the field of wetlands from South Africa. Therefore, irrespective of their affiliation to any named group, we are satisfied that the 3 Appellants have been part of the consultative process for the EIA and that they have secured the services of an expert who has been on the site where the "Wetlands no. 76" is found and compiled a report containing the expert's views on the proposed development which they have forwarded to the Respondent no.2.

II. DO APPELLANTS HAVE "SUFFICIENT INTEREST"?

12. The Appellants therefore cannot be taken to be mere busybodies or troublemakers as per the *Boyle Rule* under the Australian law. In the Australian case of **Environment East Gippsland Inc v Vic Forests [2010] Victoria Supreme Court 335**, the Supreme Court found that the plaintiff had *locus standi* as it had a special interest in the matter by virtue of the fact that it had been engaged on an ongoing basis in the consultative process regarding the formulation of the relevant Forestry Management Plan, it had made submissions to the Department of Sustainability and Environment and it had received from government a financial grant in recognition of its status as a body representing a particular sector of the public interest.

13. The same principles apply under English law. In addition to reasoning of the Court as set out in the case of **R v Inspectorate of Pollution, ex parte Greenpeace Ltd (No.2) [1994]4 All ER 329***supra*, in the case of **R (Edwards) v Environment Agency [2004] Env LR 43**, the claimant who lived in the locality of Rugby but was homeless at some point in time, sought to challenge an integrated pollution prevention and control

permit granted by the Environment Agency to a local cement company. It was argued by the Respondent that the claimant played no part in the consultation process by not being an active participant, although he had attended meetings of a local campaign group, he therefore did not have any "sufficient interest". The Court held that he had locus standi because being an inhabitant of Rugby, he would be affected by any adverse impact on the environment from the cement works.

14. Applying the above principles, on the facts of the present case, we believe that the Appellants have shown they have "sufficient interest" in the matter through their involvement in the consultation process and provision of resources and expert views. There is a duty under the law, **s.20 of the EPA**, for public comment to be invited as part of the EIA process and if there is such a designated process under the law and the Appellants have availed of this opportunity to provide their input right from the initial stages of the process.

15. In the book **Environmental Law by Bell, Mc Gillivray, Pederson, Lees, Stokes (9th Edition) at Pages 473- 474**, it is stated that the consultative process has its importance on what is known as the environmental statement, "*...Furthermore, there may be non-statutory consultees who could assist with this information. Developers can consult with these bodies if they offer some particular expertise or local insight. This type of non-statutory consultee might include such bodies as the Royal Society for the Protection of Birds (RSPB), the Campaign to Protect Rural England (CPRE), local nature groups and members of the general public. The (often extensive) consultation exercise forms part the backbone of the whole EIA process and produces a number of advantages:*

1.In development projects, some environmental issues are often obvious. The benefit of the consultation exercise, however, is that it identifies those issues that are perhaps not so evident.

2.A methodical, even approach to the objective analysis of environmental effects enables alterations to be made to a project at an early stage without great expense or inconvenience. These alterations can mitigate or eliminate adverse effects.

3.If a full and adequate consultation is carried out before a planning application is submitted the amount of time taken by the local planning authority and other consultees to consider the application when submitted will be greatly reduced.

4.The consultation process affords the developer the opportunity of communicating with all parties who are likely to have an interest in the project. Misunderstandings can be cleared up on both sides. This then enables the developer and the local planning authority to concentrate on the relevant issues."

16. Furthermore, in the reply to the statement of case of the Co-respondent no. 3, the Appellants have averred that Appellant. No.2 was a candidate for the National Assembly Elections held in 2014 in the Constituency of Savanne and Black River where he received votes from some 1254 inhabitants. This also adds to the nexus between the proposed development and the Appellant no.2.

17. For there to be "sufficient interest" an appellant he must be able to show that there is a *nexus* between the proposed development and him in that he must be able to demonstrate the impact that the proposed development is likely to have upon him, irrespective of whether or not it may also affect other people. It may or may not affect other people but he has to be able to demonstrate that it will affect him: **United States v SCRAP [1973] United States Supreme Court no. 72-535.**

18. On the facts of the present case, although we may be able to find that the Appellants have sufficient interest, we have not been enlightened on the impact that the proposed development is likely to have on the Appellants such that they are aggrieved by the decision of the Respondent no.1. Any person wishing to appeal under the **s. 54 (2)(a)** of the **EPA,** must be able to show in what way he is aggrieved by the impugned decision of granting the EIA, in what would be his grievance if the proposed development goes ahead. In the present case, although we have gathered from the Statement of Case of the Appellants that as citizens of this country, they have an interest in the natural environment and there is a risk of environmental harm moreso at grounds of appeal C (ii), E and F, we have not been enlightened on how the Appellants will be impacted by this harm.

III. IMPACT ON THE APPELLANTS

19. The Appellants have not shown through their grounds of appeal in what way as a consequence of the so-called lacunas in the process or the construction a Hotel and its amenities will have an environment impact upon them or their lives. The grounds of appeal relate to the failures of the Respondents and Co-respondents but what these failures will lead to and how the resulting acts will impact them have nowhere been addressed. The Appellants have raised, amongst others, grounds such as the hotel is being proposed on part of the *Pas Geometriques* but they have not pleaded how this is likely to affect them or have an impact upon them. The Tribunal, although vested with powers, has to operate within the parametres of the law. The law clearly sets out the criteria within which an appeal may be lodged and an appellant must respect this.

20. It was submitted by Counsel for the Appellants that "*any damage that will be caused to the wetland and the pollution that is likely to be generated by the project of the co-respondents nos. 1 and 2 will not only affect the appellants personally but also the public at large.*" The Appellants have not raised the issue of pollution ex-facie the pleadings and as for the wetland, what has been pleaded is the lack of some information pertaining to the wetland in the EIA report and the function of the wetland but not the impact that the damage to the wetland will have. We cannot read more into it than what has been pleaded. Counsel for the Appellants referred to the case of **Yan Hookoomsing and Ors v Le Chaland Hotel Ltd& Anor [ELAT C1007-2/15]** to say that in that case it was a question of public beach that would benefit the public at large and that here it was a wetland that is also in the interest of the public at large. We believe there is a distinction between two cases in that in the case of **Yan Hookoomsing** *supra*, the Appellants pleaded that having the hotel construction on that locus would have a negative environmental impact on their recreation activities. They had argued on the privatization of the beach at La Cambuse since part of the beach which had a sea frontage was to be de-proclaimed in favour of the Hotel.

21. Likewise, in the case of **Ah-Yan and anor v Le Chaland Hotel Ltd & Anor [ELAT C995-3/15]**, the Tribunal had no difficulty in recognizing the *locus standi* of the Appellants by virtue of their nexus with the development and the impact that Hotel construction was to have on their recreational activities along with the public at large. These two cases however relate to the challenge of the BLUP issued to the Hotel, under the **Local Government Act 2011**, where there is a variance in the criteria for those who can appeal as compared to those who can appeal under **s. 54 of the EPA**.

22. In the case of **Kishan Quedou v The State of Mauritius [2005] SCJ 70**, a judgment delivered by the former Chief Justice,Y.K.J Yeung Sik Yuen sitting with Justice S. Peeroo concerning an appeal against a judgment delivered by the Judge in Chambers whereby the applicant had entered an injunction against the respondent, the State Of Mauritius, prohibiting it from going ahead with the erection of a Hindu Shrine on part of the **"domaine public"** at Grand Bay and from using public funds for this purpose. The Judge rejected the application on the ground that the applicant did not have *locus standi* to ask for the remedy prayed for since it was in the nature of a public interest litigation which was not applicable in Mauritius. The reasoning of the judge was that the applicant must have a personal interest in the matter and relied on **section 17(1) of the Constitution**. The Learned Judges on appeal took on board the fact that the appellant had stated in his affidavit that the illegal acts and doing of the respondent were causing and would cause grave prejudice not only to him but also to the citizens of the State, and that every citizen had a right and interest in the 'domaine public' and finally the appellant being a resident of Grand Bay had a sufficiently strong and personal interest in ascertaining the rights of the citizens in this country and in particular his own rights over the "domaine public' of Grand Bay. The appeal was allowed.

23. The point we seek to make by referring to these authorities is that in all these cases the Appellants could successfully show in what way they were aggrieved by the impugned decision in that if the proposed development were to be allowed, it would have a negative impact upon them or their lives in some way. Ex-facie the pleadings

before us, we are not satisfied that the Appellants have shown in what way they are aggrieved as per the requirements under **s. 54 (2) (a) of the EPA**. We, therefore, find that the preliminary objection was rightly taken by the Respondents and Co-respondents. Having reached the conclusion that the Appellants do not satisfy the criterion laid under **s. 54 (2) (a) of the EPA** as raised under the first limb of the preliminary objection of the Respondents, we do not deem it necessary to address the second limb and accordingly dismiss it.

24. For all the reasons set out above, the appeal is set aside. No order as to costs.

Ruling delivered on 24th October 2019 by

Mrs. J. RAMFUL-JHOWRY	**Mr. R.P. NOWBUTH**	**Mr. Y.MUNGROO**
Vice Chairperson	**Assessor**	**Assessor**