IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 1362/17

In the matter of:

1. **Mrs Sabitree Durgahee**
2. **Miss Rehana Durgahee**
3. **Mr. Reshad Durgahee**
4. **Miss Bibi Rhea Durgahee**
   (Heirs of late Moussa Durgahee)

Appellants

v/s

District Council of Moka

Respondent

RULING

1. The present appeal is against a decision of the Council for having refused to grant the Appellants, represented by Mr. Nirshad Durgahee, a Building and Land Use Permit ('BLUP') for the construction of a boundary wall of 1.8 metres high at Petit Verger Branch Road, Saint Pierre. The Appellants are infact the heirs of late Moussa Durgahee who had initially made the application. The ground of refusal was communicated to late Moussa Durgahee *vide* a letter dated 22nd February 2017 and is reproduced hereunder:

   "APPROPRIATE ROAD RESERVE-WHICH IS ESSENTIAL-HAS NOT BEEN OBSERVED ALONG THE ACCESS ROADS LOCATED ON THE:
   (a) left hand side of the property (viewed from Petit Verger Branch Road) which is existing (notwithstanding the fact that your title deed-which dates as far back as 25 April 1985- does not make mention of same) and serves as a local access to the neighbourhood.

(b) Right hand side of the property."

2. On the day of the hearing, the Counsel appearing for the Appellants, Me. Jaunbaccus, raised a point in law at the outset, to the effect that since there has been non-compliance with the provisions of the **Local Government Act** by the Council at the application stage as regards the determination of this application within 14 working days, the application is deemed to have been approved and the appeal should be allowed.

3. Both counsel for the Appellant and the Respondent agreed on the following set of facts, which are supported by documents on record. The application was submitted on the 3rd February 2017, as per Docs B found at page 8 of the brief and E1 at page 24 for which a receipt upon payment was issued, as per Doc E2 at page25. The refusal letter duly signed by the then Chief Executive is dated 22nd February 2017 as per Doc C found at Page 9 of the brief. The letter of the Council was posted subsequently and the original envelope was produced and marked, Doc A, bearing two rubberstamps of the Post Office one reads "27" the rest of the date being illegible and the second is "28 Fe 17". It is not disputed by the Council, and the admission of the Counsel for the Respondent at pages 3,4 and 5 of the proceedings, that the refusal letter was posted on the 27th February 2017 and that it was received on the 28th February 2017.

4. The motion of the Appellants is that the Council has acted illegally by having posted the letter to the Appellants only on the 27th February 2017, some 17 working days after the application was submitted. The position of the Council is that from the 3rd February 2017 when the application was submitted until the 22nd February 2017 when the refusal letter was dated there is 14 days and Counsel for the Respondent also submitted, "The delay of 14 days does not require communication be made within 14 days." We have duly considered the submissions of both Counsel.

5. For the purposes of the subject-matter of this ruling, **Section 117 (7) of the Local Government Act 2011** [hereinafter referred as the "LGA"] is partly reproduced herewith:

"(7) With the exception of an application under subsection (8) and subject to subsections (9) and (10), the Permits and Business Monitoring Committee shall, within 14 working days of the effective date of receipt of the application, and after approval of the Executive Committee -

(a) issue to the applicant an Outline Planning Permission or a Building and Land Use Permit....
(b) notify the applicant in writing that the application has not been approved and give the reasons thereof." [stress is ours]

6. Our reading of the law as it stood then, is that within **working** 14 days of the effective date the Permits and Business Monitoring Committee (the **'PBMC'**) must imperatively have taken a decision approved by the Executive Committee to either issue the BLUP or notify the applicant of the rejection of his application, as the case may be. The word "shall" must be taken to be mandatory in this context not only as per the **Interpretation and General Clauses Act** ["**IGCA**"], but we are also comforted in our interpretation upon reading of section **117(11) (a) of the LGA** which follows wherein provision is made in the law in case of non-compliance with the **section 117(7) LGA**. **Section 117(11) (a)** provides:

"(11) (a) Subject to paragraph (b), where an applicant has not been issued with a Building and Land Use Permit or has not been notified that his application has not been approved under subsection (7) or (8), as the case may be, within 2 working days of the expiry of the due date, the application shall, on payment of the fee referred to in subsection (10), be deemed to have been approved by the Municipal City Council, Municipal Town Council or District Council and the acknowledgement receipt, together with the receipt acknowledging payment of the fee, shall be deemed to be the Building and Land Use Permit." [The underlining is ours.]

7. It can be gathered from the above-mentioned provision that the legislator had a clear intention of providing a default position in the case of those applications where the

Council failed in discharging its burden of notifying the applicants of the fate of an application and giving the reasons where the application had been rejected.

8. This point had been canvassed previously in the case of **AKM Rana C. Ltd v/s Municipal Council of Vacoas-Phoenix [ELAT 163/12]** where the Tribunal made the following lengthy observation

*"...we agree that as per the wording of **section 117(7)** the 14 day period is mandatory because of the use of the word "shall". While Tribunal accepts this to be the law, it cannot accept, unless expressly provided in the Act, that the Council is precluded from deciding the merits of an application once the 14 days have lapsed assuming that the decision went through the Executive Committee.*

***At Page 391 Administrative Law, 3rd Edition 1994, By P.P Craig** it is stated*

'A public body endowed with discretionary powers is not entitled to adopt a policy or rule which allows it to dispose of a case without any consideration of the merits of the individual applicant who is before it: R v/s London County Council exparte Corrie (1918) 1KB 68'

The above is quoted to show that we have infact addressed our minds to administrative law principles that a public body is endowed with discretionary powers when it comes to it dealing with merits of an application before it. We hasten to add, however, that this is not a case where the Council itself has adopted a policy or rule that has fettered its own discretion, but one where there is an express provision of the law that purports to deal with the consequence of the failure by a Council to act as stipulated within the time limit. This is, therefore, in our view, a question of statutory interpretation, which is one well within the remit of this Tribunal.

*...On a literal meaning of the words used, **Section 117(11)** will apply irrespective of whether the Council has in fact approved the application in question or not. On this reasoning, **Section 117(7)**, where it is applicable, will allow an applicant to walk away with his BLUP after payment of the relevant fee even where the Council has not in fact approved the application and indeed regardless of the actual merit or validity of the application.*

Section 117(11) *is, in our view, unambiguous and there cannot be any departure from the literal meaning of* ***Section 117(11)****, unless of course this interpretation leads to a manifest absurdity. However, we do not consider this to be the case here."* Since the findings of the Tribunal was not disturbed by the Supreme Court in the appeal case of **Municipal Council of Vacoas-Phoenix v/s AKM Rana Co. Ltd [2016 SCJ 150]**, we find the reasoning to be sound and hence find no reason to depart from it.

9. From the documents submitted in the present case, it appears that the Appellant duly submitted his application which was received at the Council on 3rd February 2017, for which he was given a receipt upon a payment of a fee for the processing of the application. No other letter was communicated to him until he received the refusal letter dated 22nd February on the 28th February 2017 by post, which was infact posted by the Council on the 27th February 2017. Upon application of the law as explained above, to the fact, we believe that the Council acted in breach of s. 117 (7) (b) of the LGA 2011 for having failed to notify the applicant that his application was rejected within the statutory time frame of 14 working days. There is a clear understanding that weekends and public holidays are not included in the computation. The Tribunal can take judicial notice of fact that there were two public holidays in February 2017 in between the period of submission of the application and the notification of the decision to the applicant. Nevertheless, a computation of the days between the time the application was made and the notification of the refusal totals up to more than 14 working days. Since there was no other notification or communication between the Council and the applicant in between, it is to be taken that the effective date is on the date when all the documents were submitted to the Council at the time of application, that is, the 3rd February 2017, and 14 working days from the 3rd February 2017 would be 23rd February 2017. We do not subscribe to the submission of learned Counsel appearing for the Respondent, Me. Nazurally, that "...Should the Tribunal consider that the date of effective communication is the date of the postmark, ...it will cause prejudice at a later stage to Council and all other parties who within their best of abilities has made out a decision within the time as prescribed. The delay of 14 days does not require communication be made within 14 days."

10. For all the reasons set out above, we find that the point is well taken by the Appellant's counsel, Me. Jaunbaccus. The application is deemed to be approved and should the Appellants pay the relevant fee at the Council, the acknowledgement receipt, together with the receipt acknowledging payment of the fee, will deemed to be the Building and Land Use Permit. The appeal is therefore allowed since there are no more live issues. No order as to costs.

Ruling delivered on 8th September 2020 by

Mrs. J. RAMFUL	**Mr. AUBEELUCK**	**Mr. GUITON**
Vice Chairperson	**Member**	**Member**