

BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 837/15

In the matter of:

MR. MUHAMMAD NOUFAIL GHAMY

Appellant

v.

DISTRICT COUNCIL OF GRAND PORT

Respondent

Determination:

The appeal is against the decision of the Respondent for having rejected the application of the Appellant for the conversion of an existing building to be used as a victualler shop at Royal road, Mahebourg. The refusal letter sent by the Respondent dated 22 January 2015 contains the following grounds of refusal:

1. The building has been put up without a building and land use permit.
2. A notice of intended prosecution had already been served upon the Appellant.
3. A complaint had been received at the Council stating that the building has encroached on a private access.

The Appellant, who was initially inops consilii, was, at a later stage of the proceedings, represented by counsel. The grounds of appeal as contained in his notice of appeal are in a gist that:

1. The building was still under construction. It had stopped further construction pending the approval of an application for Building and Land Use Permit submitted to the District Council with a view to regularize the said construction.
2. The notice has not been received, and, if already issued, it does not cause prejudice to anyone as an application had already been submitted to and been duly received by the Council.

3. Following the complaint, no hearing was scheduled to enable the Council to have a fair judgment. The Council simply based its determination on allegations.

From the evidence on record it came out that the Appellant had commenced construction of a building without obtaining a BLUP and that his application was submitted after a 'Notice of intended prosecution' (NIP) was served on him. On this score, we have noted contradictions in the testimony of the representative of the District Council. These are as regards the stage at which construction had reached, and whether the Appellant had refrained from pursuing the construction or not. The representative first stated that the Appellant had proceeded with the construction despite the issue of the notice of intended prosecution (NIP). Then she stated that the building remained 'as it was' after the issue of the NIP (meaning that there was no further work done from the reception of the NIP). We note also that the appeal relates to the decision of the Respondent concerning the 'conversion of an existing building' when, in fact, the application made by the Appellant was for the 'construction of a building'. This discrepancy was explained by the representative of the Respondent as being due to the fact that the building had been erected in the meantime! Her evidence above however shows that the building was still under construction and yet to be completed before the stage of conversion could be reached. At any rate, proper administrative practice would require that the decision of the Respondent be made in relation to the application submitted. Also, the information lodged against the Appellant before the District Court of Grand Port (Document G) relates to a charge of 'Commencing the extensive alteration/extension to an existing building without having obtained a BLUP...'.

Be that as it may, the concern of the Respondent was the fact that the building has reached an advanced stage of construction before the application for BLUP was made. We are alive to the difficulty faced by the Council to grant an approval of a BLUP for an 'illegally constructed' building. Yet, it cannot be overlooked that, the information lodged against the Appellant before the District Court of Grand Port did not contain any prayer relating to the pulling down of the illegal construction. The end result of the criminal proceedings against the Appellant would therefore be the imposition of a fine, if the Appellant were to be convicted for the charge. This would result in the illegal construction continuing to stand, thus being in a vacuum as to its potential for development.

The case of the 'The Municipal Council of Port Louis v. Mr. Khalil Baboo and Mrs. Bibi Faroza Baboo 2012 SCJ 343' was relied upon by the Respondent where the Supreme Court held that "We consider the fine of Rs 5,000 imposed on each of the two respondents to be so insignificant that it amounts to an open invitation to apply the law of the jungle promoting thereby unregulated, free for all, building excesses by ruthless property developers. This would defeat the need for a well regulated town and country

planning scheme which takes into account the entitlement of every citizen to enjoy good living conditions”.

The above authority is a wake- up call for local authorities to adhere to norms contained in town and country planning schemes in decision making. However, we note that in the present matter, the grounds of refusal made no reference whatsoever to planning parameters, nor has the Respondent sought to enforce the planning schemes. The substance of their refusal was firstly, the commencement of the construction without having obtained a permit, and secondly, the complaint made by the neighbour.

We are of the view that it is the mandate of the Respondent to give consideration to the planning merit of the application, which has not been done. The representative of the Respondent candidly explained that the established procedure at the Council is that when an illegal construction has been done, the offender has to be prosecuted first and then the Council, upon the judgment of the Court, will make a decision. Yet, the Council has made a decision already, which is that of refusing to grant the BLUP, without waiting for the outcome of the criminal case and, more importantly, without deeming it fit to seek a demolition order in respect of the illegal construction. We take the view that the Respondent has at all times the duty to assess the planning merits of a proposed development and impose conditions should it grant a BLUP. Sanctioning offenders for illegal activities is within the mandate of criminal jurisdictions. We do not subscribe to the view that this would open the floodgate to illegal constructions which would seek to regularise their situation '*a posteriori*'. At any rate the outright refusal to entertain an application as given in the first and second grounds of refusal is not condoned. We also distinguish the present case from the facts referred to as 'ruthless excesses of property developers' as referred to in the abovementioned case of *The Municipal Council of Port Louis v. Mr. Khalil Baboo and Mrs. Bibi Faroza Baboo 2012 SCJ 343*'

The third ground for rejecting the application submitted by the Appellant is that a complaint has been received at the Council stating that the building has encroached on a private access. The representative of the Council conceded that she had no further knowledge of any determination as to whether, in fact, there had been an encroachment or not. She was of the view that the onus was on the Appellant to establish that there was no encroachment, yet the Council did not deem it fit to hold a hearing to establish this before refusing the application. Later it came out that the complaint referred to had been made to the Ombudsman's Office by a neighbour. There had been no enquiry, nor hearing, held to determine the issue. Yet this was the third ground of refusal put forward by the Respondent. We find that this raises concern on the practice followed by the Respondent which did not have the jurisdiction to come to a determination as to whether the complaint made by the neighbour was justified or not. Unless and until the encroachment issue is thrashed out before the proper forum, the Respondent cannot

act on the complaint in this manner. This would amount to acting on a mere allegation, thus giving credence to the third ground of appeal.

For the reasons given above, we find that the grounds of refusal put forward by the Respondent cannot justifiably support the decision of the Council. We allow the appeal and refer the application back to the Respondent for it to reconsider its planning merits and/or set conditions for the operation of the proposed development by the Appellant.

Delivered by:

Mrs. V. Bhadain, Chairperson _____

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Mrs. B Kaniah, Assessor

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Mr. M. Busawon, Assessor

Date: 21st September 2017 _____