

IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT C-2/589/14

IN CHAMBERS

In the matter of:

REDMOND HART DE KEATING

Applicant

v/s

- 1. Mooness Nemdharry**
- 2. Ramanand Sagar Nemdharry**

Respondents

IPO:

District Council of Riviere du Rempart

Co-Respondent

JUDGMENT

1. An appeal lodged by the applicant against the decision of the co-respondent (hereinafter referred as the "local authority") for having granted a Building and Land Use Permit ("BLUP") for the construction of a building on Coastal Road, Roches Noires, be used as a supermarket at is pending before this Tribunal. The applicant has objected to the application. The co-respondent granted the permit after having heard the objection.
2. The applicant referred to an earlier application made by the respondents for a BLUP for the construction of a building at the same place to be used as General Retailer at the ground floor. This application was also contested by the applicant and yet a BLUP was granted and an appeal was lodged before this Tribunal which was subsequently withdrawn due to the fact the respondents decided not to go ahead with that project but to set up a Supermarket instead. Hence the present application.

3. The applicant, in his affidavit has mentioned that the co-respondent is in contempt for having processed a new application for the same subject matter when an appeal was already before this Tribunal. Since the Law does not provide for an appeal from the decision of the local authority to have any suspensory effect on the decision, so that the applicant had to resort to the present application before me for the purpose, I do not find that this has any bearing on the determination of the application that lies before me.
4. The grounds which the applicant has basically advanced are basically that allowing a supermarket to be erected adjacent to his property will have social and environmental consequences due to its large scale and this will cause him serious prejudice. The nuisance that will arise out of the very existence of a supermarket next door to him such as noise, traffic, unsocial behavior in view of the sale of alcohol on the premises and the scale of the supermarket as well as devaluation of his property, are issues advanced by the applicant in his affidavit to support his application.
5. The respondents challenge the averments of the applicant and feel strongly about the fact that since they have obtained a permit after a hearing was given to the applicant, they have the right to build and operate a supermarket just as the applicant's son operated a restaurant 15 years back in the area. They believe that the BLUP was granted to them after they had complied with the requirements of the law. They also averred that there was no objection from any other inhabitants of the locality, that the son in law of the applicant, with the latter's consent, was currently using the premises, previously used as Restaurant by the applicant's son, as storage space for his waterproofing materials and that in their view, the present application was made by the applicant in bad faith and out of self interest for fear that his property will be devalued.
6. I have taken into account the submissions of all counsel. From the second affidavit of the applicant and submission of his counsel, it is rather obvious that as a background to this application there are a number of legal and factual issues which have lead to this BLUP being contested. The applicant in his affidavit has made extensive reference to the application of planning instruments to the facts of this case. I believe that these issues cannot be effectively determined on the basis of affidavit evidence and that it would be more apt for these to be canvassed in the main case. This being said, I have been satisfied that there is a serious issue to be tried.

7. In order to ascertain where the balance of convenience lies, I have to consider whether there will be substantial non-compensable disadvantage to one party whichever way my decision goes? The main problem for the applicant stems from the location of his house, which is adjacent to the respondents' plot of land so that not only will the respondents' building, be it a supermarket or otherwise, be in the line of vision of the applicant each time he goes in and out of his premises but also as contiguous neighbours, they would be affected by each other's daily activities to some extent. If the purpose for which the applicant has entered this application is to abate any nuisance due to noise, dust etc arising from the construction of the building, then even if respondents were to construct a house instead of a supermarket these issues would still arise. This cannot jeopardize the respondents' chance to exercise their legal right to enjoy their property just as the applicant has and in fact still is, that is by putting up their house on their plot. But if the issue is about construction of a supermarket and its operation, allowing the respondents to carry on with such a construction pending the determination of the appeal would mean allowing them to put up a structure which as at now is not (or at least not fully) existent, allowing them to invest in infrastructure such as car park, and it would also mean giving them the possibility of investing in goods and putting into operation a supermarket, which runs the risk of having obtained a BLUP not in conformity with the requirements of law. I have not been enlightened as to how the respondents will be prejudiced if this order is made. On the contrary, I am of the view that the respondents run the risk of having financial loss if they are to proceed with this project pending the appeal. Since it is clear from the respondents' affidavits that they intend to construct and operate a supermarket albeit on one floor, I believe that the apprehensions expressed by the applicant in the form of grounds in his affidavits are valid and not at all farfetched. I therefore consider that the balance of convenience lies in favour of the applicant in this case and that it is only fair if the construction is put on hold.
8. I have been satisfied that damages would not be an adequate remedy to this applicant, bearing in mind his age, due to the associated nuisance if the supermarket starts operating. The prejudice would be irreparable and the applicant would be denied the right to peaceful enjoyment of his property. I could not agree more with Justice Domah when he said "*One cannot put a price to the peace and quiet enjoyment of citizens in their homes.*": Suhotoorah & Ors v/s Al Rahman Co. Ltd & Anor (2013) SCJ 273. Besides it is a right enshrined under **section 4 of our constitution** under the right to life, which also means quality of life. Counsel for the Respondent did argue that if at appeal stage, the Tribunal came to the conclusion that the BLUP was wrongly granted, the respondents could demolish the building. But the issue is what if the respondents have a

change of heart then and decide not to pull down the building? The ground floor of the building would be structurally more in line with a supermarket rather than a house and it would be a separate action for the demolition of the building. Although it is within the magistrate's discretionary powers to order a demolition, if respondents are allowed to complete the construction, there is also a likelihood that there no demolition order be made and that may cause serious prejudice to the applicant. I am therefore convinced that damages would be an inadequate remedy. It is accordingly appropriate and desirable to maintain the status quo pending the determination of the appeal case.

9. I therefore order an interlocutory writ of injunction against the respondents as prayed for by the applicant. The decision of the local authority granting the permit for the construction of the building to be used as a supermarket at the ground floor is therefore stayed pending the determination of the appeal before this Tribunal. The costs will be costs in the main case.

I certify as to counsel.

Jayshree RAMFUL-JHOWRY
Ag. Chairperson

17 June 2014

For Applicant: Mr. Doorga, of Counsel

For Respondents: Mr. M. Gujadhur together with Mr. Chiniah, of Counsel

For Co-Respondent: Mr. Kistnen, of Counsel