IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C602/14

In the matter of:

Sohunlall Moothoor and others

Applicants

v/s

Indian Oil (Mauritius) Ltd

Respondent

IPO:

1. **District Council of Riviere du Rempart**
2. **Department of Environment, Ministry of Environment and Sustainable Development**

Co-Respondents

~~INTERLOCUTORY~~ JUDGMENT

1. An appeal lodged by the applicants against the decision of the co-respondent no.1 (hereinafter referred as the "Council") for having granted a Building and Land Use Permit ("BLUP") to the respondent for the setting up of a filling station with 3 dispensers, one tourist shop and retail outlet with ATM at Pointe aux Cannoniers, is pending before this Tribunal. The applicants, who are in fact the contiguous neighbours, objected to the application submitted by the respondent for the BLUP and after having heard the objections of some of the applicants, the co-respondent no.1 granted the permit. Having obtained the BLUP, the respondent therefore initiated construction works on the site. On 20th March 2014, I declined to grant the interim injunction prayed for in their *exparte* application. Affidavits have now been exchanged in relation to whether an interlocutory injunction should be granted to prohibit and restrain the respondent from proceeding with the construction of the filling station pending the determination of the appeal case, hence the present application.

2. At the very outset of the hearing for the present application, counsel appearing for the respondent moved to take a point in law which in essence is that the appeal in this case having been lodged outside the time frame and thereby amounting to no appeal before this Tribunal, the present application for injunction cannot be entertained. The motion was resisted by the counsel for the applicants. I shall address this issue further on. Prayer 'D' of the Proecipe which essentially related to a motion for site visit and for an additional ground of appeal was dropped by the applicants.

3. The respondent, along with the above point in law also took 2 *pleas in limine litis* in its affidavits which were also challenged by the applicants. The applicants did however give an undertaking, in their affidavit sworn on 8/04/14, with regards to damages and this was confirmed by their counsel in the course of submissions. I will address the issues raised *in limine* in due course. I have taken into account the submissions of all counsels. From the affidavits of the applicants and respondent and submissions of their counsels, it is rather obvious that as a background to this application there are a number of legal and factual issues which I needed to address my mind to and shall now rule upon.

4. **Appeal outside delay**

Counsel for the respondent, Me. Gayan raised the point that in essence for there to be an application for injunction there should be a substantive cause of action, in this case a proper appeal before this Tribunal. In the present case, his motion was that since the appeal was lodged outside the prescribed time limit, it amounted to there being no appeal, hence the application for injunction could not stand and should be disregarded. In support of this contention he referred to documents filed as part of the pleadings.

I agree with the submission of counsel in so far as the law is concerned.

Lord Diplock said in **The Siskina [1979] AC 210**:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the Defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the Plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action."

The very first document that Counsel referred me to is allegedly a copy of the notice of appeal lodged by the applicants annexed to the Applicants' first affidavit. Ex-facie the

document, I find that I cannot rely on this document because, albeit a copy, it is does not bear the official stamp of the Tribunal nor has the part "For Official Use" been filled out by the registry of the Tribunal. This being the case, there is no evidence before me as to when the appeal has been duly lodged at the registry of the Tribunal and if it the respondent's case that the appeal has been lodged outside the time prescribed by law, then it was for the respondent to prove his case. This is a civil case and as the principle goes "He who avers must prove". In this case, not only did the respondent in its affidavit take note to the averment of the applicants that an appeal has been lodged at the Environment and Land Use appeal Tribunal but at the stage where it was contested, no evidence was produced as to when the Tribunal duly recorded the appeal lodged by the applicants. In the absence of such crucial evidence, I cannot speculate that the appeal must have been lodged on the 25th February 2014. On this point, I agree with the submissions of Me. Pursem that the matter has not been pleaded from before and I am not in the presence of any evidence to show that the appeal has been lodged outside delay. On this point therefore, I am not convinced by the point raised by counsel for the respondent. I find that for all intents and purposes there is a proper appeal lodged before this Tribunal and consequently the present application for injunction also stands.

5. Merits of the application

The applicant no.3 in his affidavits filed on behalf of all the applicants has made extensive reference to the application of legislation and planning instruments to the facts of this case. I believe that some of 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. An allegation was made that the applicant no.3 has sworn a false affidavit. Whilst this issue in itself should, if at all, be dealt before another forum, counsel for the respondent submitted lengthily on why this application which has for objective to seek an equitable remedy should not be granted to applicants who did not come with clean hands. Presently, the applicants have not been convicted of any criminal offence of swearing a false affidavit, hence I cannot take it as a 'fait accompli' that they are guilty. This being said, I do believe that I can assess the facts before me to come to the conclusion that in this respect, the applicants should have exercised more care. Applicant no.3 stated in his affidavit that he was duly authorized by the four other applicants to affirm the affidavit and to lodge the application. Being given that he stated in his first affidavit that the applicants were not given a hearing shows firstly that the other applicants may not have taken note of applicant no.3's averment and that when applicant no.3 made the averment, he, instead of speaking in one voice with the other applicants, was in fact referring to his own self. He disclosed in his

subsequent affidavit that he was speaking about himself and maintained that the Council never convened him for a hearing and therefore his objections were not recorded but that applicants nos.1, 2 and 5 were convened to voice their objections. This allegation was not disputed by the Council. Looking at this issue holistically, I am of the view that the applicant no.3 made a frank disclosure that he was speaking for himself, and this is evidenced by the letter sent by the other applicants and uncontested by the Council, he has rectified the so called mistake he may have made in averring that the Council did not offer the applicants a hearing. Whether the mistake is genuine or deliberate, made in good faith or bad faith, it is not for this forum to decide but for the purposes of the record before me an averment, partially incorrect, was made and it was rectified to set the record straight. No prejudice has been caused to any party nor have I been misled into believing an averment which is factually incorrect. I therefore, find that the application made by the applicants can still be entertained before me.

6. A serious issue to be tried

The Applicants must satisfy this Tribunal that the issue at hand is causing hardship to them and hence whether there is a serious issue to be tried. The applicants have filed affidavits in which they have expressed concerns, as contiguous neighbours to the development site, regarding issues of environment pollution, noise pollution, air pollution, health hazards, visual and qualitative degradation of the location, issues of safety and security. They have extensively addressed each issue and referred to the planning instruments to substantiate their application. In essence, their case rested mainly on the prejudice that would be caused to them and they would be denied the right to peaceful enjoyment of their property. They did mention pecuniary loss but this was not substantiated in the course of submissions. The respondent's counsel, on the other hand, submitted that there was no issue, let alone no serious issue, to be tried as there was no proper appeal before this Tribunal and even if there was, it which was not scheduled to be "heard" before the Tribunal and I was therefore precluded by **section 4 (2) of the Environment and Land Use Appeal Act 2012,** to entertain the present application. I have already ruled upon the fact that there is a proper appeal before the Tribunal. This being said, my understanding of **s. 4 (2)** is that a matter should be "***due*** *to be heard by the Tribunal*" (the stress is mine). A matter that is due to be heard can only be taken to mean that at some point in the near future it is likely to be heard. Paragraph 4 of the applicants' first affidavit states that the appeal was last mentioned on 18/03/2014 and has been postponed to the 22/04/2014. This averment has been noted by the respondent. If counsel's contention is that the appeal did not yet have a Hearing date fixed and that it was still at *proforma* stage, then it was for the respondent to

make the averment in its affidavit regarding the purpose for which the case was called on 22/04/2014. No evidence was placed before me in that respect .It could have been for the purpose of Hearing the appeal, or it could have been to fix a Hearing date or otherwise. I cannot be asked to infer from the pleadings. The ground raised by learned counsel for the respondent challenging my jurisdiction therefore fails. In any event, this argument, in my view, defies settled principles that an injunction can in most cases be granted if the applicant has a cause of action entitling him to substantive relief. In the Chambers case of **Louis Cyrano Entresol & Ors v/s Saltlake Resorts Ltd IPO The Director of Dept of the Environment & Anor 2004 SCJ 305** where the learned Judge in Chambers' jurisdiction was challenged on the ground that there was no main case pending before the Supreme Court, she analyzed the position in law and I find it apt to reproduce part of it here

"What the law requires is that the applicant has a legal and equitable right which can be enforced by the Court and in relation to which interlocutory relief is sought. In many instances, the applicant seeks the interlocutory relief in connection of a main case which is awaiting trial. In many others- textbook writers refer often to cases in restraint in trade as examples- the applicant may choose not to proceed with the main case. If the claimant has a substantive cause of action, his application for interlocutory relief in the nature of an injunction is maintainable. It is not required of him to have actually lodged a main case."

Applying the law to the facts, do the applicants have a legal or equitable right which they believe will be infringed if the relief is not sought? The answer is yes. 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.":* **Suhootoorah & 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. The applicants have given several reasons, as mentioned above, to justify the present application to which respondents have explained the steps taken and are to be taken by them to mitigate such risks and the clearances obtained from the relevant authorities in the case of fire outbreaks, oil spillage amongst others. But besides this, the applicants have averred that at present when the construction is in progress, it appears that they have already started facing noise pollution issues when a matter had to be reported at Pt aux Cannoniers Police Station on 20.3.14 at 7.42pm, to stop pumping cement from a cement lorry. The respondents explained in their affidavit that it was normal that whilst works are being carried out the noise level will be higher. I note with concern this explanation of the respondents since it is in clear breach of the condition of BLUP more specifically at paragraph 19. Simply on this basis, the BLUP could have been revoked by the Council. Similarly, the respondent could not contest that its failure to notify was in clear breach of the law in that it had a duty to inform the Department of Environment of the date of commencement of works and operation of activity for

monitoring purposes. Instead it candidly stated that co-respondent no.2 was free to monitor same. That would be like placing the cart before the horse. If the law provides for an independent and specialized body to monitor such type of works right from the start of the works, it is there for a reason, and undoubtedly a good one. The respondent did state that the Council in its supervisory role is closely monitoring the work but surprisingly the co-respondent no.1's affidavit contains no such averments. The applicants in their affidavits have also made extensive reference to the non compliance by the respondent of PPG 8, which is the Planning Policy Guidance on location and siting of Filling Stations. 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. Apart from environmental pollution and nuisances, some important issues that will need to be canvassed on appeal, should this application succeed, will definitely be with regards planning, that is the impact of a filling station in such a location on the traffic and environment, in view of the fact that it will also contain a tourist shop and a retail outlet equipped with an ATM machine, and the compatibility of a filling station with the physical characteristics of the location, which appears to be a mixed residential- commercial area and the impact of any derogation from the planning instruments on the planning systems, since planning is always for the future. Poor planning always leads to user conflicts such as more congestion, more pollution, less sustainability, less privacy, poor public transport and infrastructure, to mention a few.

7. Adequacy of damages

However strong the case may appear to be, if damages would be an adequate remedy to the applicants and the respondent would be in a financial position to pay the applicants, then the position in law is that no injunction should be granted. The applicants mentioned in their affidavit the possibility of monetary loss but this was not pressed upon in the course of submissions. It is clear that damages would not be an adequate remedy in this case because the issue at stake here is the prejudice that will be caused to the applicants if they are denied the right to a peaceful enjoyment of their property, a right that cannot be adequately compensated in monetary terms.

8. Balance of convenience

In order to ascertain where the balance of convenience lies, I have to consider whether there will be a substantial non-compensable disadvantage to one party whichever way my decision goes?

The respondent's case is that no prejudice will be caused to the applicants since it has complied with all safety measures and the development will enhance the locality. It has fully complied with the laws and regulations regarding the location and siting of the filling stations and it has obtained all relevant permits and clearances where as the applicants have acted in bad faith by swearing a false affidavit. I have taken note of the clearances obtained by the respondent, however some evidence referred by the respondent in its affidavit was again not placed before me such as the contingency plan to be implemented in case of accidental spillage and the drawings approved by the TMRSU and RDA which according to the respondent show that the roundabout is in fact more than 90 metres from the development site. Counsel for the respondent has submitted lengthily on the issue of undertaking to provide damages because of the substantial monetary loss the respondent company will incur if the application is granted. In the respondent's second affidavit at paragraph 5.1 (which should in fact read 6.1) the respondent moved that the applicants furnish as security for the undertaking a bank guarantee in the sum of Rs 5 million which will cover the requirements of the penal clause. The respondent averred in its first affidavit that it has signed a contract with Arun Fabricators for the works to be completed within the time frame of 140 calendar days with a penalty clause of Rs 10,000 per day. The prejudice to be caused to the respondent would accordingly far outweigh that of the applicants. The respondent insisted upon the undertaking to be given by the applicants with respect to damages and for the applicants to furnish a security of Rs 10,000 per day from the date of the injunction until the determination of the matter. Counsel appearing for the applicants submitted in essence that the balance of convenience tilts in favour of the applicants because if the development is allowed it will cause irreparable damage to the applicants which cannot be compensated in money's worth where as the respondent will suffer only pecuniary loss because it is bound by the contract that it has signed at its own risk and peril with company Arun Fabricators. It is admitted by the respondent that after the BLUP was granted to it, works had started on the site in March 2014. Counsel for applicants submitted at some point that once an appeal has been lodged before the Tribunal there should have been an automatic stay pending the determination of the Tribunal. The position in law is such that it does not provide for an appeal from the decision of the local authority to have any suspensory effect on the decision, so that the applicants had to resort to the present application before me for the purpose. I do not find that it was legally wrong for the respondent to have started with the construction but I do agree with learned counsel for the applicants that it was at their own risk and peril. This being said, what is their risk and peril? A close inspection of document A2-"Appendix to letter of Acceptance" clearly shows that it is the contractor Arun Fabricators which will be liable to pay the penalty clause of Rs10, 000 per day for late delivery of the project and not the respondent, as was suggested. Therefore, when weighed against the potentially irreparable damage that would be caused should the construction proceed, the balance of convenience clearly lies with the applicants.

9. Status quo

If the interlocutory order is not made, the respondent will carry on with a construction whose legality is being challenged. I am therefore convinced that such a situation would result in great irreparable prejudice to the applicants, which cannot be adequately compensated by damages. It is accordingly appropriate and desirable to halt all construction and to maintain the status quo pending the determination of the appeal case.

I therefore grant the interlocutory writ of injunction against the respondent as prayed for by the applicants. It is on record that the applicants have provided an undertaking as to damages. I pause here to address the issue of security. The respondent is insisting upon the applicants to provide a security which would be at the rate of Rs 10,000 per day and as a bank guarantee in the sum of Rs 5 million. Counsel for the respondent did not address me on how the respondent substantiated this claim and how the latter quantified the security to arrive at these figures. As noted above, the penalty is in fact applicable to the construction company, Arun Fabrications, for failure to complete the work, not the respondent. Since this claim is not substantiated I fail to see why the applicants should be made to "fortify" their undertaking in damages to the respondent company. I therefore reject this motion. The decision of the local authority granting the permit for the construction of the filling station together with the tourist shop and retail outlet is otherwise stayed pending the determination of the appeal before the Environment and Land Use Appeal Tribunal. The costs will be costs in the main case.
I certify as to counsel.

Jayshree RAMFUL-JHOWRY

Vice Chairperson

25 July 2014

For Applicant: Mr. R. Pursem, of Counsel

For Respondents: Mr. A. Gayan, of Counsel

For Co-Respondent no.1: Mr. N. Kistnen, of Counsel

For Co-Respondent no.2: Mrs. C. Green- Jokhoo, Principal State Counsel