BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

Cause No. : ELAT 995/15

In the matter of:

GEORGES CHEN FEE AH YAN

&

BRUNO SAVRIMOOTOO

Appellants

v.

THE DISTRICT COUNCIL OF GRAND PORT

Respondent

In the presence of:

LE CHALAND HOTEL LIMITED

Co-Respondent

DETERMINATION:

1. The present appeal is against the decision of the Grand Port District Council (the Respondent) for having granted a building and land use permit (BLUP), with conditions, to Le Chaland Hotel Limited (hereinafter referred to as LCHL), the Co-Respondent for the construction of the first phase of 'Le Chaland Resort Hotel' comprising of 164 rooms, central facilities and related amenities.

The hearing of this appeal lasted for nine months with extensive evidence having been adduced by the parties in support of their respective positions.

After setting out the facts, we shall address the grounds of appeal as contained in the notice of appeal lodged on the 30 September 2015 in chronological order, whilst noting that several of the grounds can be grouped together.

2. The background:

2.1 As per the evidence on record, LCHL has on the 28th May 2012 been granted by the Ministry of Housing and Lands a lease over a site of an approximate extent of 33 Arpents at la Cambuse, being part of Pas Geometrique Mon Desert and part of defence land (Document B)

Following this LCHL obtained an EIA licence with conditions from the Ministry of Environment & Sustainable Development for the construction of a resort hotel, as contained in a letter dated 23 January 2013 (Document C). The EIA licence lists out as a condition that LCHL obtains the required permits /clearances from several authorities, namely, the Ministry of housing and lands (Document E), National Ramsar Committee of the Ministry of Agro Industry & Food Security (Document D) and the District Council of Grand Port (Document F).

The BLUP (Document F) granted by the District Council of Grand Port on the 9th September 2005 refers to eight conditions to be observed by LCHL.

2.2 The Appellants lodged the appeal against the granting of the BLUP by the Respondent. It was lodged initially in their own names and in their capacity as representatives of 'Forum des Citoyens Libres' and 'Mouvement Vague divan Borlamer' respectively. In the course of the hearing, this was amended and Appellants No.1 and 2 are now appealing in their personal names. At the hearing however, Appellant No.2 adduced no evidence whatsoever and Appellant No.1 did not represent him, having repeatedly said that he was representing himself. It is only at a later stage that Appellant No.2 intervened in order to pray for a postponement on account of the absence of his counsel.

3. The Grounds of Appeal:

3.1 The notice of Appeal lodged on the 30 September 2015 contains nine grounds of appeal which have been grouped as follows:

Ground 1 relates to zoning.

Grounds 2, 3 4 and 5 relate to the hearing at the level of the Council, whereby the Appellants contend that a proper and fair hearing was not granted to them, both in terms of access to information and conduct of the hearing itself. The Appellants have proposed to deal with grounds 7 and 8 together with grounds 2 to 5.

Ground 6 relates to the ecological impact of the project.

Ground 9 relates to the Respondent's failure to appreciate the public interest which outweighs the private interest in granting the application.

3.2 We draw attention to our approach, which is that of an assessment of the project in context and in the light of the grounds of appeal raised. This explains for the calling of evidence so that the Tribunal can have a view of the development in context. This differs from the appeal process as it holds before other appellate jurisdictions.

4. Ground 1

The first ground is as follows:

> **"Because the Respondent failed to understand that the project was one which did not fall within the Outline Planning Scheme of the Town and Country Planning Scheme".**

4.1 There has been no evidence brought by Appellant No.1 on this issue. It is only in submission that the Appellant attempted to address the issue. The only other reference to the above came from the evidence of Mrs. Bosquet. This witness called

by the Appellant confirmed that the site is outside settlement boundary and is not within the tourism zone. However from her cross examination the following important aspects of the policies unfolded:

'Policy Coastal Development and Tourism (CDT 2) provides that "Within approved Tourisn zones but outside settlement boundaries, ...and outside Tourism Zones...there should be a general presumption against major new development, unless and in the national interest or where a Government-approved scheme has already been identified and committed....'

4.2 Mrs. Bosquet explained that the development did not contradict the Outline Planning Scheme and that it had been committed by the Government. The Industrial Site Lease granted by the Government to the developer for this particular project demonstrates that the project had been identified and committed, and this is confirmed by the representative of the Ministry of Housing and Lands. This evidence brings the project within the exception provided in Policy CDT 2. The EIA licence, with several conditions, granted by the Ministry of Environment is the green light given by the Government.

The above evidence adduced by Mrs Bosquet, who is the Appellant's witness, did not bring credence to the ground of appeal that the Respondent had failed to understand that the project did not fall within the Outline Planning Scheme.

4.3 In addition, we observe that the drafting of the first ground of appeal is inaccurate in as much as (and this has been confirmed by Mrs Bosquet) there is no such instrument as the 'Outline Planning Scheme of the Town and Country Planning Board'. The governing instrument for the area is the 'Outline Planning Scheme of Grand Port Savanne District Council Area' prepared by the Town and Country Planning Board'.

4.4. Therefore not only is this ground as set out not 'precise' as required by section 5 (4) of the ELAT Act 2012, but the reality on the ground indicates that the planning provisions do not prevent development of such a project in the area, as elaborated above.

4.5 In the light of the above, we set aside the first ground of appeal.

5. Grounds 2 to 5, 7:

For ease of reference, these grounds of appeal are listed below:

"2. Because the Respondent failed to give a proper hearing to the Appellant in connection with the objections raised in relation to the application of such magnitude and importance.

3. Because the Respondent has failed to give proper accessibility of the whole file pertaining to the said application to the Appellants.

4. Because in this particular case justice could only be done through individual hearing in contrast with a collective hearing and on the score of individual hearing the Respondent has lamentably failed in its duty.

5. Because the Respondent has been biased and in favour of the Co-Respondent to hear and retain only the version of the latter.

7. Because in spite of the 'mise en demeure' served upon the Respondent, the latter has ignored same and thereafter speed up to process with the application and grant same.

8. Because the Respondent had failed to seriously address its mind in respect of the Appellants' objective which mainly focus on the proposed site on which the development was to take place in contrast with an objection to the project itself."

5.1 The representative of the Council explained that although there was no legal duty on the Council to hold a hearing, it called for a hearing in its endeavour to hold a consultation process given the numerous objections received in relation to the project.

One of the contentions of the Appellants is that they were not given a proper hearing at the level of the District Council, the major point of dispute being that they were not given an individual hearing. The evidence adduced by the representative of the Council is that this course of action had been resorted to because of the large number of protestors who wished to voice out their protest on one hand and be

heard on the other hand. The Council had received more than one thousand objections and these were 'grouped by associations'. The Council called 348 objectors who had given their names and addresses for a hearing. She added that in the Council's view, there was nothing wrong in conducting a collective hearing. On this score, we do not find that the procedure to conduct a collective hearing is faulty. It was a practical decision and there was nothing on record to suggest that the conduct of such hearing itself did not allow the protestors to voice out their concerns.

5.2 On the other hand, what is noteworthy for the Tribunal is that the Appellants chose not to participate in this consultation process and hearing as they had effected a 'walk out'.

5.3 In addition, there is nothing on record that suggests that there had been a denial to access to information. The Appellant may not have agreed to the manner in which the information requested was to be imparted, but there is no indication on record that they had been denied access to the relevant files for consultation. In fact the undisputed version of the representative of the Council is that copies of the application for a BLUP with all the documents of LCHL that had been submitted to the Respondent had been made available for consultation to the Appellants. The Appellants failed to consult them. Their request for photocopies and pictures of the documents had not been acceded to. The Respondent acted in accordance with their legal duty of confidentiality (section 150(4) of the Local Government Act).

5.4 As regards the 'mise en demeure' served on the Respondent, it has been submitted on behalf of the latter, that Respondent has a duty to approve or refuse the application for BLUP within a statutory time frame. Failure to do so would entail legal consequences. The decision to grant the BLUP was justified by the obtention by the Co-Respondent of all the required clearances. We find that this stand of the Respondent is justified.

5.5 The Appellants have made a submission regarding the effective date for the application to be approved. We note that this point has not been canvassed at all in

the course of the hearing. We are not in presence of evidence in support of this submission.

5.6 From a jurisdictional point of view, the ELAT is empowered to hear appeals. In so doing, it looks into the planning merits of the proposed development and other relevant considerations that may have guided the decision that is under appeal. The ultimate decision is what is looked into. If the process by which the decision is reached is questioned as being faulted, so much so that it taints the decision itself, this calls for a judicial review of the process before the appropriate jurisdiction, which is not within the appellate jurisdiction of the ELAT.

5.7 On the basis of the above considerations, grounds 2 to 5 and 7 cannot succeed. They are set aside.

6. Ground 6:

The sixth ground is as follows :

> **"Because the major ecological impact and effect have been ignored by the Respondent in reaching its decision quoad the location".**

6.1 We have taken note of the submission made on behalf of the Appellants on the existence of the Blue Bay Marine Park and the marine ecological system including sand dunes in proximity to the site. We note that these ecological aspects have been considered by the Ministry of Agro Industry and Food Security in their letter dated 23 June 2014, and approval has been granted by the National Ramsar Committee where strict conditions have been imposed in the Ramsar clearance given. The six conditions imposed, all of ecological concern, include that '*The Company shall ensure that no damage is caused to the marine eco-system including sand dunes and the Blue Bay Marine Park during the implementation and operation phase of the project*'. Monitoring of those conditions remains within the jurisdiction of the Ministry.

6.2 On this score, we are draw attention to the fact that the Council has the sole jurisdiction to grant a BLUP on the conditions as considered by it. It should not fetter its discretion in the exercise of this power. On the other hand it cannot usurp the powers and role of other institutions, like the National Ramsar Committee, which holds the mandate for conservation. Once the necessary clearance is obtained from the relevant authority, the Council can legitimately act on the basis of those clearances. The permit was issued with no less than eighteen general conditions and eight special conditions. The representative of the Council explained that the BLUP concerns building and development of the land. Matters concerning the environment are monitored not by the Council but by the EIA Monitoring Division of the Ministry of Environment through the Environment Monitoring Plan (EMP). Her evidence is that ecological considerations are monitored within the EIA process. Considerations of ecological impact are taken and assessed at the time of the EIA process and not in the course of the BLUP. The conditions imposed in the BLUP in line with this stand.

Being given that it is the BLUP (and not the EIA Licence) that is being challenged by the present appeal, ecological considerations, or lack of consideration, cannot be laid at the door of the Council but is a matter for the EIA Monitoring Committee to look into in accordance with the EIA Report submitted for this project.

6.3 Furthermore, this Tribunal can only make a pronouncement on the basis of evidence adduced before it. The evidence of the Appellants which purported to establish negative ecological impact came from Dr. Janoo. Despite the endeavour of Dr. Janoo to establish the major ecological impact of the proposed development, he has been unable to do so. He conceded that his report was tainted with mistakes. It came out that when LCHL asked that the mistakes be corrected this was not done (for reasons that are not relevant for the present appeal). The cross examination revealed that his report was in relation to the site of another hotel (the former Le Chaland Hotel which is now known as the

Shandrani). His evidence was shaken as many of the questions put to him as regards the actual location of his study for the purposes of his report, which had been commissioned by the LCHL itself, were left unanswered. The report on record, Document T, cannot be relied upon. The other evidence adduced in respect of ecological damage came from Appellant No.2 himself, when he stated that there could be such damage by the use of lotions and other products by tourists. These were mere statements on his part and no evidence was brought in support thereof. The submission of the Appellants that the construction of the first phase of the project will cause major ecological impact has remained unsubstantiated by any scientific evidence.

6.4 As regards the ecological impact of the project on the sand dunes which has been raised by the Appellants in submission, we have given careful consideration to this aspect. The statement of defence of LCHL describes at paragraph 47 the sand dune restoration plan as set out in its EIA Report and it is stated that the project will be implemented under the guidance of the ecological consultant, Mr. Baissac. The Appellants' submission is that '*part of the site along the beach frontage lies within a sand dune classified as an environmentally sensitive area category 2*'. On this point, as we have stated above, this is a matter which ought to be considered during the EIA process and consideration of the restoration plan lies within the jurisdiction of the EIA Monitoring Committee. This is in response to the Appellants' contention that the Council had not considered this aspect in issuing the BLUP. Furthermore, we note that the Appellants did not place before this Tribunal any evidence establishing the ecological impact of the project on the sand dunes.

6.5 In the light of the above considerations, ground 6 is not upheld and is set aside.

7. <u>Ground 8</u> :

"This ground reads as follows: 'Because the Respondent had failed to seriously address its mind in respect of Appellants objective which mainly focus on the proposed site on which the development was to take place in contrast with an objection to the project itself."

7.1 This ground of appeal reflects the position of the Appellant on the proposed project. He reiterated the same position to the Tribunal during the site visit. However, we agree with the Co-Respondent that this ground is unclear and imprecise. It reflects the position of the Appellants and can hardly be said to be a basis for the challenge of the decision of the Council. The lease obtained by LCHL was on the site as contained in the lease agreement and the proposed development on that very plot. The Respondent could not possibly address its mind (let alone seriously) to any other project or site in its decision making process. This ground is set aside for lack of precision.

8. Ground 9:

"This ground reads as follows: 'Because the Respondent failed to appreciate the public interests which outweigh private interests in granting the application."

8.1 The Appellants did not lead any evidence to substantiate this ground. This remains a bare statement with no evidence in support thereof. We note however that in the statement of case of the Appellants, the issue was raised that the concern of the Appellants was the loss of access to the public beach. Appellant No.1 has been very forceful throughout the hearing on this issue. He took notice of the passing of the Government Notice deproclaiming part of the defence land during the site visit and was satisfied that this part of his concerns had been addressed by the GN.

8.2 On the other hand there is ample evidence on record to show that public interest has been served by the works undertaken by the promoter on site, some of them being in accordance with the conditions of the lease of the land by the

Government (e,g, construction of a new road) and some being done by the promoter(e.g, the treatment of waste water on the site).

8.3 In connection with this ground of appeal, the issue of locus standi has been raised, namely that Appellant No.1 had no personal interest as an aggrieved person to be a litigant in the present appeal. This Tribunal takes a different view of the concept of locus standi in appeals brought before it. It has been submitted that Appellant No.1 has no 'legitimate personal right' that is infringed and which allows him to bring an action. We are of the view that environmental matters concern one and all, so much so that it can be said that we are all custodians of the environment in which we are living. This is why the adage of one having a "interet legitime juridiquement protégé" that applies in contractual relations (or even in claims based on tort, "i.e "responsabilite delictuelle") do not apply. It is our view that we should not read more than what is provided in the law and the Tribunal takes a literal reading of Section 117(14) of the Local Government Act which provides that *"Any person aggrieved by a decision.....may within 21 days of receipt of the notification, appeal to the Environment and Land Use Appeal Tribunal.."*. The Legislator has, through this broad drafting, allowed one and all to bring an action before the Tribunal whenever a decision taken by a local authority has an impact on them. (By virtue of the jurisdiction of the ELAT, it is understood that such impact relates to a breach or potential breach of the environment).

Ground 9 not having been substantiated by the Appellants, it is set aside.

9. However, we wish to highlight that, being a Tribunal having jurisdiction in Environment matters, we cannot refrain from making a call, 'proprio motu', for a careful monitoring by all the respective institutions involved in the EIA process and which have imposed conditions to ensure close monitoring of those conditions.

10. All the grounds of appeal are otherwise set aside.

Determination by:

Mrs. V. Phoolchund-Bhadain, Chairperson:...

Professor Toolseeram Ramjeawon, Assessor.

Mr. Pravin Manna, Assessor....

Date: 26/12/2016