IN THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

[IN CHAMBERS]

ELAT C921/15

In the matter of:

NAZIDA ISLAM-MOOLKEEA & ORS

Applicants

v/s

MAHANAGAR TELEPHONE (MAURITIUS) LTD

Respondent

IPO:

THE MUNICIPAL COUNCIL OF VACOAS/PHOENIX

Co-Respondent

JUDGMENT

1. Three appeals have been lodged before this Tribunal by the applicants against the decision of the co-respondent (the "Council") for having granted a Building and Land Use Permit ("BLUP") to the respondent ("MTML") for the installation of a Telecommunication Tower of a height of 35 metres at School Lane, Quinze Cantons Road II, Vacoas. 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 granted the permit. The applicants entered an application seeking injunctive relief under section 4(2) of the Environment and Land Use Tribunal Act 2012. On 6th October 2015 I gave an order whereby I declined to grant the interim injunction prayed for in the *exparte* application and asked the respondent and correspondent to appear before me.

BACKGROUND

2. Affidavits were exchanged in relation to whether an interlocutory injunction should be granted enjoining the respondent, its servants, workers and preposes to stop all works (except to make safe the large and deep hole left in the ground) in connection with the erection of the Tower at the site in lite pending the determination of the appeal cases. The record shows that on the sitting of the 28th October 2015, Mr. Agowan, attorney for the respondent, stated that as per the instructions he received from his clients the site was enclosed as they were awaiting materials from India. He stated that the materials were due to reach at the end of November 2015 and that up until then no works had been undertaken on site which was enclosed. At the sitting of the 9th November the attorney informed the Tribunal that the respondent was not willing to give any undertaking with regards to works to be done on site but that it was agreeable to fill up the hole dug and that would be done within the same week. The matter was mentioned on a few more occasions at the request of the parties for the filing of affidavits and subsequently on the 3rd December 2015 it was fixed for the application to be heard on its merits on 29th January 2016.

3. On the 4th December 2015, following a letter emanating from the applicants' attorney in essence requesting my urgent intervention on account of the fact that, according to the applicants, there was a risk that I be put before a *fait accompli* since the respondent had resumed excavation works on the site and that the works might be over before the hearing of the application for injunction, the matter was fixed for the 8th December 2015. On that day, following the stand of the respondent that they were not willing to give any undertaking to stop the works on the site pending the outcome of the application for injunction, both counsel appearing for the applicants and respondent were given the chance to offer submissions, the co respondent having chosen to abide by the decision of the Tribunal. I then ordered the respondent not to proceed with any works on the site pending the outcome of the present application by virtue of the powers vested upon me under **section 4(2) of the Environment and Land Use Appeal Tribunal Act 2012.** I was convinced by the submissions of learned counsel appearing for the applicants that my urgent intervention was required in view of the urgency of the matter and the likelihood of undue prejudice being caused since the tower had just been erected. The hearing of the present matter was brought forward to the 12th January 2016.

THE APPLICATION

4. I have duly considered all evidence placed before me and submissions of Counsel. Counsel appearing for the applicants also filed written submissions. At the outset Counsel for the co-respondent confirmed the constat after a site visit was that the

tower was already erected. The stand of the Council was to abide by the decision of the Tribunal. Counsel for the respondent addressed me on points in law before moving onto the merits of the application, which I shall now address.

5. The learned counsel for the respondent submitted in essence that this being an application for injunction with a specific prayer, the Chairperson should not rule outside what has been prayed for in the Proecipe. The wording of the Proecipe is reproduced hereunder-

" 1 (a) an order in the nature of an Interim Writ of Injunction be issued by the Tribunal enjoining the Respondent, its servants, workers and preposes to stop forthwith all works (except to make safe the large and deep hole left in the ground) in connection with the erection of the Tower at School Lane, Quinze Cantons, Road II, Vacoas.

(b) a summons be issued calling upon the Respondent to show cause, if any, why the Interim Writ of Injunction should not be converted into an Interlocutory Writ of Injunction pending the determination of the appeals bearing Reference No. ELAT 921/15, ELAT 936/15 and ELAT 940/15 before the Tribunal.

IN THE ALTERNATIVE, should the Tribunal decline to grant the said Interim Writ of Injunction, the applicants pray for a summons calling upon the Respondent to be and to appear before the Tribunal on a day and hour to be fixed to show cause, if any, why an Interlocutory Writ of Injunction should not be issued enjoining the Respondent, its servants, workers and preposes to stop forthwith all works (except to make safe the large and deep hole left in the ground) in connection with the erection of the Tower at School Lane, Quinze Cantons, Road II, Vacoas pending the determination of the appeals bearing Reference No. ELAT 921/15, ELAT 936/15 and ELAT 940/15 before the Tribunal."

6. The argument of the respondent is that the purpose of the injunction is to stop the works in connection with the erection of the tower on the site *in lite*. It is borne out in evidence that the tower has already been put up and is already operational. At page 10 of the respondent's affidavit dated 18th January 2016, it is averred that prior to my order being issued the works were completed. According to the respondent, the Palm Tree Tower was already affixed, placed, the telecommunication equipment, including the cables were installed and the tower was operational at about 08 30 hours on the day. It is also averred that the electricity supply has already been connected by the CEB. This evidence is not denied by the applicants.

7. The position of the applicants is that they are aggrieved by the erection of a telecommunication tower in front of their houses. Counsel for the applicants submitted that the latter were enjoying a panoramic view from their houses in Quinze Cantons, Vacoas until the respondent decided to put up a tower of 30 metres in height only some 20 metres from their residences in an open field thus impeding their view. The location of the development is not proper in that according to them it is 'unusual and incompatible' because the presence of a tower in front of their houses constitutes a "trouble anormal de voisinage" by impeding a view they had been enjoying until then. They lodged appeals contesting the BLUP granted to the MTML before the Tribunal.

8. It is a settled maxim that "Equity does not act in vain". This essentially implies that the Courts and Tribunals exercising an equitable jurisdiction are reluctant to make an order that has no real consequences or that cannot be enforced. In **Mosley v News group Newspapers Ltd [2008]All ER (D) 322**, the tabloid News of the World published on its website a video clip showing the plaintiff engaging in sexual activity. In just 2 days, the

clip was accessed over 1.4 million times and copied on numerous websites. Eady J rejected an application to order the defendant no longer to publish the footage on its website because the 'granting of an order.....at the present juncture would merely be a futile gesture.'

9. If an injunction evidently has no practical utility for the plaintiff, the Court will exercise its discretion to deny such an order where the subject matter of the claim can no longer be protected. The question that begs for an answer in this case would be what would be the practical effect of making the order prayed for in this case? In other words will the granting of an injunction or maintaining the order made on the 8th December 2015 have any practical utility? The answer at this stage is in the negative. This bench was indeed put before a *fait accompli*. In the absence of any evidence to the contrary we have to accept the version of the works undertaken by the respondent in erecting the tower were completed by the time the order was issued by this bench on the 8th December 2015 save for some minor works such as painting and leveling the floor. But with being the state of affairs, the purpose for which this jurisdiction was seized was to stop the construction of the tower infront of the dwellings of the applications. The order prayed for as couched in the Proecipe of the applicants was specifically to stop all works in connection with the erection of the tower. The tower having now already been erected, and being operational, the only issue in dispute now is whether this development can gain planning acceptance on the site *in lite,* which goes to the merits of the granting of the BLUP, which will be the subject matter in the main case before the Tribunal, not before me.

10. Having reached the conclusion that an order for the injunction prayed for will now be futile in that it will have no practical utility since the tower has already been put up, I do not deem it necessary to consider the merits of this application nor any other points raised. I therefore discharge the order I made on the 8th December 2015 and set aside this application.

Jayshree RAMFUL-JHOWRY

Vice Chairperson

18 April 2016

For Applicants: Me. R. Saha

For Respondent: Me. Z. Jaunbaccus

For Co-Respondent : Me. K. Lobine