14th Meeting of the Aarhus Convention Task force on Access to Justice:

Access to Justice in cases related to spatial planning and in energy related cases:

The experience of Mauritius in establishing a specialized Environment Tribunal

1. Environment and Land Use Appeal Tribunal: Institutional set up

Mauritius has established the Environmental and Land Use Appeal Tribunal (ELUAT) in 2012. This Tribunal was created to deal with appeals against administrative decisions taken by the Minister of Environment, all local authorities and other administrative bodies dealing with spatial planning. Spatial planning is within the jurisdiction of the Town and Country Planning Board (TCPB), which is an administrative body operating under the aegis of the Ministry of Housing and Lands. This Board is in charge of the preparation of Outline Planning Schemes for each district. Appeals against decisions to grant/refuse building/development permits were directed to the TCPB, which sat as an appellate body.

On the other hand, appeals against decisions of the Minister of Environment to grant EIA Licences were dealt with by the Environment Appeal Tribunal, created under the Environment Protection Act 2002. Its jurisdiction was to hear and determine appeals against decisions of the Director of Environment and the Minister of Environment, the two entities having discretionary power in environmental decisions for the former and granting EIA permits for the latter. The Tribunal operated on a part time basis.

The present specialized jurisdiction, the ELUAT is a quasi-judicial Tribunal, created by the ELUAT Act 2012. It is headed by a Chairperson, a former member of the Judiciary (Magistrate of the Intermediate Court) and a Vice -Chairperson, assisted by members having technical expertise in their respective fields. The Chairperson and Vice Chairperson are appointed by an independent service commission (the Public Service Commission) set up under the Constitution and have security of tenure. Members are appointed on a part time and on rotation basis by the Attorney General.

2. Access to Justice

The process of appeal:

Decisions of local authorities are notified to applicants, informing them of their right to appeal within 21 days of being notified of the said decision, or from the date public notification of the decision is given (in the case they are not required to be notified). The legislator has, in enacting the ELUAT Act, done away with the formalism that normally exists in an appellate process access. It provides that proceedings shall be conducted with as little formality and technicality as possible and shall not preclude an endeavour by the Tribunal to effect an amicable settlement between the parties[1].

Based on this, the approach followed by the ELUAT has been a very open and flexible one, so much so that appellants are not required to be represented by attorney for the lodging of the

[1] Sections 5(3)(b) and (c) of the Environment and Land Use Appeal Tribunal Act 2012 (referred to as the ELUAT Act)

appeal, and can conduct their case without a counsel. It has even been referred to as the "Tribunal for the people". No fee is levied for lodging appeals and no cost has so far been ordered against the losing party, although the Act makes provision for the discretion of the Tribunal to award costs.[2]

Over the years, however, amendments were made, introducing some degree of formalism in the process. Strict deadlines were introduced for the exchange of 'pleadings' and witness statements were to be filed within short delays, among others. This was cause for concern. Appellants, especially ENGO's complained of the difficulty they faced in gathering their witness statements within 21 days (the delay to appeal), especially in appeals against EIA's which very often called for the involvement of highly technical and specialist expertise. So far, the Tribunal has used its discretion to allow witness statements to be filed outside delay, and this has been subject of many arguments.

3. <u>The issue of locus standi</u>:

The locus standi of the appellants has been central to the appellate process before the Tribunal. Numerous points in law have been raised by parties and arguments heard and rulings given on the 'locus standi' of appellants.

In this respect, one important provision of our legislation was relied upon to 'open' the doors of the Tribunal. This is Section 2 of the Environment Protection Act 2002 which provides as follows:

> *"Environmental Stewardship:*
> *It is declared that every person in Mauritius shall use his best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius".*

In the case of *Association of Hoteliers and Restaurants (AHRIM) v. 1. Ministry of Social Security, National Solidarity and Environment and Sustainable Development 2. Minister of Social Security, National Solidarity and Environment and Sustainable Development, in presence of 1. Growfish International (Mauritius) Ltd. 2. Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping 3. Ministry of Tourism [ELAT 1502/17]*[3], the locus standi of the Association of hotels was challenged by the Respondents as failing to meet the requirement of being an "aggrieved party", and thus failing to show a legitimate and personal right or interest in the matter. The Tribunal placed reliance on section 2 of the EPA[4] to allow AHRIM to enter the appeal and also on the fact that AHRIM was defending the rights of the tourist industry, of which its members were the main protagonists. As such it was not considered to be a class action 'per se' nor was it considered as opening the door to 'public interest litigation'. The Tribunal took the position that although the general public would be impacted by the outcome of the appeal, yet the remedy sought was first and foremost for the benefit of its members. The concept of 'associative standing' was coined by Sea Users Association (the consolidated matter) by reason of the fact that the appeal had been lodged by the association on behalf of its members.

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[2] Section 5(10) of the ELUAT Act

[3] Consolidated with case of The Sea Users Association & Ors. v. Ministry of Social Security, National Solidarity and Environment and Sustainable Development & Anor. i.p.o Growfish International (Mauritius) Ltd. & Ors. ELAT 1507/17

[4] Environment Protection Act 2002 as amended.

The Tribunal referred to case of Betsy v Bank of Mauritius[5] where the Court, quoting from Wade's Administrative Law: "*The law will now focus on public policy rather than private interest*", and stated that "*This takes particular significance in the realm of environmental law being given that environmental stewardship rests on the shoulders of every person in Mauritius*" [6]. This was described as a 'pledge' by the Court.[7]

Despite the wide approach taken in the case of AHRIM (supra), a less liberal position was taken by the Tribunal in the case of *Agir Pour L'Environnement v 1. The Minister of Environment, Solid Waste Management and Climate Change 2. The Ministry of Environment, Solid Waste Management and Climate Change i.p.o The District Council of Savanne & Others*[8]. Here, the Tribunal laid down the parameters in which the pledge were to be considered. It stated that section 2 of the EPA lays down a general duty of care on the citizens of Mauritius for the environment. It does not supersede the specific provisions of the Environment Protection Act, namely section 54(2), which sets out specifically the category of persons who have the capacity to enter an appeal against a decision taken by the Minister. The criteria are set out in section 54(2) of the EPA.

It is to be noted that a very recent amendment (Act No. 7 of 2020) brought to the EPA had added further criteria to qualify the persons who can enter an appeal against the Minister's decision. The new section 54(2) reads as follows:

> "*Where the Minister has decided to issue an EIA Licence, any person who-*
> *(a) Is aggrieved by the decision;*
> *(b) Is able to show that the decision is likely to cause him undue prejudice; and*
> *(c) Had submitted a statement of concern in response to a notice published under section 20,*
> *may appeal against the decision to the Tribunal.*

Section 20 of the Environment Protection Act (EPA) relates to Public Comment, following the deposit of the EIA application opening it for public inspection. The delay to make a public comment is specified in the notice published by the Director for Environment, it is generally not less than 10 days and not more than 21 days from the deposit, unless otherwise specified. This delay has been outcried as being short and the inclusion of the additional criterion (i.e statement of concern) that further restricts the appeal process.

4. Access to justice in land use matters (spatial planning)

The issue of locus standi in cases relating to land use matters has been a disputed subject in appeals before the Tribunal. The land use matters are governed by the Local Government Act, Town and Country Planning Act and Planning Policy Guidance issued by the Ministry of Housing and Lands mainly. All development works have to obtain a Building and Land Use Permit (BLUP) issued by the local authority in the district where the development is proposed.[9] The jurisdiction of the ELUAT in land use matters is derived from section 117 (14) of the Local Government Act which provides that *"Any person aggrieved by a decision of a Municipal City Council, Municipal Town Council or District Council under subsections (7)(b),*

[5] 1992 MR 231
[6] Section 2 EPA
[7] Case of Tacouri Preetam & Ors.v. Mohamud Feroze & Ors. [2010] SCJ 132
[8] ELAT 1909/19
[9] Section 117 of the Local Government Act as amended

(8)(b) or (12) may within 21 days of receipt of the notification, appeal to the Environment and Land Use Appeal Tribunal".

The Tribunal, since its inception, has accepted and entertained appeals lodged before it by applicants for Building and Land Use Permits, and also from objectors to such development. In a judgment delivered in 2019[10] ,the Supreme Court has restricted this wide approach by stating that "*Only an aggrieved party can appeal to the Tribunal and an aggrieved party is one who has been notified that his application has not been approved…*". The rationale of this decision has been that "*the legislator in his wisdom, did not intend to allow any interested person to challenge the granting of a BLUP as this would have significantly affected the business climate in Mauritius*". This judgment has had a significant impact on the jurisdiction of the Tribunal and the number of appeals that are lodged. In practice, the only recourse that objectors have is to seek a judicial review of the decision of the local authority, which is a long and costly process. Objectors are very often the immediate neighbours who will feel the impact of the development. Sometimes the objectors are ENGO's, who are constrained by the technicality of the process of judicial review.

After the judgment in the case of Baumann (supra), the legislator brought an amendment to the Local Government Act by adding a definition of who is an 'aggrieved person' (for the purposes of lodging an appeal before the Tribunal): "*Person aggrieved means a person whose application for an Outline Planning Permission or Building and Land Use Permit has not been approved by a Municipal City council, Municipal Town Council or District Council*".[11]

This limitation of access to the Tribunal has had a serious impact on objectors. It is noteworthy that the restriction was not extended to appeals against the decisions to grant EIA licences. Yet the latest amendment to the EPA Act limited access to the Tribunal to those who had submitted a statement of concern in response to the public inspection[12].

5. <u>Other provisions</u>:

<u>Injunction</u>:

The Environment and Land Use Appeal Tribunal Act 2012 makes provision for the Chairperson to make such orders as he thinks fit, including an order in the nature of an injunction, where he is of opinion that for reasons of urgency and the likelihood of undue prejudice, it is necessary to do so pending the hearing of the matter[13]. This provision has been used in many cases where objectors had lodged appeals against development projects that were likely to affect them and it was urgent to stop the project. Now that the appeals are only accepted from persons who had their application rejected, the issue of injunction has become obsolete. Injunctive relief, if any, is to be sought before the Supreme Court. This is in fact a departure from the legislative intent at the time of setting up the specialized jurisdiction.

[10] Marie Louise Isabelle Baumann v The District Council of Riviere du Rempart i.p.o Syndicat des Co-Propriétaires de Savannah Sparrow Residence & Ors. 2019 SCJ 311.

[11] Section 15 of the Local Government Act amended by Act 7 of 2020.

[12] Sections 20 and 54(2)(c) of the Environment Protection Act.

[13] Section 4 (2) of the ELUAT Act.

Mediation:

The ELUAT is empowered to conduct mediation with a view to effect an amicable settlement between parties[14]. This process has been mainly used in appeals against decisions of local authorities in BLUP applications. There has been no mediation as at to date in appeals against decisions of the Minister in granting EIA licences. Similarly, the likelihood of mediation in decisions relating to parcelling of land ('morcellement') is remote. Mediations are done on a 'no-prejudice basis' and the matter can proceed for hearing in the absence of a settlement.

Delays:

Determinations of the Tribunal are to be made within a period of 90 days after the start of the hearing[15], except where there is a valid reason and with the consent of parties. This exception is very often resorted to, especially in long and complex appeals. Furthermore, the Supreme Court has made a pronouncement to the effect that the provisions of section 5(7) of the ELUAT Act "*may only be construed as directory and not mandatory*"[16].

A recent amendment to the ELUAT Act has made provision for a filter to be made to appeals that are lodged, such that the Tribunal shall examine the appeal within a delay of 15 days after the reception of all the required documents (the 'pleadings') to see if the appeal is vexatious or frivolous and, depending on the examination, can set aside the appeal.[17]

Appeals to Supreme Court:

Appeals against the final decisions of the Tribunal as being erroneous in law can be made to the Supreme Court. As at date, several determinations of the Tribunal have been appealed against to the Supreme Court and also to the Judicial Committee of the Privy Council, which is the final court of appeal for Mauritius.

Energy-related cases:

The Tribunal has not received any energy-related appeal so far.

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[14] Section 5(3)(c) of the ELUAT Act.
[15] Section 5(7) of the ELUAT Act
[16] Globe Prism Ltd v. The Environment and Land Use Appeal Tribunal i.p.o Roland Haus Co. Ltd. & Ors. 2020 SCJ 99
[17] The new section 5(8) introduced by Act 7 of 2020.