

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE ENVIRONMENTAL COMMISSION

EAP 004 OF 2008

BETWEEN

**SOUTH WEST TOBAGO FISHERMEN'S
ASSOCIATION**

APPELLANT

V.

**THE ENVIRONMENTAL MANAGEMENT
AUTHORITY**

RESPONDENT

Dated the 30th July 2009

Coram: Her Honour Sandra Paul - Chairman
Her Honour Indira Ramrekersingh - Deputy Chairman
His Honour Dr. Eugene Laurent – Member

Appearances:

Mrs. Debra Moore-Miggins
Ms. Renee Gift

for the Appellant

Ms. Nalini Sharma
Ms. Shireen Khan

for the Respondent

RULING ON PRELIMINARY POINTS

Introduction

(1) The Commission is being asked to deliberate upon two preliminary points:

- Firstly, whether a third party, South West Fishermen's Association ("the Association") has locus standi to challenge by way of appeal

a decision of the Environmental Management Authority (“the EMA”). If such a finding were to be made, it would have far reaching consequences for the development of environmental jurisprudence in Trinidad and Tobago.

- Secondly, whether the substantive proceedings should be stayed pending the outcome on appeal of a matter which dealt with a similar issue as one which arises in the substantive appeal, that is the interpretation of section 81(5)(a) of the Environmental Management Act Chap.35:05 (“the Act”).

Background

(2) The EMA granted PGS Geophysical AS (“PGS”) a certificate of environmental clearance (“the CEC”), Certificate No. 2224 of 2008, to carry out a 2-D Seismic Survey off the East, West and North coast of Tobago for the exploration of crude oil or natural gas. The Authority granted this CEC subject to certain terms and conditions and stipulated that certain mitigation measures should be undertaken.

(3) The Association, which represents a substantial number of fisher folk in Tobago, subsequently appealed to the Environmental Commission under sections 81(5)(a), (f) and (i) of the Act. The appeal includes several substantive grounds of appeal that do not need to be addressed in this ruling because the issues before us are ones of locus standi and a request for a stay of the substantive proceedings.

The Issues

(4) The Commission has two issues upon which it must deliberate:

- (i) does the Association have locus standi to bring an action against the EMA under sections 81(5)(a), (f) and (i) of the Act; and
- (ii) if the Association has locus standi, should the Commission grant a stay of proceedings pending the outcome of an appeal of its

decision in **Fishermen and Friends of the Sea v. The Environmental Management Authority (FFOS v. EMA).**¹

(5) With respect to section 81(5) (a) of the first issue, the Commission, in **FFOS v. EMA** was called upon to interpret section 81(5)(a) of the Act. Section 81(5)(a) states as follows:

The Commission shall have jurisdiction to hear and determine –

(a) appeals from decisions or actions as specifically authorised under this Act;

The Commission applied the literal rule of statutory interpretation and construed the words “specifically authorised” as qualifying the words “decisions or actions” and therefore held that the Commission had jurisdiction to hear by way of appeal, any decision or action of the EMA.

Holdings of the Commission

(6) The Commission, based on the facts of this case, holds

- (i) that the Association has locus standi because
 - (a) the Commission has jurisdiction under section 81(5)(a) to hear appeals from all decisions or actions of the EMA;
 - (b) the Commission has jurisdiction under section 81(5)(f), to hear by way of appeal, a decision of the EMA made under section 36 of the Act;
 - (c) the matters raised on appeal by the Association are matters arising under the Act as provided for by section 81(5)(i) of the Act;and
- (ii) that contrary to the assertion of the EMA, the Association cannot initiate a private party action against the EMA under section 69 of the Act because that section does not apply to the matters in this case.

¹ EAP 005 of 2007

(7) The Commission also holds that the requested stay of proceedings is not warranted for the following three reasons:

- (i) a stay will significantly delay these proceedings,
- (ii) denying a stay will not prejudice the EMA, and
- (iii) the hearing of this appeal is in the public interest.

The Association has locus standi to assert its claim.

(8) Under the Act the Association has locus standi to assert its claim against the EMA. When the Act created the EMA and tasked it with, among other things, the establishment of an effective regulatory regime to protect, enhance and conserve the environment, the Act imbued the EMA with certain powers to make decisions and take actions in furtherance of this mandate. The Act also created a specialist superior court of record, the Commission, for the purpose of supporting and strengthening the role of the EMA. The EMA now has available to it the necessary institutional framework for enforcing its decisions, but the Act also created a mechanism for an aggrieved person to seek redress from a decision or action of the EMA, by way of appeal. To bring such an appeal, an aggrieved person, like the Association, must have the proper locus standi.

(9) Here, the Association has locus standi under three sections of the Act:

- (i) under section 81(5)(a) of the Act because the Association is appealing a decision or action of the EMA,
- (ii) under section 81(5)(f) because the Association is appealing a decision made under section 36 of the Act, and
- (iii) under section 81(5)(i) because the Association is alleging that that the EMA breached its duties and responsibilities arising under the Act at sections 35, 36 and 37.

Section 81(5) (a) of the Act

(10) Under section 81(5)(a), the Association has locus standi to assert its claims. The Commission has already interpreted section 81(5)(a) as giving it the jurisdiction to hear and determine all appeals against decisions or actions of the EMA.²

(11) Having regard to the foregoing, Counsel for the Association submitted that the EMA failed to act as it was required to do under sections 35 and 36 of the Act and consequently an appeal for failure to act would lie with the Commission. These sections both make provision for how the EMA is to act when dealing with an application for a CEC. Section 35(4) provides that:

The Authority in considering the application may ask for further information including, if required, an environmental impact assessment, in accordance with prescribed procedure.

Section 36(1) provides that:

After considering all relevant matters, including the comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirements to undertake appropriate mitigation measures.

(12) The sections both require the EMA to take certain factors into consideration with respect to an application for a CEC and the issuance of a CEC respectively. Failure on the part of the EMA to act in accordance with the dictates of the section may well frustrate the interests of persons who may be affected by its action or lack of action. Certainly, these persons must have some legal recourse.

(13) The Commission, having determined in **FFOS v. EMA** that it can hear appeals from any decision or action of the EMA, finds that the Association has locus standi to bring an appeal under section 81(5)(a) of the Act.

² Fishermen and Friends of the Sea v. The Environmental Management Authority, EAP 005 of 2007

(14) Counsel for the EMA expressed the concern that by the assumption of jurisdiction by the Commission to hear appeals from all decisions or actions of the EMA was tantamount to authorising the judicial review of decisions or actions of the EMA, through the back door. However, this concern is unwarranted, because the Commission on the hearing of an appeal can only dispose of it in a manner provided for by the Act. The Commission has no power to give judicial review type relief. The Act at section 86(3) provides that:

.... The Commission may dispose of an appeal by-

(a) dismissing it;

(b) allowing it;

(c) allowing it and modifying the decision or action of the Authority; or

(d) allowing it and referring the decision or action back to the Authority for reconsideration.

The Association is not precluded from bringing a judicial review application to the High Court where the EMA may fails to take certain factors into consideration before it issues a CEC. However, section 9 of the Judicial Review Act Chap. 7:08 provides:

The court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.

Having regard to the foregoing, the Association is entitled to challenge a decision or action of the EMA by way of appeal to the Commission.

(15) Counsel for the Association further submitted that appealing to the Commission is proper because the EMA failed in its obligation to monitor performance of the survey activity, which is required under section 37 of the Act. Section 37 provides that the EMA must adequately monitor the performance of an approved activity:

The Authority shall monitor the performance of the activity to ensure compliance with any conditions in the Certificate, and to confirm that the performance of the activity is consistent with –

- (a) the description provided in the application for a Certificate; and*
- (b) the information provided in any environmental impact assessment.*

(16) Under section 37 of the Act if the EMA fails to monitor the performance of the activity to ensure compliance with the conditions in the CEC and a third party is affected what recourse does the third party have? It will not be in a position to enforce the terms of the CEC in the High Court because it is not a party to the CEC. It will not have any ground for relief by way of judicial review. Surely the third party must have some legal recourse. And that recourse is an appeal to the Commission.

(17) Here, the Commission holds that the Act imposed an obligation to monitor on the EMA. The EMA cannot shirk its responsibilities under the Act without consequences. The Act having created that unique responsibility for the EMA, also created a mechanism to ensure that the EMA upheld its responsibilities, that is, by way of appeal to the Commission under section 81(5)(a).

(18) Consequently, because the EMA failed to act properly when considering the CEC application and when monitoring the subsequent survey performance, the Association, based on the Commission's interpretation of section 81(5) (a), has locus standi to bring this claim.

Section 81 (5)(f) of the Act

(19) Under section 81(5)(f), the Association has locus standi to assert its claim. Counsel for the Association submitted that the Association can appeal a decision of the EMA under section 81(5) (f) of the Act. The Commission considered this submission and finds that the provisions of section 36 are quite clear in that the EMA must take certain actions prior to the grant of a CEC and the EMA may issue it subject to terms and conditions.

(20) Section 36 gives a discretionary power to the EMA. It may issue a CEC subject to terms and conditions including requirements to undertake appropriate mitigation methods. When exercising this discretion the EMA is required to act judiciously, prudently and fairly. If this discretion is improperly exercised then the decision or action flowing therefrom will be subject to appeal to the Commission under section 81(5)(f). Consequently, the Association has locus standi to bring an appeal from a decision made under section 36 of the Act by way of appeal under section 81(5)(f).

Section 81 (5) (i) of the Act

(20) Under section 81(5)(i), the Association has locus standi to assert its claim. Section 81(5)(i) provides another avenue for bringing an action to the Commission. This section states:

The Commission shall have jurisdiction to hear and determine –

- (i) such other matters as may be prescribed by or arise under this Act or any other written law where jurisdiction in the Commission is specifically provided.*

(21) When the principles of sentence construction are applied to the wording of the above section, it is obvious that the Act describes three categories of matters that can be heard and determined, each category being separated by the word “or” which suggests that they are separate items over which jurisdiction is to be had. Therefore the Commission can hear and determine, firstly such other matters as may be prescribed by the Act, as for example under Rule 4(1)(b)³ the CEC Rules, secondly matters that arise under the Act, and thirdly, matters under any other written law where jurisdiction of the Commission is specifically provided. We will deal only with the issue of “matters arising” under the Act.

³ When processing an application for a CEC the EMA can “request further information of the applicant as prescribed in rule 3(5)”

(22) In dealing with matters which arise under the Act, regard has been had to the High Court decision in the Australian case of *The King v. The Commonwealth Court of Conciliation and Others, Ex parte Barrett*.⁴

(23) In *Ex parte Barrett*, the court had to interpret the phrase “arising under” with respect to a provision in the Commonwealth Constitution which read

The Parliament may make laws conferring original jurisdiction on the High Court in any matter-

- (i) *Arising under this Constitution, or involving its interpretation:*
- (ii) *Arising under any laws made by the Parliament.*

In interpreting the phrase “arising under”, the court held that a right or duty would arise under a law if that right or duty owed its existence to the particular law or depends on the law for its enforcement. Specifically, Latham CJ held the following:

[A] matter may arise under the Constitution without involving the interpretation, and that a case may involve the interpretation of the Constitution without arising under the Constitution. Paragraph (ii) is limited to matters arising under Federal statutes, and does not extend to matters involving the interpretation of such statutes if they do not arise thereunder. This variation in language supports the view that, in order to bring a matter within s. 76(ii) – which is the relevant provision in the present case – the inquiry to be made is not whether the determination of the matter involves the interpretation of a Federal law. The relevant inquiry is whether the matter arises under the law. Thus one is compelled to the conclusion that a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law.....If a right claimed is conferred by or under a Federal statute, the claim arises under the statute (our emphasis).

⁴ [1945] 70 CLR 141

(24) We accept this interpretation of “arising under” and apply it to “matters arise” in this case. We find therefore that, under sections 35, 36 and 37, the Act gave rise to duties and obligations on the EMA that the EMA is required to discharge. Further, we find that the duties and obligations that the EMA must execute are enforceable against it under the Act.

(25) Therefore, the Commission holds that the Association has locus standi to assert its claim under section 81(5)(i), as well as under sections 81(5)(a) and 81(5)(f) and the EMA’s contention to the contrary is rejected.

The Association, contrary to the EMA’s submission, cannot initiate a direct private party action.

(26) Indeed an appeal is the only proper way for the Association to proceed in this case, because contrary to the EMA’s position, it cannot initiate a direct private party action against the EMA.

(27) Counsel for the EMA submitted that the proper avenue for redress for the Association before the Commission would be by means of a direct private party action under section 69 of the Act, alleging that the EMA has breached an environmental requirement.

(28) The Commission rejects this submission since the matters complained of do not fall within the ambit of section 69. Section 69 provides, *inter alia*, that

Any private party may institute a civil action in the Commission against any other person for a claimed violation of any of the specified environmental requirements identified in section 62, other than paragraphs (c), (d) and (l), ...

It is obvious that what is contemplated at section 69 is that a private party can bring an action against a person who is in breach of an environmental requirement. However, the term “person” in section 62 does not include the EMA. We say this based on the provisions in the Act that have vested the EMA with enforcement powers. Section 63 of the Act provides that where the EMA reasonably believes that a person is in violation of

an environmental requirement it can take certain actions. Sections 64 to 68 empower the EMA to take enforcement action against a person who has violated an environmental requirement, by issuing against the violators Notices of Violation, Administrative Orders, and Civil Assessments.

(29) We make the above finding despite

(i) the word “person” being defined in the Act as including:

any individual or any firm, business, company, enterprise, body corporate, trust, un-incorporated association, partnership, or governmental entity, however constituted;

(ii) the fact that section 6 of the Act established the EMA as a body corporate;

(iii) section 62(h), which states that:

*“environmental requirement” means the requirement of upon a person to –
comply with the procedures and standards with respect to the periodic or continual monitoring of pollution or release of pollutants or conditions required under a permit or licence;*

The conclusion arrived at above is warranted in light of the fact that the EMA has enforcement powers against a “person” for violation of an environmental requirement. The Commission notes the words of the learned author Bennion in his treatise⁵ where he said “the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament”. Consequently, it would be an absurdity to conclude that the EMA can be an enforcer against itself.

(30) The Commission therefore holds that, given the above circumstances, the Association cannot initiate a direct private party action against the EMA.

⁵ Bennion on Statutory Interpretation 4th ed., Section 312, para. 1

Stay of Proceedings

(31) A stay of execution is not warranted. We make this finding after reviewing three pertinent factors: ensuring timeliness of the proceedings, preventing any prejudice to the parties and protecting the public's interest. Accordingly, the Commission finds that a stay of the substantive proceedings is not warranted.

(32) Regarding the first factor, we determined that granting the stay would prevent the substantive matter from being heard in a timely manner. The requested stay would postpone these proceedings until the Court of Appeal hears the appeal of the Commission's decision in **FFOS v. EMA**, which involved the interpretation of section 81(5) of the Act. Because the hearing of that appeal cannot be expedited,⁶ that appeal will have to take its place amongst all the other appeals pending at the Court of Appeal. Therefore, since the hearing of **FFOS v. EMA** appeal may be some time away, granting the requested stay would likely create an unnecessary delay and prevent the Association's appeal from being heard in a reasonable period.

(33) Regarding the second factor, denying the stay would not prejudice either of the parties in this case, particularly the EMA. The matters raised on appeal were already dealt with when the EMA issued a CEC to PGS to conduct a 2-D Seismic Survey off the East, West and North coast of Tobago. In its appeal the Association has simply asked the Commission to make certain declaratory orders none of which are enforceable against the EMA. Thus, because the requested declaratory orders could not be enforced against the EMA, the EMA would not experience any prejudice if the proceedings continue.

(34) Regarding the third factor, hearing this appeal, because it may affect how the EMA performs its duties and obligations, is in the public interest. The appeal as enunciated in the grounds of appeal raises fundamental issues regarding these duties and obligations. To assess the impact of these issues on the public interest, we have considered both the

⁶ We note the ruling in **The Environmental Management Authority v. Fishermen and Friends of the Sea, Civil Appeal No. 199 of 2008**. In that ruling, the Court of Appeal found that when an appeal was brought by way of Case Stated, the Court of Appeal, under the Civil Procedure Rules, had no jurisdiction to expedite an appeal.

EMA's role and mandate, and the specific questions being asked in the Association's appeal.

(35) The Commission is acutely aware and mindful of the very important role and mandate of the EMA as they pertain to the sustainable development of Trinidad and Tobago. We note the Government's intent, as expressed in the Preamble to the Act, that managing and conserving the environment is an important public issue:

And whereas, management and conservation of the environment and the impact of environmental conditions on human health constitutes a shared responsibility and benefit to everyone in the society requiring co-operation and co-ordination of public and private activities:

(36) To achieve this goal of coordinating the private and public approach to protecting Trinidad and Tobago's environment, the Government established the EMA and gave it authority to create a regulatory regime:

And whereas, in furtherance of its commitment, the Government is undertaking the establishment and operation of an Environmental Management Authority to co-ordinate, facilitate and oversee execution of the national environmental strategy and programmes, to promote public awareness of environmental concerns, and to establish an effective regulatory regime which will protect, enhance and conserve the environment: (our emphasis).

Thus, when granting the EMA the authority to institute this effective regulatory regime, the Government imbued the EMA with specific powers to protect, enhance and conserve the environment.

(37) However, in the current appeal, some of the EMA's powers, as found in sections 35 and 36 are at issue. Specifically, the Commission is being asked to:

- (i) indicate on what factors should the EMA base its decision to request an environmental impact assessment when considering the application for a CEC under section 35(4); and
- (ii) indicate what are some of the “relevant matters” that the EMA should consider before it issues a CEC under section 36(1).

(38) Making a finding on both these issues will have serious implications for the EMA, and by extension the public. For example, an obvious finding may be that, under section 35(4), the EMA does not have unfettered powers as to when to request an environmental impact assessment. Clearly, making a finding with respect to the first issue, and likely the second issue as well, will be in the public’s interest. Thus hearing the appeal will be in the public interest.

(39) Therefore, because hearing the appeal

- (i) will ensure the timeliness of the proceedings in this case,
- (ii) will not prejudice either party, and
- (iii) will be in the public’s best interest,

a stay of proceedings is not warranted. Consequently the Commission denies the request.

Conclusion

(40) The Commission rejects the EMA’s preliminary point that the Association lacks locus standi and further, rejects its request for a stay of the substantive proceedings pending the outcome of the appeal of **FFOS v. EMA**.

(41) We will therefore proceed to hear the substantive matter.

Sandra Paul
Chairman

Indira Ramrekersingh
Deputy Chairman

Dr. Eugene Laurent
Member