



FISHERMEN AND FRIENDS OF THE SEA

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Fishermen and Friends of the Sea- FFOS (Appellant) v Environmental Management Authority - EMA (Respondent) And The Ministry of Works and Transport - MOWT (First Interested Party) and Kall Company Limited - KALLCO (Second Interested Party) Privy Council Appeal No 0055 of 2018

Facts:

On 22nd June 2017, the EMA issued a certificate of environmental clearance (**CEC**) CEC 4952/2016 to the MOWT for the specific purpose of the 5000m highway alignment commencing at a point 300m east of the Cumuto Main Road and ending at a point 600m west of Guaico Trace, Sangre Grande. This highway was being aligned on the last unsquatted southern boundary of the legally designated Environmentally Sensitive Area – the Aripo Savannas.

FFOS received leaked documents, which included an internal memo from the EMA which stated the following

1. The CEC was prepared in accordance with the following instructions from the the EMA's Managing Director Mr. Hayden Romano "Please complete your review with the officers by Tuesday 20th lunchtime and advise me of how you will be addressing the conditions in the CEC. I expect I will have a CEC for signature by Thursday 22nd 2017".
2. "The Managing Director instructed that the document not be subjected to review by other agencies who formed part of the review team. Because of this, there are certain sections of the response that have not yet been reviewed, since the competency lies with the respective agencies."
3. "The Managing Director instructed that the document not be subjected to public review".
4. Ms. Jiselle Joseph, Assistant Manager-Technical Services, stated "It is highly irregular and unprecedented to issue a determination for a CEC application, for which there are significant outstanding concerns to be addressed based on the requirements of a TOR that was issued for the conduct of an EIA in support of the application".

5. Ms. Vidjaya Ramkhalawan, Manager Technical Services (Ag), stated that “this did not follow proper processing procedure, which is supported by the technical review, as well as the timeline was unrealistic (given past review experience) I am not in agreement with the issuance of the CEC, notwithstanding the instruction for a CEC was followed”.
6. Ms. Lanalisa Jackson-George Environmental Compliance Specialist “this is indeed an unusual position being taken by the EMA should a CEC be issued ... much of the assessment that should have taken place during the CEC application phase is now being “conditioned” into the CEC ... should these assessments be left out of the CEC, the EMA would abdicate proper management”.
7. Mr Maurice Wishart Legal Advisor stated:
“the inescapable conclusion that the minimum requirement to proceed to issue a CEC in the instant matter does not exist”;

... that “the Authority’s action in issuing the CEC is open to legal challenge”;

... that “the Authority would be hard pressed to Justify the decision making process utilised”; and

... that “in the circumstances, to adopt a course of action to issue a CEC is not advisable”

On 29th September 2017, FFOS filed the matter at the High Court, 3 days after the 90-day deadline for Judicial Review due to *our attorneys recusing themselves 48 hours before the deadline.*

Works on the highway commenced on 8th January 2018. FFOS filed for an injunction on the 15th January 2018 due to our then attorneys recusing themselves and a scramble to find another team of attorneys during the Christmas holidays.

Court: High Court, Court of Appeal, Privy Council

FFOS relied on the grounds such as:

1. Precautionary Principle
2. Sustainable development
3. Public Participation
4. Substantial compliance with the TOR and the CEC Rules
5. Deficiencies in the EIA -Failure to consider cumulative impacts
6. Environmental Justice

7. Ecological Justice

Outcome:

High Court – FFOS successfully filed for an interim injunction until judgment at the High Court, thereby restraining the interested parties from continuing work on the highway. Justice Ramcharan refused FFOS leave for Judicial Review on the grounds of delay.

Court of Appeal - FFOS successfully filed for an interim injunction until judgment at the Court of Appeal. The Panel which comprised of Justice Smith, Justice Jones and Justice des Vignes refused FFOS leave for Judicial Review on the grounds of delay. FFOS had raised the issue that the Draft Terms of Reference which is the blue print for an EIA was not consulted with the non-governmental stakeholders in accordance with Rule 5 (2) and Rule 5(3).

Justice Jones applied a literal interpretation and concluded that

- I. It is for the applicant to establish whether or not a consultation was necessary and if it was, with whom it should consult.
- II. If an applicant wishes to modify the draft TOR, it must engage in appropriate consultation, and report back to the EMA providing a reasoned justification for the modifications, and a report of the consultations made.
- III. The EMA only becomes concerned with consultations made by the applicant if the applicant requests a modification of the draft TOR.
- IV. Since the consultations are only relevant to the written representations for modifications, the applicant is not required in every case to engage in consultation.
- V. There is no obligation placed on the EMA by Rule 5 to conduct consultations.
- VI. Since in this case the MOWT did not seek a modification of the draft TOR, whatever consultations it deemed appropriate or not were irrelevant to the process of finalizing the TOR.

However, Justice Jones found merit in the issue as the draft TOR submitted by the EMA made provision for stakeholder consultations but this was outweighed by the delay on FFOS's part.

As the Law now stands, there is no mandatory consultation with the draft TOR and it is based on the discretion of the applicant of the CEC to consult.

The EMA, since inception, would mandate Applicants for a CEC to consult on the Draft TOR. From early 2001 the EMA would inform the Applicant that “**Rule 5(2) makes provision for the applicant to conduct consultations with relevant agencies, non-governmental organizations or other members of the public on the draft TOR. You**

are therefore required to conduct such consultations and submit a report to the EMA”. Presently the EMA informs the Applicant that “According to Rules 5(2) and (3) of the CEC Rules, in the event that you wish to request that the draft TOR be modified the applicant shall, where appropriate, conduct consultations with relevant agencies, non-governmental organizations and other members of the public on the draft TOR”.

Privy Council

The Privy Council dismissed the appeal on the grounds of delay and lifted the interim-injunction.