QORTI TAL-APPELL

(KOMPETENZA INFERJURI)

(TRIBUNAL TA' REVIZJONI TAL-AMBJENT U L-IPPJANAR)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum it-Tnejn, 11 ta' Lulju, 2016

Numru 1

Appell Nru. 11/2003

George Fenech, Joseph Cutajar u Carmelo Borg
vs

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' George Fenech et tal-5 ta' Gunju 2003 mid-decizjoni tal-Bord tal-Appell dwar l-Ippjanar tat-23 ta' Mejju 2003 li cahad l-appell tal-appellanti mill-iskedar ta' Wied il-Ghomor u Wied il-Kbir limiti ta' San Giljan u Swieqi skond Government Notice 409/1999;

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tal-Bord konfermata;

Rat l-atti u wara diversi seduti u talbiet ghal differiment minhabba vertenza ohra konnessa li kienet ghadha mhix deciza mill-Bord tal-Appell (illum it-Tribunal) u fejn din il-Qorti fis-seduta tat-22 ta' Gunju 2016 uriet li ma kinitx disposta li tiddilunga

aktar biex tiddeciedi dan l-appell, din il-vertenza giet differita ghas-sentenza wara li l-partijiet trattaw l-appell;

Rat id-decizjoni tal-Bord li tghid hekk:

Ikkunsidra:

Illi l-appellanti qed jappellaw mill-iskedar li sar fin-Notifikazzjoni tal-Gvern hawn fuq imsemmija li permezz taghha gew skedati l-propjetaijiet li jinsabu f'Wied Ghomor u Wied il-Kbir limiti ta' San Gwann, San Giljan u s-Swieqi kif jidhru fil-pjanta annessa ma' l-istess Notifikazzjoni tal-Gvern. Dawn il-propjetajiet gew skedati peress li l-propjeta' skedata hija area ta' importanza ekologika u sit ta' importanza xjentifika ta' livell 2 u livell 3, imdawra b'buffer zone ta' livell 4, skond it-termini tal-Policies RCO 10 u RCO 12 tal-Plan ta' Struttura u tikkwalifika ghal protezzjoni skond klawsoli 15.34, 15.38, 15.39 u 15.40 tal-Explanatory Memorandum ta' l-istess Pjan ta' Struttura;

Ra l-appell tal-Perit Anthony Fenech Vella A. & C.E. ghall-appellanti li jaqra kif gej:-

"Nirreferi ghad-decizjoni ta' l-Awtorita' ta' l-Ippjanar riferita lilna permezz ta' ittra ddata 15 ta' Marzu 2000 u li ikkonfermat l-iskedar din iz-zona u li biha gew milquta propjeta tal-klijenti tieghi hekk kif indikat fit-talba ta' rikonsiderazzjoni mibghuta fl-l 0 ta Lulju 1999.

Ir-ragunijet ghala inhossu li dan l-iskedar ma hux gustifikat huma dawk li jinsabu fl-ittra msemmija ta' l-10 ta' Lulju 1999 u qed nannettu kopja taghha bhala referenza u li nzommu id-dritt li nespandu fuqha waqt il-process tal-appell.

L-art kienet inkluza fl-iskemi validi qabel il-hrug tat-Temporary Provisions schemes tal-1988, tant li parti minnha lahqet inbniet u giet imhollija fiz-zoni tal- bini u, issa li forsi wasslu biex johorgu l-ewwel Local Plans. B'hekk dan l-iskedar qed johnoq a priori kuli possibilta ta' zvilupp fuq art ga committed u l-aktar haga li inkwetanti hu li, fil-fehma taghna, dan sar fuq bazi ta' informazzjoni kemmxejn mhux kompluta u forsi anke mhux korretta, u allura, sproporzjonat ghal dak li suppost qed jigi protett biha.

KONKLUZJONI
Filwaqt li napprezzaw u naqblu mal-bzonn ta' konservazzjoni tal-wirt naturali ta' dan il-pajjiz, nezigu li, f'isem il-gustizzja, din issir bl-aktar reqqa possibli meta wiehed iqies li il-htigijiet nazzjonali jinkludu ukoll bzonn li tigi provvduta art bizzejjed ghal espansjoni ta' l-izvilupp. Dan, apparti id-dritt li nigu protetti kontra superficjalita' f'decizjonijiet li jaffetwawna daqshekk direttament. Ghaldaqstant, nitolbuk tichad dan l-iskedar bhala pregudikatorju u tilqa' dan l-appell.";

Ra r-risposta tas-Sur Adrian Mallia ghall-Awtorita' li taqra kif gej:-
"Comments on Appeal
The points raised in the appeal are essentially the same as those put forward in the request for reconsideration of the scheduling. Our comments are included below.
The following are some additional remarks related to the comments included in the letter of appeal:

1. The fact that the land was once part of the schemes (before 1988) has no bearing since today it is outside the official scheme boundary and also, scheduling can still take place even if the area was within schemes;
2. The North Harbours Local Plan does not change any of these schemes but rather endorses the protection of this valley;
3. The scheduling was based on detailed scientific studies undertaken by expert consultants for the formulation of the Local Plan;
4. The scheduling is aimed at the whole valley as a geomorphologic unit and it makes no sense with regards to scheduling of a heritage item to disaggregate the property into small parts.
5. The proposal for development not only goes against the scheduling provisions but also infringes several Structure Plan policies.

Further comments on points submitted as part of Reconsideration

Reconsideration
The points for reconsideration are the following:
• The owners had paid a lot of money for the property due to its being within the Building Scheme and so if it is now scheduled, the owners will be deprived of the return expected.
• Due to the land lying on a plateau away from the valley area, development would not create an adverse effect and with good landscaping and a slightly deeper setback from the cliff face, one would be able to develop it. Due to the numerous committed sites, this site would not creating a precedent.
• The owner also complained on the fact that the major polluter and most visual negative impact i.e. the quarry was left outside the scheduling when it should have been definitely included.
• The objector claims that this is one of the few remaining areas in the San Gwann zone that "can accommodate the very much needed expansion of the urban zones" He also complained that the site notices fixed on site where limited and placed in unnoticeable locations.

Comments
The objector is not only not providing any information that would justify the descheduling of the valley but he is actually trying to deceive by his statements but is caught out by the very documents he attached to the request.

His very first comment is that his clients bought the land "when it was included within an approved building scheme". However, the notarial deed attached to the request and signed by Dr Mario Bugeja on 2 January 1996 is very clear that the clients bought "a portion of agricultural land and therefore a green area known as Ta' Wied Ghomor". The deed continues that the land is "not within the building scheme". Hence, all the claims about returns on the land, etc., are completely unfounded.

The objector then tries to provide justification why this land should be descheduled by providing design considerations of how the land could be developed, again claiming hardships since the area was "within scheme". However, apart from the above considerations which nullify these arguments, he does not provide any information that would justify the descheduling of the area.

His comment regarding the quarry could be justified, however, the quarry has not been scheduled at this stage since it is still operating and legally permitted.

His comment on the "very much needed expansion of San Gwann" is "interesting" since the emerging North Harbours Local Plan is not recommending any expansion of the San Gwann schemes. His claim that the schemes need expanding is not backed up by any statistical information and is therefore considered to be unfounded.

The comment on the site notices is also incorrect. We have affixed 19 site notices all in prominent location around the valley, mostly utilising existing walls. This apart from media exposure to this scheduling. In fact, his clients did see them and they have submitted a request for reconsideration.

Conclusion
The information provided is largely irrelevant if not completely false. No justification for the de scheduling of the valley has been provided.

Recommendation:
It is recommended that the appeal be rejected and the scheduling of Wied Ghomor confirmed.";

Ra l-policies RCO 10 u RCO 12 tal-Pjan ta' Struttura kif ukoll il-paragrafi 15.34, 15.38, 15.39 u 15.40 tal-Explanatory Memorandum;

Ikkonsidra ulterjorment:
Dan l-appell huwa minn skedar ta’ propjeta’ ta’ l-appellant. F’dan it-tip ta’ appell, il-Bord irid jiddeciedi jekk jirrevedix id-decizjoni ta’ l-Awtorita’ biex jara jekk l-iskedar sarx skond dak li jitlob l-artikolu 46 tal-Kapitlou 356 tal-Ligijiet ta’ Malta. Dan l-artikolu jirreferi b’mod partikolari ghall-kriterji li fuqhom irid isir l-iskedar u ghalhekk dan il-Bord qed jirreferi ghal dan l-artikolu. Madankollu, l-artikolu tal-ligi ma jirreferix ghall-fatti speci ta’ dan l-appell izda jaghti lista ta’ kriterji li l-Awtorita’ trid timxi maghhom meta tigi biex tiskeda propjeta’;

Fil-kaz in kwistjoni, l-Awtorita’ ghazlet certi kriterji minn dawk imsemmija fl-artikolu fuq citat tal-ligi u applikathom ghall-fatti speci ta’ dan l-appell. Dawn huma l-importanza ekologika ta’ sit u l-importanza xjentifika tas-sit. Fin-Notifikazzjoni tal-Gvern li a bazi taghha sar l-iskedar u li qed tigi mpunjata quddiem dan il-Bord l-Awtorita’ trid tirreferi ghall-policies relevanti tal-Pjan ta’ Struttura u l-Explanatory Memorandum biex tissostanzja dak l-iskedar;

Min-naha tieghu, sabiex dan il-Bord ikun jista’ jirrevedi tali skedar, il-Bord irid ikollu provi cari u konkreti quddiemu illi l-iskedar li sar mill-Awtorita’ ma kienx korrett peress li mhux il-kaz li jikkonkorru fis-sit li ghalih dak l-iskedar ikun qed jirreferi jezistu dawk il-kriterji li l-Awtorita’ qed tirreferi ghalihom. Fil-kaz odjern, il-kwezit li dan il-Bord irid jirrispondi ghalhekk tirriduci lilha nnifisha f’wiehed fis-sens jekk is-sit mertu ta’ dan l-appell huwiex wiehed ta’ importanza ekologija jew ta’ importanza xjentifika. Hija bizzejjed determinazzjoni minn dan il-Bord li s-sit in kwistjoni huwa wiehed ta’ natura ekologija biex l-iskedar jigi konfermat. Bl-istess mod, hija bizzejjed ukoll determinazzjoni minn dan il-Bord li s-sit mertu ta’ dan l-appell huwa ta’ importanza

xjentifika biex l-iskedar jigi konfermat. Mhix ghalhekk mehtieg li l-Bord jasal ghall-konkluzzjoni li biex jikkonferma l-iskedar is-sit mertu ta' dan l-appell irid ikollu kemm importanza ekologija kif ukoll importanza xjenitifika. M'hemmx dubbju wkoll li t-tieni terminu, dak xjentifiku, huwa aktar komprensiv mill-ewwel terminu, dak ekologiku;

Biex il-Bord ikun f'pozizzjoni li jaghmel dan l-ezercizzju huwa jrid jistrih fuq il-provi prodotti quddiemu. Tali tip ta' provi necessarjament iridu jkunu teknici u jridu jkunu fi forma ta' studji ekologici u xjentifici dwar dan l-appell odjern. Dawn il-provi jridu jingieb mill-partijiet u a bazi ta' dawn il-provi l-Bord ikun jista' jaghti d-decizjoni tieghu;

Fil-kaz odjern, il-Bord ezamina kemm l-appell u r-risposta tal-appell, il-GF file 307/98 kif ukoll zamm access fis-sit mertu ta' dan l-appell. L-appellant izda naqas milli jressaq provi sufficjenti quddiem dan il-Bord li jimmiltaw kontra t-tezi ta' l-Awtorita' li s-sit mertu ta' dan l-appell huwa ta' importanza ekologija jew ta' importanza xjentifika. Tali argumenti jridu jkunu bbazati fuq studji li juru, per ezempju, li mhemm l-ebda ekologija fi forma ta' popolazzjoni ta' pjanti jew ta' speci li jezistu f'dan is-sit li huma endemici jew li ghandu xi valur ghall-flora Maltija. L-istess ighodd ghal forom ohra ta' hxejjex, sigar (huma ta' liema forma huma), insetti, ghasafar, ecc. li jinsabu f'dan is-sit. Sfortuatament l-argumenti li ngiebu mill-appellant kienu aktar ta' ppjanar milli ta' natura ekologika jew xjentifika biex jipperswadu lil dan il-Bord illi s-sit mertu ta' dan l-appell la ghandu valur xjentifiku u lanqas ghandu valur ekologiku. Ghalhekk, il-Bord ftit li xejn ghandu bazi konkreta u soda li fuqha jista' jiddisturba l-apprezzament tal-fatti speci li ghamlet l-Awtorita';

Ghal dawn il-motivi, il-Bord jichad l-appell u jikkonferma l-iskedar.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Id-decizjoni tal-Bord kienet zbaljata fid-dritt billi poggiet oneru sproporzjonat fuq l-appellant biex jaghti prova dwar in-nuqqas ta' htiega ta' skedar u ma flietx jekk il-provi tal-Awtorita kienux konvincenti bizzejjed biex jiggustifkaw l-iskedar;

2. L-art kienet inkluza fl-iskema valida tal-bini qabel il-hrug tat-Temporary Provision Schemes 1988 u l-iskedar holoq diskriminazzjoni inaccettabbli bejn dak li lahaq inbena u dak li ma lahaqx. L-art giet resa inutilizabbli minghajr kumpens.

L-ewwel aggravju

Dan l-aggravju, kuntrarjament ghal dak sottomess mill-Awtorita hu punt ta' ligi peress li jirrigwarda kwistjoni procedurali dwar l-element tal-prova rikjesta. Pero bhala fatt l-appellanti ma ghandhomx ragun fl-argument imressaq. Il-Bord beda biex ikkonsidra taht liema cirkostanzi seta' jsir skedar cioe kriterji applikabbli taht l-artikolu 46 tal-

Kap. 356. Hu qies illi l-Awtorita sottomettiet illi l-art kellha tigi skedata ghax hi ta' importanza ekologika u xjentifika. Hu jzied illi l-kompitu tal-Bord kien li jiddetermina jekk fil-fatt is-sit hux ta' importanza hekk kif sottomess mill-Awtorita. Hu zied li tali determinazzjoni setghet issir mill-atti u provi li ngiebu. Wara li ezamina tali provi hu wasal ghal konkluzjoni illi l-provi prodotti mill-Awtorita ma gewx imxejna minn provi kontradittorji tal-appellanti. Anzi zied illi l-argumenti tal-appellanti kienu iktar ta' natura ta' ippjanar milli argumenti kontra l-valur ekologiku u xjentifiku kif sottomess mill-Awtorita.

Hi l-fehma tal-Qorti li ma ghandhiex tiddisturba la apprezzament ta' provi fattwali tal-Bord u wisq anqas apprezzamenti teknici li huma prerogattiva tal-istess Bord sakemm ma jirrizultax xi zball manifest jew ingustizzja lampanti fil-konkluzjoni milhuqa. Ma jistax jinghad li sehhet ebda eventwalita simili f'dan il-kaz. L-argument tal-appellanti illi l-Bord tefa' l-oneru tal-prova negattiva fuqhom mhix sorretta minn qari tad-decizjoni. Kull ma ghamel il-Bord hu li enuncja principju logiku u naturali fil-piz tal-prova ta' kull parti cioe li l-Awtorita trid iggib prova li tissostanzja t-tezi taghha. Migjuba tali prova sta mbaghad ghal parti li qed tikkontesta li ggib prova kuntrarja. Il-Bord kien konvint mill-prova tal-Awtorita u ma sabx prova kuntrarja li timmerita kontra fis-sens li jonqsu l-elementi tal-iskedar.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju wkoll ma jimmeritax konsiderazzjoni favorevoli. Il-Bord esprima ruhu fuq il-valur ta' skedar. Il-fatt illi art kienet inkluza fi skema valida qabel il-hrug tat-Temporary Provision Schemes 1988, u f'xi zmien giet skartata ma hix kontra l-ligi, anzi l-ligi stess taghti d-dritt lil Awtorita, fejn jirrikorru l-elementi necessarji skond il-ligi, li tiskeda art u dan fl-interess nazzjonali. Kwindi dan l-argument wahdu hu fallaci. Hu fallaci wkoll l-argument fl-ambitu ta' appell mill-Bord tal-Appell dwar l-Ippjanar konsiderazzjonijet dwar telf ta' qliegh fl-izvilupp minhabba l-iskedar. Dan semmai jista jaghti lok, jekk jirrizultaw cirkostanzi idoneji ghall-azzjoni civili izda mhux parti mill-kompitu jew kompetenza tal-Bord jew din il-Qorti li tiddeciedi dwarhom. In kwantu

ghal kwistjoni tad-diskriminazzjoni allegata, dan l-ilment lanqas tqajjem bhala aggravju quddiem il-Bord u strettament din il-Qorti tista' anqas biss tikkonsidrah peress li l-Qorti ghandha jedd tisma appelli fuq aggravji mqajma quddiem il-Bord. Madankollu l-Qorti zzid illi lanqas jista' jkun hemm diskriminazzjoni bil-mod kif allegat mill-appellanti peress li l-iskedar affettwa dik l-art kollha kolpita u pogga lil kull minn ghandu jedd fuq l-istess art fl-istess keffa. L-Awtorita ghandha dritt tiskeda art jekk taqa' fil-parametri li trid il-ligi u jekk lahaq nghata permess ta' zvilupp qabel l-iskedar, dan bl-ebda mod ma jista jitqies diskriminatorju fil-mument li nghata l-permess ghax iz-zona kienet regolata b'policies ad hoc li fiz-zmien tal-permess kienu jaccettaw zvilupp. Il-Qorti mhix teskludi li l-appellant hu prekluz milli jezercita drittijiet ohra fil-forum opportun pero ghall-iskop ta' dan l-appell u kif impostat fil-parametri tal-ligi tal-ippjanar l-aggravju ma jistax jinghata mertu.

Ghalhekk l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tal-appellanti George Fenech u ohrajn u tikkonferma d-decizjoni tal-Bord tal-Appell dwar l-Ippjanar tat-23 ta' Mejju 2003, bl-ispejjez kontra l-appellanti.

Onor. Mark Chetcuti LL.D.
Imhallef

Anne Xuereb
Deputat Registratur