PRIM'AWLA QORTI CIVILI
ONOR IMHALLEF ANNA FELICE
(SEDE KOSTITUZZJONALI)

Illum 20 ta' Gunju, 2017

Rikors Guramentat Nru: 32/2008/1 AF

Medcast Foundry Limited (C-1768)

vs

Avukat Generali u ghal kull interess li jista' jkollha Malta Industrial Parks Limited

Il-Qorti:

Rat ir-rikors tas-soċjetà attriċi li permezz tiegħu wara li ġie premess illi:

B'sentenza tal-Qorti tal-Appell tat-30 ta' Novembru, 2007, gie deciz appell kontra l-kumpanija rikorrenti, li ordnat l-izgumbrament tar-rikorrenti mill-fabbrika li ghandha u fejn topera.

Sussegwentement, is-socjeta' rikorrenti pprezentat rikors ghar-ritrattazzjoni, u kif inhu risaput, ir-ritrattazzjoni marret quddiem il-Qorti tal-Appell imma b'kompozizzjoni differenti.

Mal-istess talba ghar-ritrattazzjoni giet prezentata l-kawza apposita ghas-sospensjoni tal-esekuzzjoni tas-sentenza sakemm ikun hemm decizjoni fuq it-talba ghar-ritrattazzjoni.

Din it-talba giet michuda b'sentenza moghtija fis-16 ta' April, 2008, u dan mill-Qorti tal-Appell komposta bl-istess mod kif kienet komposta meta nghatat is-sentenza li ordnat l-izgumbrament fit-30 ta' Novembru, 2007. kif jidher mill-anness estratti tas-sentenza kif jidhru fuq il-website tal-Qrati, il-kompozizzjoni tal-gudikanti hija l-istess (Dok. A u Dok. B).

Din il-kwestjoni diga' qamet quddiem il-Qorti Ewropea ghad-drittijiet tal-bniedem, fil-kawza "San Leonard Band Club vs Malta".

.....Omissis.....

Bl-istess mod, l-istess argumenti japplikaw ghall-kwestjoni tal-esekuzzjoni tas-sentenza jew is-sospensjoni tal-esekuzzjoni.

Hemm principju kardinali li jghid li "accessorium sequitur principale". Jekk mhux legali skond il-Konvenzjoni Ewropea li l-istess gudikanti jisimghu ritrattazzjoni, multo magis ma jistghux ikunu huma li jiddeciedu li s-sentenza taghhom tidhol fl-effett, u r-ritrattazzjoni ma tkun tiswa xejn, anke jekk tkun favorevoli ghall-appellanti.

Ghal dawn ir-ragunijiet, fil-kaz prezenti hemm vjolazzjoni tal-Artiklu 6(1) tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem u dan billi l-esponenti ma kellhomx it-talba taghhom ghas-sospensjoni tal-esekuzzjoni deciza minn Qorti imparzjali. U dan ghall-istess ragunijiet esposti fis-sentenza tal-Qorti Ewropea.

Ghaldaqstant, l-esponenti jitolbu bir-rispetti li din l-Onorabbli Qorti, stante l-urgenza, (1) taghti provvediment temporanju billi tissospendi l-esekuzzjoni tas-sentenza deciza mill-Qorti tal-Appell fit-30 ta' Novembru 2007, fl-ismijiet Malta Development Corporation et v Medcast Foundry Limited (2) tiddikjara li d-decizjoni tas-16 ta' April 2008, tivvjola l-Artiklu 6(1) tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem peress li l-

istess kwestjoni ma gietx deciza minn Qorti imparzjali (3) taghti kull provvediment iehor, inkluz li tiddikjara dawk il-partijiet tal-ligi tal-Kap. 12 li ghandhom x'jaqsmu mas-sospenzjoni tal-effetti ta' sentenza li fuqha jkun hemm ritrattazzjoni (4) taghti kumpens adegwat lill-esponenti.

Rat ir-risposta tal-intimat Avukat Ġenerali li permezz tagħha eċċepixxa illi:

Fl-ewwel lok stante z-zmien qasir ghad-dispozizzjoni tieghu sabiex jintavola r-risposta ghal dan ir-rikors, l-esponenti qieghed umilment jirriserva d-dritt li jwiegeb b'mod aktar ezawdjenti aktar `il quddiem jekk jidhirlu li jkun il-kaz.

Rigward ir-rikors promotur, l-esponent jirrileva li meta wiehed iqis il-fatti tal-kaz ghandu jikkonkludi li ma jissussisti ebda ksur tal-artiklu 6 tal-Konvenzjoni Ewropea.

Is-sentenza ikkwotata mir-rikorrent kienet tikkoncerna fatti mhux identici ghal dawk odjerni u allura ma tistax tintuza bhala mudell. Is-sentenza li nghatat mill-Qorti Ewropea f'**San Leonard Band Club vs Malta** tikkoncerna ritrattazzjoni minn sentenza tal-Qorti tal-Appell fejn l-Imhallfin sedenti baqghu l-istess li kienu taw is-sentenza ritrattata.

Fil-kaz prezenti, ir-ritrattazzjoni li qed issir qed tkun presjeduta minn Imhallfin differenti minn dawk li ddecidew is-sentenza fl-Appell. Hija biss id-decizjoni dwar it-talba ghas-sospensjoni tal-ezekuzzjoni tas-sentenza tal-Appell li giet moghtija mill-istess Imhallfin sedenti fil-Qorti tal-Appell. Tali decizjoni ma kinitx tolqot b'ebda mod il-mertu tal-kawza ritrattata, kuntrarjament ghal dak li gara fil-kaz ta' **San Leonard Band Club**. Ghalhekk ma tqum ebda kwistjoni ta' imparzjalità.

Ghaldaqstant, l-esponent jissottometti bir-rispett li din l-Onorabbli Qorti ghandha tirrespingi r-rikors odjern bl-ispejjez kontra r-rikorrent.

Rat ir-risposta tas-soċjetà intimata Malta Industrial Parks Limited li permezz tagħha eċċepiet illi:

In linea preliminari, is-socjetà rikorrenti naqset li titlob l-astensjoni tal-gudikanti li kienu qed jiffurmaw il-Qorti ta' l-Appell fil-mori tal-proceduri li minnhom qieghda tilmenta permezz tar-rikors kostituzzjonali fl-ismijiet fuq premessi u ghalhekk akkwixxiet ghall-kompozizzjoni ta' dik l-istess Qorti.

Subordinatament u minghajr pregudizzju ghall-premess illi l-procedura ghas-sospensjoni ta' l-ezekuzzjoni ta' sentenza *ai termini* tal-Art. 823 tal-Kap. 12 hi procedura straordinarja u l-istess dispozizzjoni tal-ligi turi ampjament car li s-sospensjoni tal-ezekuzzjoni ta' sentenza pendenti l-ezitu ta' proceduri ta' ritrattazzjoni hi l-eccezzjoni altru milli r-regola.

Fi kwalunkwe kaz, fl-eventwalità li t-talbiet tas-socjetà rikorrenti fil-kawza ta' ritrattazzjoni jigu milqugha, l-istess socjetà ghandha rimedju ordinarju billi tipprocedi ghar-risarciment tad-danni li tkun sofriet.

Rat is-sentenza tagħha tas-27 ta' Jannar 2011 li permezz tagħha laqgħet l-ewwel eċċezzjoni tas-soċjetà intimata Malta Industrial Parks Limited u a tenur tal-artikolu 46(2) tal-Kostituzzjoni u l-artikolu 4(2) tal-Kapitolu 318 tal-Liġijiet ta' Malta ddeklinat milli teżerċita s-setgħat tagħha peress illi s-soċjetà attriċi kellha rimedju xieraq taħt liġi ordinarja għall-ksur ta' jeddijiet minnha allegat.

Rat is-sentenza tal-Qorti Kostituzzjonali tat-3 ta' Frar 2012 li permezz tagħha rrevokat is-sentenza tas-27 ta' Jannar 2011 u ordnat li l-atti tal-kawża jintbagħtu lura lil din il-Qorti għall-kontinwazzjoni tal-każ fil-mertu.

Rat illi fl-udjenza tas-27 ta' Ġunju 2013 din il-Qorti laqgħet it-talba tas-soċjeta attriċi u ordnat l-allegazzjoni tal-atti tal-proċeduri bin-numru 284/2000 u 52/2008 fl-isem Malta Development Corporation vs Medcast Foundry, deċiżi mill-Qorti tal-Appell fit-30 ta' Novembru 2007 u 16 ta' April 2008 rispettivament.

Semgħet ix-xhieda kollha prodotti.

Rat in-noti ta' sottomissjonijiet tal-intimati.

Semgħet it-trattazzjoni finali tal-abbli difensur tas-soċjetà attriċi.

Rat li l-kawża tħalliet għas-sentenza.

Rat l-atti kollha tal-kawża.

Ikkunsidrat illi permezz ta' din l-azzjoni, is-soċjetà attriċi qiegħda titlob lill-Qorti ssib illi ġie leż id-dritt fundamentali tagħha għal smigħ xieraq kif sanċit permezz tal-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea dwar il-protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali. Dan għaliex l-attriċi tikkontendi li d-deċiżjoni tal-Qorti tal-Appell tas-16 ta' April 2008 li permezz tagħha ċaħdet it-talba għas-sospensjoni tal-eżekuzzjoni tas-sentenza tagħha stess tat-30 ta' Novembru 2007, a tenur tal-artikolu 823 tal-Kap. 12 tal-Liġijiet ta' Malta, ma ngħatatx minn Qorti imparzjali in kwantu li l-Qorti tal-Appell kienet komposta mill-istess imħallfin li ddeċidew is-sentenza li tagħha kienet qiegħda tintalab ir-ritrattazzjoni.

Mill-provi prodotti jirriżulta li l-fatti tal-każ huma dawn. Permezz ta' sentenza datata 30 ta' Novembru 2007 fl-ismijiet Malta Development Corporation u b'digriet tas-6 ta' Novembru 2007 Malta Industrial Parks assumiet l-atti minflok l-Malta Development Corporation vs Medcast Foundry, il-Qorti tal-Appell komposta mill-imħallfin Vincent Degeatano (President), Alberto Magri u Tonio Mallia kkonfermat is-sentenza tal-ewwel Qorti u ordnat l-iżgumbrament tas-soċjetà Medcast Foundry mill-art fil-Qasam Industrijali ta' Ħal-Far. A tenur tal-artikolu 811(e) tal-Kap. 12 tal-Liġijiet ta' Malta, u ċioè fuq allegazzjoni li s-sentenza tat-30 ta' Novembru 2007 kienet riżultat ta' applikazzjoni ħażina tal-liġi, fis-27 ta' Frar 2008, is-soċjetà Medcast Foundry Limited ressqet rikors għal ritrattazzjoni tal-imsemmija sentenza tal-Qorti tal-Appell. Fl-istess jum Medcast Foundry Limited għamlet rikors għas-sospensjoni tas-sentenza tat-30 ta' Novembru 2007 pendenti l-eżitu tar-ritrattazzjoni. Permezz ta' deċiżjoni datata 16 ta' April 2008, il-Qorti tal-Appell komposta mill-imħallfin Vincent Degeatano (President), Alberto Magri u Tonio Mallia ċaħdet it-talba ta' Medcast Foundry għas-sospensjoni tas-sentenza tat-30 ta' Novembru 2007

pendenti l-eżitu tar-ritrattazzjoni għaliex hija ma kinitx sodisfatta li tikkonkorri ċ-ċirkostanza ravviżata fil-paragrafu (b) tas-subartikolu (2) tal-artikolu 823 tal-Kap. 12 u ċioè li jiġi muri għas-sodisfazzjon tal-Qorti li l-eżekuzzjoni tas-sentenza aktarx tikkaġuna preġudizzju akbar lil dik il-parti milli t-twaqqif tal-esekuzzjoni tkun tikkaġuna lill-parti kuntrarja. Permezz ta' sentenza datata 14 ta' Ottubru 2008, il-Qorti tal-Appell komposta mill-imħallfin Giannino Caruana Demajo (Aġent President), Noel Cuschieri u Abigail Lofaro ċaħdet it-talba għal ritrattazzjoni.

Permezz tal-ewwel talba tagħha, is-soċjetà attriċi talbet lill-Qorti għall-provvediment temporanju billi tissospendi l-esekuzzjoni tas-sentenza deċiża mill-Qorti tal-Appell fit-30 ta' Novembru 2007. Permezz ta' digriet datat 27 ta' Ġunju 2008 din il-Qorti ordnat lill-Malta Industrial Parks Limited sabiex ma tesegwix l-iżgumbrament sakemm tiġi deċiża din il-vertenza. Madanakollu permezz ta' digriet datat 3 ta' Novembru 2008 din il-Qorti rrevokat '*contrario imperio*' id-digriet tagħha tas-27 ta' Ġunju 2008 peress illi t-talba għal ritrattazzjoni kienet ġiet miċħuda. Għalhekk jirriżulta li din it-talba hija issa sorvolata.

Fil-mertu, kif intqal, is-soċjetà attriċi qiegħda tilmenta minn ksur tad-dritt fundamentali tagħha għal smigħ xieraq minn Qorti imparzjali a tenur tal-Kostituzzjoni u l-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem. L-artikolu 39(2) tal-Kostituzzjoni jiddisponi hekk:

> "*Kull qorti jew awtorità oħra ġudikanti mwaqqfa b'liġi għad-deċiżjoni dwar l-eżistenza jew l-estensjoni ta' drittijiet jew obbligi ċivili għandha tkun indipendenti u imparzjali; u meta l-proċeduri għal deċiżjoni bħal dik huma mibdija minn xi persuna quddiem qorti jew awtorità oħra ġudikanti bħal dik, il-każ għandu jiġi mogħti smigħ xieraq għeluq żmien raġonevoli.*"

L-ewwel sub inċiż tal-artikolu 6 tal-Konvenzjoni Ewropea jaqra hekk:

> "*Fid-determinazzjoni tad-drittijiet ċivili u tal-obbligi tiegħu jew ta' xi akkuża kriminali kontra tiegħu, kullħadd huwa*

ntitolat għal smigħ imparzjali u pubbliku fi żmien raġonevoli minn tribunal indipendenti u imparzjali mwaqqaf b'liġi. Is-sentenza għandha tingħata pubblikament iżda l-istampa u l-pubbliku jistgħu jiġu esklużi mill-proċeduri kollha jew minn parti minnhom fl-interess tal-morali, tal-ordni pubbliku jew tas-sigurta nazzjonali f'soċjeta demokratika, meta l-interessi tal-minuri jew protezzjoni tal-ħajja privata tal-partijiet hekk teħtieġ, jew safejn ikun rigorożament meħtieġ fil-fehma tal-qorti f'ċirkostanzi speċjali meta l-pubbliċita tista' tippreġudika l-interessi tal-ġustizzja."

Fis-sottomissjonijiet tiegħu l-Avukat Ġenerali jikkontendi li dak li qed tilmenta minnu s-soċjetà attriċi hija proċedura anċillari u ta' natura interlokutorja li ma taqax fl-ambitu tal-artikolu 6 tal-Konvenzjoni Ewropea.

Id-deċiżjoni tas-16 ta' April 2008 kienet ibbażata fuq talba magħmula a tenur tal-artikolu 823 tal-Kap. 12 li jaqra hekk:

"(1) It-talba għar-ritrattazzjoni ma twaqqafx l-esekuzzjoni tas-sentenza attakkata.

(2) B'dak kollu li hemm fid-disposizzjonijiet tas-subartikolu (1), il-qorti li quddiemha tintalab ritrattazzjoni tista', ad istanza, b'rikors kemm quddiem il-Qorti tal-Appell kemm quddiem il-qorti tal-ewwel grad, tal-parti li tagħmel dik it-talba, tordna t-twaqqif ta' esekuzzjoni tas-sentenza jekk –

(a) flimkien mat-talba tagħha dik il-parti tagħti garanzija tajba għall-esekuzzjoni tas-sentenza, jekk ma tiġix imħassra, magħduda dik il-garanzija kif imsemmija fl-artikolu 266(10); u

(b) jiġi muri għas-sodisfazzjon tal-qorti illi l-esekuzzjoni tas-sentenza aktarx tikkaġuna preġudizzju akbar lil dik il-parti milli t-twaqqif tal-esekuzzjoni tkun tikkaġuna lill-parti kuntrarja."

Minkejja li huwa minnu li fil-passat il-ġurisprudenza tal-Qorti Ewropea kienet fis-sens illi l-artikolu 6 ma jsibx applikazzjoni fejn id-deċiżjoni tal-Qorti tkun waħda dwar l-għoti ta' provvediment proviżorju bħal ma hija talba għas-sospensjoni tal-esekuzzjoni tas-sentenza a tenur tal-artikolu 823(2) tal-Kap 12, fil-każ ta' Micallef v Malta tal-15 ta' Ottubru 2009, il-Qorti Ewropea spjegat illi wasal iż-żmien illi din il-ġurisprudenza tiġi aġġornata:

> "*As previously noted, Article 6 in its civil "limb" applies only to proceedings determining civil rights or obligations. Not all interim measures determine such rights and obligations and the applicability of Article 6 will depend on whether certain conditions are fulfilled.*
>
> *Firstly, the right at stake in both the main and the injunction proceedings should be "civil" within the autonomous meaning of that notion under Article 6 of the Convention (see, inter alia, Stran Greek Refineries and Stratis Andreadis v. Greece, 9 December 1994, § 39, Series A no. 301- B; König v. Germany, 28 June 1978, §§ 89-90, Series A no. 27; Ferrazzini v. Italy [GC], no. 44759/98, §§ 24-31, ECHR 2001-VII; and Roche v. the United Kingdom [GC], no. 32555/96, § 119, ECHR 2005- X).*
>
> *Secondly, the nature of the interim measure, its object and purpose as well as its effects on the right in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable*."

Fil-każ ta' Central Mediterranean Development Corporation Limited v Malta tat-22 ta' Novembru 2011, is-soċjetà rikorrenti wkoll kienet qiegħda tilmenta li l-Qorti tal-Appell ma kienitx imparzjali fid-deċiżjoni tagħha in kwantu li meta ċaħdet l-appell tagħha minn digriet a tenur tal-artikolu 229 tal-Kap.12, il-Qorti kienet komposta mill-istess imħallfin li semgħu u ddeċidew it-talba għal provvediment proviżorju li minnha kien qiegħed jintalab l-appell. Il-Qorti Ewropea qalet hekk:

"The Government argued that Article 6 was not applicable to the stay of execution proceedings since the proceedings did not relate to a determination of any civil rights or obligations. In the present case, any civil rights or obligations had been finally determined by the judgment of the Court of Appeal of 25 February 2005 which had given the plaintiffs an executive title against the applicant company, then defendant. Therefore, the only subject matter of the impugned proceedings was simply whether or not to stay the execution of the said judgment. The decision on the matter depended on whether a sufficient guarantee had been given for the execution of the judgment and whether its execution would have caused greater prejudice to the requesting party than the stay would have had on the other party. Thus, at no point did the court decide on any civil right or obligation, either definitely or provisionally.

The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("contestation" in the French text) over a "civil right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is also protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, inter alia, Mennitto v. Italy [GC], no. 33804/96, § 23, ECHR 2000 X, and Gülmez v. Turkey, no. 16330/02, § 28, 20 May 2008).

Moreover, the execution of a judgment given by a court must be regarded as an integral part of the "trial" for the purposes of Article 6 (see Hornsby v. Greece, 19 March 1997, § 40, Reports of Judgments and Decisions 1997-II).

The Court notes that the impugned proceedings concerned the applicant company's request for the reconsideration and revocation of the decision on the stay of execution of

the judgment (ordering the applicant company to perform works), pending the outcome of its application for retrial, and its request for withdrawal of the relevant judges.

It notes that Article 6 cannot be made to apply on the basis of the request for withdrawal of the said judges which is entirely procedural in nature and not determinative of civil rights and obligations. However, the Court considers that the applicant company's other demand, namely its request for a stay of execution of the judgment of the Court of Appeal of 25 February 2005, constitutes a corollary of the execution phase of that judgment which is an integral part of the proceedings determining civil rights and obligations and therefore engages the protection of Article 6. That Article is therefore applicable to the stay of execution proceedings."

Isegwi għalhekk illi l-proċeduri li minnhom qiegħda tilmenta s-soċjeta attriċi jaqgħu fl-ambitu tal-artikolu 6 tal-Konvenzjoni minkejja li kienu jirrigwardaw deċiżjoni dwar provvediment proviżjorju.

Dwar xi tfisser 'Qorti imparzjali' għall-finijiet tal-artikolu 6 tal-Konvenzjoni Ewropea, fil-ktieb tagħhom Law of the European Convention on Human Rights (Tieni Edizzjoni), l-awturi Harris, O'Boyle & Warbrick jispjegaw illi:

"'*Impartiality' means lack of prejudice or bias. To satisfy the requirement, the tribunal must comply with both a subjective and objective test:*

The existence of impartiality for the purpose of article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."[1]

[1] Paġna 290

Fil-każ ta' Kyprianou v Cyprus tal-15 ta' Diċembru 2005, il-Qorti Ewropea rriteniet illi:

> "*The Court reiterates at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused (see Padovani v. Italy, judgment of 26 February 1993, Series A no. 257-B, p. 20, § 27). To that end Article 6 requires a tribunal falling within its scope to be impartial. Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach, that is endeavouring to ascertain the personal conviction or interest of a given judge in a particular case, and an objective approach, that is determining whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect (see Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30, and Grieves v. the United Kingdom [GC], no. 57067/00, § 69, 16 December 2003). As to the second test, when applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to its impartiality. In this respect even appearances may be of some importance (see Castillo Algar v. Spain, judgment of 28 October 1998, Reports 1998-VIII, p. 3116, § 45, and Morel v. France, no. 34130/96, § 42, ECHR 2000-VI). When it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (see Ferrantelli and Santangelo v. Italy, judgment of 7 August 1996, Reports 1996-III, pp. 951-52, § 58, and Wettstein v. Switzerland, no. 33958/96, § 44, ECHR 2000-XII).*
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> *...*

An analysis of the Court's case-law discloses two possible situations in which the question of a lack of judicial impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where, for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings (see court martial cases, for example, Grieves, cited above, and Miller and Others v. the United Kingdom, nos. 45825/99, 45826/99 and 45827/99, 26 October 2004), objectively justify misgivings as to the impartiality of the tribunal, which thus fails to meet the Convention standard under the objective test (see paragraph 118 above). The second is of a personal character and derives from the conduct of the judges in a given case. In terms of the objective test, such conduct may be sufficient to ground legitimate and objectively justified apprehensions as in Buscemi, cited above, but it may also be of such a nature as to raise an issue under the subjective test (see, for example, Lavents, cited above) and even disclose personal bias. In this context, therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct."

Fil-każ ta' Warsicka v Poland tas-16 ta' Jannar 2007 intqal hekk:

"*As regards the objective test, the Court is of the view that the requirements of a fair hearing as guaranteed by Article 6 § 1 of the Convention do not automatically prevent the same judge from successively performing different functions within the framework of the same civil case. In particular, it is not prima facie incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (Eur. Comm. HR, R.M.B. v. the United Kingdom, No. 37120/97, dec. 9 September 1998). The assessment of whether the*

participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge."

Fis-sentenza ċitata Central Mediterranean Development Corporation Limited v Malta il-Qorti Ewropea kompliet billi qalet hekk:

"*In the instant case, the concerns regarding the Court of Appeal's impartiality stemmed from the fact that its bench on 14 December 2005 was composed of the same three judges who had previously decided the applicant company's request for a stay of execution "at first-instance".*

As regards the subjective test, it has not been shown or argued that the Court of Appeal held or manifested any personal convictions such as to cast doubt on its subjective impartiality.

As regards the objective test, the Court reiterates that it is not prima facie incompatible with the requirements of this provision if the same judge is involved, first, in a decision on the merits of a case and, subsequently, in proceedings in which the admissibility of an appeal against that decision is examined (see Warsicka v. Poland, no. 2065/03, § 40, 16 January 2007 and Eur. Comm. HR, R.M.B. v. the United Kingdom, No. 37120/97, dec. 9 September 1998). The assessment of whether the participation of the same judge in different stages of a civil case complies with the requirement of impartiality laid down by Article 6 § 1 is to be made on a case-to-case basis, regard being had to the circumstances of the individual case and, importantly, to

the characteristics of the relevant rules of civil procedure applied to the case. In particular, it is necessary to consider whether the link between substantive issues determined in a decision on the merits and the admissibility of an appeal against that decision is so close as to cast doubt on the impartiality of the judge (see Warsicka, cited above, § 40).

It is true that in the present case the applicant company did not have the possibility of a further recourse in the terms of the Warsicka case. Unlike in Warsicka, where the applicant had recourse to the Supreme Court having a full remit to decide on the applicant's claims, in the instant case, the proceedings the applicant company brought before the constitutional jurisdictions could only deal with the impartiality issue and not with the admissibility or merits of the applicant company's request. Nevertheless, the absence of such a review cannot alone be determinative. The Constitutional Court found that the applicant company's impartiality complaint was unfounded. Having regard to the nature of the issues involved, namely that the Court of Appeal concluded that Article 229 invoked by the applicant company did not apply in those circumstances, as no appeal lay against the final judgment delivered by the Court of Appeal on 3 November 2005, it considered that the fact that the same formation gave a judgment on the merits of a case and subsequently decided that the applicant's request in the form of an appeal application was null and void, could not be in violation of Article 6 (see paragraph 13 above).

As in Indra v. Slovakia, (no. 46845/99, §§ 51-54, 1 February 2005) the Court considers it appropriate to examine whether there was a close link between the issues examined by the Court of Appeal on the two occasions at issue. In the present case, the question determined by the Court of Appeal on 14 December 2005 was not the same as the question which the Court of Appeal had determined on 3 November 2005. In the November hearing the court was examining the substance of the applicant company's request for a stay of execution. In the December decision,

the court had to determine whether the applicant company's request for reconsideration under Article 229 (4) of the COCP was compatible with domestic law and procedure, and could be allowed. Only if that had been the case could the court have carried out an examination of the merits, a phase which never materialised in the circumstances of the case. Thus, in the Court's view, the scope of the examination involved, which can be considered tantamount to an assessment of admissibility, cannot be said to be the same or intrinsically linked to the merits of the original claim.

Hence, the Court considers that, in the instant case, the Court of Appeal when deciding on the applicant company's request for reconsideration under Article 229 was not called upon to assess and determine whether, for example, sitting as a bench, it had correctly applied the relevant domestic law to the applicant's case or whether or not it had committed an error of legal interpretation or application in its previous decision (see San Leonard Band Club, cited above). There was no such link between the substantive issues determined on 3 November 2005 regarding the merits of a request for a stay of execution and the decision of 14 December 2005 on whether the applicant company had a legal avenue of access to an appeal or reconsideration of the previous decision, which would cast doubt on the impartiality of that court."

Applikati dawn il-prinċipji għall-kawża tal-lum, ma jirriżultax illi hemm xi ħaġa fid-deċiżjoni tas-16 ta' April 2008 li twassal lil din il-Qorti sabiex tqis illi l-Qorti tal-Appell kienet, soġġettivament jew oġġettivament parzjali fl-imġieba tagħha b'mod illi ġabet fix-xejn il-jedd tas-soċjetà attriċi għal smigħ xieraq.

Fir-rigward tat-test soġġettiv, is-soċjetà attriċi mhijiex qiegħda tallega li kien hemm xi imparzjalità personali da parti ta' xi wieħed mill-imħallfin sedenti u allura dan it-test huwa sodisfatt. Is-soċjetà attriċi qiegħda tistrieh biss fuq it-test oġġettiv għaliex issotni li l-apparenza ta' nuqqas ta' imparzjalità hija

biżżejjed in kwantu li l-istess imħallfin iddeċidew dwar is-sospensjoni tal-esekuzzjoni tas-sentenza tagħhom stess.

Madanakollu, id-deċiżjoni tas-16 ta' April 2008 ma kinitx tirrigwarda l-mertu tal-kawża deċiża mill-Qorti tal-Appell fit-30 ta' Novembru 2007 imma kienet tirrigwarda proċedura speċifika għas-sospensjoni ta' esekuzzjoni tas-sentenza fejn ir-rekwiżiti sabiex il-Qorti tilqa' t-talba huma ben definiti mill-liġi u jmorru lil hinn mill-mertu tal-kwistjoni. Filfatt, din il-proċedura hija regolata mill-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili. Isegwi għalhekk li meta l-istess tlett imħallfin taw id-deċiżjoni tagħhom tas-16 ta' April 2008, huma ma kinux qegħdin jissindikaw l-operat tagħhom stess, kif kristallizzat permezz tad-deċiżjoni tagħhom tat-30 ta' Novembru 2007. Il-Qorti tal-Appell kienet qiegħda tiddeċiedi kwistjoni kompletament ġdida ċioè jekk jikkonkorrux iż-żewġ elementi li jitlob l-artikolu 823(2) tal-Kap. 12.

Dan il-każ allura huwa wieħed differenti minn dak ta' **San Leonard Band Club v Malta** ċitat mis-soċjetà attriċi. F'dak il-każ l-imħallfin sedenti kienu ddeċidew it-talba għar-ritrattazzjoni ta' sentenza tagħhom stess u allura kif osservat il-Qorti Ewropea kellhom jiddeċiedu jekk huma stess applikawx il-liġi ħażina fis-sentenza preċedenti tagħhom. Fil-fatt, f'dak il-każ il-Qorti Ewropea sabet li '*the Court of Appeal was essentially called upon to ascertain whether its previous judgement of 30th December 1993 was based on a misinterpretation of the law*.'

Kif ingħad mill-Qorti Kostituzzjonali fid-deċiżjoni tat-3 ta' Frar 2012 li permezz tagħha rrevokat is-sentenza ta' din il-Qorti tas-27 ta' Jannar 2011:

> "*Dak li kien in kunsiderazzjoni fil-proċedura għas-sospensjoni tal-eżekuzzjoni tas-sentenza inkwistjoni kienu kwistjonijiet ta' fatti ġodda li kienu toto coelo differenti minn dak li kien ġie quddiemhom fil-kawża minnhom preċedentement bis-sentenza li tagħha kienet qed tintalab is-sospensjoni.*"

Fis-sottomissjonijiet tagħha s-soċjetà intimata Malta Industrial Parks Limited tagħmel referenza għas-sentenza tal-Qorti tal-Appell fl-ismijiet Maria Dolores Debono vs Alfred Galea tal-15 ta' Frar 2005 fejn ingħad hekk dwar il-proċedura għas-sospensjoni tal-esekuzzjoni ta' sentenza a tenur tal-artikolu 823(2) tal-Kap. 12:

> "*Illi dwar it-talba sabiex din il-Qorti kif komposta tastjeni milli tiehu konjizzjoni tar-rikors de quo (cioe` r-rikors ghas-sospensjoni tal-esekuzzjoni tas-sentenza) – din it-talba hija proprjament eccezzjoni ta' rikuza –* ***din il-Qorti tara li din it-talba hija infondata. Din il-Qorti, bir-rikors tal-20 ta' Jannar, 2005 maghmul ghall-fini tal-Artikolu 823(2) tal-Kap. 12, b'ebda mod ma hija qed tigi mitluba biex tirriezamina l-operat taghha fir-rigward tal-vertenza bejn il-partijiet deciza fid-29 ta' Ottubru, 2004. Il-Qorti trid tara biss jekk prima facie tirrikorrix is-sitwazzjoni ravvizata fil-paragrafu (b) tas-subartikolu (2) ta' l-Artikolu 823, u jekk il-garanzija migjuba ghall-finijiet tal-paragrafu (a) ta' l-imsemmi subartikolu hix wahda tajba tenut kont tac-cirkostanzi kollha (u cioe` meta wiehed jiehu anke in konsiderazzjoni dak li jipprovdi s-subartikoli (10) tal-Artikolu 266, li ghalih jirreferi l-paragrafu (a) imsemmi). Dak li jrid jigi deciz, ghalhekk, hija proprjament kwistjoni "gdida" bejn il-partijiet, ghalkemm naxxenti minn sentenza li ghaddiet in gudikat u li giet moghtija minn din il-Qorti kif illum komposta.*** *Wiehed jista', infatti, jigbed analogija ma' dak li jigri meta tintalab l-esekuzzjoni provvisorja ta' sentenza moghti fl-ewwel grad. Huwa l-istess gudikant li jkun ippronunzja s-sentenza fl-ewwel grad li neccessarjament jiddeciedi jekk ghandhiex tintlaqa' t-talba ghall-esekuzzjoni provvisorja ta' dik is-sentenza qabel ma tkun ghaddiet in gudikat, u dan mhux biss ghax dak li jkollu quddiemu tkun proprjament kwistjoni gdida bejn il-partijiet u mhux l-istess kwistjoni minnu deciza bis-sentenza, izda wkoll ghax dik il-kwistjoni gdida ghandha tigi deciza kemm jista' jkun malajr (Art. 266(3)), u hu evidenti li hadd aktar mill-gudikant li jkun sema' il-kawza ma jkun f'posizzjoni tajba li jaghmel dan.* ***Provvedimenti dwar l-esekuzzjoni (jew is-***

<u>sospensjoni ta' l-esekuzzjoni) ta' sentenza jistghu dejjem jinghataw mill-istess gudikant li jkun ippronunzja dik is-sentenza.</u> *Ghalhekk it-talba ghar-rikuza ta' l-imhallfin komponenti din il-Qorti ser tigi michuda*." (Sottolinejar ta' din il-Qorti).

Fl-għoti ta' kull deċiżjoni, il-Qorti tkun qiegħda tesprimi fehma. Madanakollu b'daqshekk ma jfissirx li l-Qorti tkun qiegħda tesprimi dejjem xi ġudizzju fil-mertu. Il-Qorti tal-Appell permezz tad-deċiżjoni tagħha tas-16 ta' April 2008 ma kinitx qiegħda tidħol fil-mertu tal-kwistjoni minnha ġja deċiża iżda kienet marbuta li ssegwi u tapplika kriterji stabbiliti skont il-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili. F'dan il-każ ma kinitx sodisfatta li jikkonkorru ż-żewġ rekwiżiti tal-artikolu 823(2), u dan indipendentement mill-mertu minnha preċedentement deċiż.

Isegwi għalhekk illi t-talbiet attriċi ma jistgħux jintlaqgħu għaliex id-deċiżjoni tas-16 ta' April 2008 ngħatat minn Qorti imparzjali u allura ma jirriżultax illi ġie mittiefes id-dritt tas-soċjeta attriċi għal smigħ xieraq a tenur tal-artikolu 39 tal-Kostituzzjoni u l-artikolu 6 tal-Konvenzjoni Ewropea. In kwantu li din il-Qorti qiegħda ssib illi ma seħħ l-ebda ksur, it-talba attriċi għall-ħlas ta' kumpens ukoll ser tiġi miċħuda.

Għaldaqstant, il-Qorti qiegħda taqta' u tiddeċiedi billi, tiċħad it-talbiet tas-soċjetà attriċi bl-ispejjeż kontra tagħha.

IMHALLEF

DEP/REG