QORTI TAL-APPELL

IMHALLFIN

S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF TONIO MALLIA
ONOR. IMHALLEF JOSEPH AZZOPARDI

Seduta ta' nhar il-Gimgha 13 ta' April 2018

Numru 9

Rikors numru 337/17

Aluminium Extrusions Limited (C7322)

v.

Malta Industrial Parks Limited (C28965)

Il-Qorti:

Dan huwa provvediment dwar talba ta' rikuza tal-Imhallfin li jikkomponu din il-Qorti mressqa mis-socjetà rikorrenti ghall-finijiet tar-rikors pendenti ghas-sospensjoni tal-ezekuzzjoni tas-sentenza li taghha qeghda tintalab ritrattazzjoni. Din it-talba saret waqt is-seduta tas-6 ta' Marzu, 2018, peress li jinghad li "*kienet din il-Qorti kif komposta li tat id-decizjoni li qed tintalab ir-ritrattazzjoni taghha*".

Rat li l-partijiet esebew numru ta' dokumenti in materja, kif ukoll itrattaw it-talba ghar-rikuza waqt is-seduta tat-13 ta' Marzu, 2018, meta l-kawza baqghet differita ghas-sentenza, limitatament fuq dan il-punt.

Jibda billi jinghad li r-ragunijiet li ghalihom gudikant jista' jigi rikuzat milli jkompli jisma' kawza huma limitati ghal dawk li l-ligi nnifisha tippreskrivi taht l-Artikolu 734 tal-Kodici ta' Organizzazzjoni u Procedura Civili (Kap. 12 tal-Ligijiet ta' Malta) u f'kazijiet eccezzjonali, ragunijiet ohrajn serji, li jwasslu ghall-konkluzjoni li tkun xierqa tali astensjoni jew rikuza. Ghalkemm is-socjetà rikorrenti ma ccitat ebda artikolu tal-ligi li fuqu qeghdha ssejjes it-talba taghha, jidher li dan qeghda taghmlu a bazi tal-Artikolu 734(1)(d)(ii) li jipprovdi:

> "*(1) L-Imhallef jista' jigi rrikuzat jew jista' jastjeni ruhu milli joqghod fil-kawza –*
>
> "*(d) (ii) jekk il-kawza kienet ga giet quddiemu bhala Imhallef jew bhala arbitru :*
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> "*Izda dan ma jghoddx ghal decizjoni, moghtija mill-Imhallef, meta ma tkunx qatghet definitivament il-meritu fil-kwistjoni bejn il-partijiet, u lanqas ghal sentenza li tehles ab observantia,*".

Is-sentenza li taghha qieghed jintalab is-sospensjoni tal-ezekuzzjoni hija dik li ggib referenza 77/2008, li kienet titratta kawza ta' spoll mressqa mis-socjetà rikorrenti wara l-ordni ta' zgumbrament li nharget mis-socjetà intimata Malta Industrial Parks Limited, fir-rigward tal-Fabbrika HF12, fil-Qasam Industrijali ta' Hal-Far. L-ordni ta' zgumbrament

nharget skont l-Ordinanza dwar il-Kummissarju tal-Artijiet (Kap. 169) u l-Att dwar Zgumbrament mill-Artijiet (Kap. 228). L-ewwel Qorti ddecidiet li tammetti l-kawza ta' spoll kif proposta, stante li l-ordni ta' zgumbrament ma kienitx ritenuta *prima facie* regolari peress li ma nhargitx skont il-ligi fis-sens li fil-fehma taghha l-ordni setghet tinhareg biss wara li jkun skada z-zmien specifikat fil-kuntratt, filwaqt li rriteniet li l-ordni f'dan il-kaz inharget qabel iz-zmien pattwit bejn il-partijiet li fih is-socjetà rikorrenti kellha tirregola ruhha. Inoltrè sabet ukoll li l-istess ordni ta' zgumbarment kienet milquta b'difett serju, inkwantu rriteniet li l-istess ordni kellha tkun mahruga mic-Chairman tas-socjetà konvenuta, nuqqas li fil-fehma taghha tolqot il-validità tal-istess ordni ta' zgumbrament. Wara li dik il-Qorti qieset l-ordni bhala irregolari u addiritura nulla skont il-ligi, l-istess Qorti ghaddiet biex sabet ukoll li gew sodisfatti l-elementi ta' spoll, li wassluha sabiex tichad l-eccezzjonijiet tas-socjetà konvenuta u tiddeciedi favur il-pretensjonijiet tas-socjetà attrici.

Bis-sahha tas-sentenza taghha tat-28 ta' April, 2017, din il-Qorti laqghet l-appell interpost u rrevokat is-sentenza tal-ewwel Qorti u ghaddiet sabiex cahdet it-talbiet attrici, peress li kien ritenut illi (i) ladarba l-okkupazzjoni tal-fabbrika da parti tas-socjetà attrici kienet fuq bazi ta' *encroachment*, is-socjetà Malta Industrial Parks kienet legalment intitolata tohrog l-ordni ta' zgumbrament u dan kif jipprovdi l-Artikolu 3 tal-Att dwar Zgumbrament minn Artijiet (Kap. 228 tal-Ligijiet ta' Malta);

(ii) il-ligi ma taghti ebda forma partikolari ta' kif issir ordni ta' zgumbrament, ghajr li ghandha ssir bil-miktub, kif wara kollox gara f'dak il-kaz, mentri min johrog l-ordni ta' zgumbrament hija materja ta' organizzazzjoni interna; u (iii) ladarba l-ordni ta' zgumbrament la kienet irregolari u lanqas nulla, isegwi li l-azzjoni ta' spoll ma kienitx dik idonea sabiex tigi kkontestata ordni ta' zgumbrament u dan kif jipprovdi l-istess Artikolu 3 tal-Kap. 228 tal-Ligijiet ta' Malta, li jipprovdi espressament li l-Artikolu 535 tal-Kodici Civili ma japplikax ghal ordnijiet ta' zgumbrament mahrugin taht is-subartikolu (1) tieghu.

Din il-Qorti bir-rikors tas-27 ta' Lulju, 2017, mhix qeghda tigi mitluba biex tirriezamina l-operat taghha fir-rigward tal-vertenza bejn il-partijiet deciza fit-28 ta' April, 2017. Dak li qieghed jintalab issa huwa jekk hux il-kaz li tigi ordnata s-sospensjoni tal-ezekuzzjoni tas-sentenza li taghha qeghda tintalab ir-ritrattazzjoni. Skont l-Artikolu 823(2) tal-Kap. 12 tal-Ligijiet ta' Malta, meta tintalab is-sospensjoni tal-ezekuzzjoni tas-sentenza li taghha tkun qed tintalab ir-ritrattazzjoni, il-Qorti ghandha thares lejn zewg affarijiet: (a) jekk min qieghed jaghmel it-talba jaghtix garanzija tajba ghall-ezekuzzjoni tas-sentenza jekk ma tigix imhassra u (b) jekk l-ezekuzzjoni tas-sentenza aktarx tikkaguna pregudizzju akbar lil dik il-parti li titlob is-sospensjoni milli t-twaqqif ta' ezekuzzjoni tkun tikkaguna lill-parti kuntrarja. Ma jirrizultax li xi wiehed minn dawn l-aspetti msemmija kien ga` gie quddiem xi hadd mill-Imhallfin sedenti.

Dak li ghandu jittiehed in konsiderazzjoni mill-Imhallfin fil-procedura ghas-sospensjoni tal-ezekuzzjoni tas-sentenza in kwistjoni huma fatti godda, li huma totalment differenti minn dak li kien gie trattat quddiemhom, fil-kawza deciza minnhom precedentement, bis-sentenza li taghha issa qeghda tintalab is-sospensjoni.

Dan qieghed jinghad ukoll fuq l-iskorta tas-sentenzi ta' din il-Qorti diversament preseduta li nghataw, fosthom fil-kawza fl-ismijiet **L-Avukat Dottor Richard Camilleri pro et noe v. Dr. Victor Ragonesi noe**, deciza fl-10 ta' Dicembru, 1991, fejn inghad:

> "*…din il-Qorti hija tal-fehma illi l-Imhallef jew l-Imhallfin li jkunu ppronunzjaw is-sentenza fil-kawza li taghha tkun qed tintalab ir-ritrattazzjoni – huma dawk li, mill-punti di vista guridiku u prattiku, huma fl-ahjar posizzjoni – biex jiehdu konjizzjoni u jiddeciedu talba ghas-sospensjoni tal-ezekuzzjoni tas-sentenza li jkunu ppronunzjaw huma stess, inkwantu, dak li jridu jqisu ghas-sospensjoni tal-ezekuzzjoni tas-sentenza, huma fatturi godda li ma jkunux ippronunzjaw ruhhom fuqhom – u fl-istess hin ikunu konsapevoli tal-fatti kollha li jkunu taw lok ghas-sentenza li s-sospensjoni tal-ezekuzzjoni taghha tkun qed tintalab;*
>
> "*Ghalhekk l-Imhallfin sedenti ma jsibu ebda raguni biex jilqghu l-eccezzjoni tar-rikuza taghhom*".

Hekk ukoll f'sentenza aktar recenti ta' din il-Qorti diversament komposta, fl-ismijiet **Maria Dolores sive Doris Debono v. Alfred u Doris konjugi Galea**, deciza fil-15 ta' Frar, 2005, inghad:

> "*Provvedimenti dwar l-ezekuzzjoni (jew is-sospensjoni tal-ezekuzzjoni) ta' sentenza jistghu dejjem jinghataw mill-istess gudikant li jkun ippronunzja dik is-sentenza. Ghalhekk it-talba ghar-rikuza tal-Imhallfin komponenti din il-Qorti ser tigi michuda;*".

Is-socjetà rikorrenti Aluminium Extrusions Limited esebiet zewg sentenzi li fuqhom issejjes l-argumenti taghha sabiex titlob ir-rikuza tal-Imhallfin sedenti. Wahda hija dik tal-Qorti Kostituzzjonali fl-ismijiet **Lawrence Grech et v. L-Avukat Generali et** deciza fis-7 ta' Marzu, 2017, fejn kienet qeghda tigi investita r-rikuza ta' Imhallef fil-kuntest ta' ilment dwar il-jedd ta' smigh xieraq. Fiha nghad li ghalkemm dak li thoss jew tahseb parti f'kawza dwar il-parzjalità jew imparzjalità tal-gudikant huwa rilevanti, ma huwiex il-kriterju determinanti, peress li hu determinanti hu jekk dik il-percezzjoni hix imsejsa fuq konsiderazzjonijiet oggettivi li persuna ragonevoli tasal li hija wkoll ikollha dubji dwar l-imparzjalità tal-gudikant. Kien ritenut li l-apparenzi wkoll jistghu jkunu konsiderazzjonijiet oggettivi li joholqu dubji, anke jekk ma jkunx hemm rabtitet gerarkici bejn il-gudikant u parti fil-kawza, peress li tiddghajjef il-fiducja fl-imparzjalità ta' dak il-gudikant. F'dak il-kaz ma kienitx ritenuta rragonevoli l-percezzjoni li seta' kien hemm rabta bejn l-assocjazzjoni li l-Imhallef huwa president taghha u l-Arcidjocesi, bhala parti fil-kawza. Kwindi nghad li d-dubju ma kienx wiehed li ma jitqisx oggettivament gustifikat, ukoll jekk dak id-dubju ma jolqotx l-imparzjalità soggettiva tal-Imhallef.

Hekk ukoll fis-sentenza l-ohra citata li hija dik tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, deciza fid-9 ta' Jannar, 2018, fl-ismijiet **Nicholas v. Cyprus**, fejn fuq l-ezami oggettiv inghad:

> "*60. To the extent that the applicanta' s fear of impartiality on the part of Judge A.K. stemmed from the "in-law" relationship between that judge and P.G.P., the Court notes that they have a family tie through the marriage of their children. The Court considers that this tie in itself sufficed to objectively justify the applicanta' s fears as to Judge A.K.'s impartiality. It is noted in this respect that under domestic law a judge has the possibility to withdraw from a case for personal reasons, even without having been challenged (see paragraphs 17 and 27 above).*
>
> "*61. It is worth noting that the code of judicial practice was subsequently amended to stipulate that such a relationship constituted grounds for the withdrawal of a judge from a case (see paragraph 16 above).*
>
> "*62. As regards the second ground invoked by the applicant (see paragraph 57 above), the Court finds that when a judge has blood ties with an employee of a law firm representing a party in any given proceedings, this does not in and of itself disqualify the judge (see Ramljak v. Croatia, no. 5856/13, § 29, 27 June 2017). An automatic disqualification on the basis of such ties, as was provided in the judicial code prior to the applicanta' s case, is not necessarily required (see paragraph 15 above). It is, however, a situation or affiliation that could give rise to misgivings as to the judge's impartiality. Whether such misgivings are objectively justified would very much depend on the circumstances of the specific case, and a number of factors should be taken into account in this regard. These should include, inter alia, whether the judge's relative has been involved in the case in question, the position of the judge's relative in the firm, the size of the firm, its internal organisational structure, the financial importance of the case for the law firm, and any possible financial interest or potential benefit (and the extent thereof) on the part of the relative*".

Madankollu meta din il-Qorti tapplika dawn il-kriterji ghall-kaz in ezami, ma ssibx li l-Imhallfin sedenti jista' jinghad li huma b'xi mod jistghu jitqiesu parzjali – la oggettivament u wisq anqas soggettivament. Dan l-element tal-imparzjalitá gie ezaminat diversi drabi fir-rigward ta' x'inhu u x'ghandu jkun smigh xieraq, partikolarment fil-kuntest tal-Artikolu 6 tal-Konvenzjoni Ewropea. Hekk per ezempju, l-awturi **Harris, O'Boyle & Warbrick**, fil-ktieb taghhom **Law of the European Convention on Human Rights** (Tieni Edizzjoni, p. 290) jispjegaw:

> "'*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*".

Fit-test soggettiv tal-imparzjalità tal-gudikanti, ghandu jigi determinat jekk l-Imhallfin ghandhomx xi interess personali f'kawza jew jekk esprimewx xi opinjoni jew ahjar konvinzjoni personali dwar il-kaz, li certament mhuwiex il-kaz fil-kawza in ezami. Ma tressqet ebda prova kuntrarja f'dan is-sens. Fin-nuqqas ta' prova, l-presunzjoni f'tali kaz hija li l-Imhallfin huma imparzjali u mhux bil-kontra. Dan il-principju ilu affermat kemm mill-Qrati taghna (ara per ezempju is-sentenza tal-Qorti Kostituzzjonali tal-5 ta' Ottubru, 2001, fl-ismijiet **Onorevoli Imhallef Dottor Anton Depasquale LL.D. v. l-Avukat Generali**, kif ukoll is-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-23 ta' Gunju, 1981, fl-ismijiet **Le Compte, Van Leuven and De Meyere v. Belgium**).

Fil-kaz tat-test oggettiv, apparti li wiehed irid jezamina l-agir tal-gudikanti, hemm fatturi ohra li jistghu jaghtu lok ghal dubju dwar l-imparzjalità taghhom, fejn kif inghad fil-kawza citata ta' **Grech v. Avukat Generali**, l-apparenzi wkoll jistghu jkunu importanti. Izda f'dan il-kaz mhux talli m'hemmx rabtitet gerarkici bejn il-gudikanti u xi parti fil-

kawza, talli lanqas jista' jinghad li hemm xi percezzjoni ta' rabta bejn il-gudikanti u xi parti fil-kawza. Meta giet ezaminata l-bizà tas-socjetà rikorrenti f'dan il-kaz, dwar il-possibbilitá ta' nuqqas ta' imparzjalitá tal-gudikanti, din ma tfallix lanqas it-test oggettiv, peress lanqas jista' jinghad li din il-biza' hija oggettivament gustifikata. Dan jinghad b'aktar enfasi meta giet ezaminata s-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, tas-16 ta' Jannar, 2007, citata mis-socjetà intimata, fil-kawza fl-ismijiet **Warsicka v. Poland** fejn inghad:

> "40. *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*".

Applikati dawn il-principji ghall-kaz in ezami, kif inghad qabel, dak li jrid jittiehed in konsiderazzjoni fil-procedura ghas-sospensjoni tal-ezekuzzjoni tas-sentenza li hemm issa pendenti quddiem din il-Qorti huma kwistjonijiet ta' fatti godda, li huma totalment differenti minn dak li kien gie trattat u deciz precedentement fis-sentenza li nghatat fit-28 ta'

April, 2017, li taghha issa qeghda tintalab is-sospensjoni. Kwindi ma tistax tara kif jista' jinholoq dubju dwar l-imparzjalità tal-Imhallfin sedenti ta' din il-Qorti, ladarba l-mertu taz-zewg proceduri huma distinti.

Dan il-punt gie ribadit ukoll fis-sentenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem tat-22 ta' Novembru, 2011, fil-kawza fl-ismijiet **Central Mediterranean Development Corporation Limited v. Malta**, fejn f'dak il-kaz is-socjetà rikorrenti wkoll kienet qeghdha tilmenta dwar in-nuqqas ta' imparzjalità tal-Qorti tal-Appell, li meta cahdet l-appell taghha mid-digriet ai termini tal-Artikolu 229 tal-Kap. 12, il-Qorti kienet komposta mill-istess Imhallfin li semghu u ddecidew it-talba ghall-provvediment provizorju li minnu kien qieghed jintalab appell. Inghad fir-rigward:

> "*31. 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".*
>
> "*32. 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.*
>
> "*33. 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).

"*34. 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 applicanta' 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 applicanta' 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).*

"*35. 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 Courta' 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.*

"*36. 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 applicanta' 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.*
>
> "*37. Having regard to the circumstances of the case taken as a whole, the Court is of the view that it cannot be said that the applicant company's fears as to the impartiality of the Court of Appeal when examining its request of 9 November 2005 were objectively justified*". (sottolinear ta' din il-Qorti).

Hekk ukoll f'dan il-kaz, din il-Qorti permezz tar-rikors ghas-sospensjoni tal-ezekuzzjoni tas-sentenza mhux qieghda tintalab taghmel apprezzament gdid tal-provi li wassluha ghas-sentenza taghha jew li tara jekk inghatatx interpretazzjoni legali korretta ghall-mertu deciz, izda ser tiddeciedi fuq aspetti totalment differenti. M'hemmx dik ir-rabta bejn is-sustanza taz-zewg proceduri li tista' tixhet dubju fuq l-imparzjalità tal-Imhallfin sedenti. Applikati l-istess principji ghall-kaz in ezami, ma jirrizultax li jista' jinghad li s-sentenza taghha tat-28 ta' April, 2017, irrendiet din il-Qorti kif komposta parzjali soggettivement jew oggettivament b'tali mod li ma tistghax tkompli bis-smigh tar-rikors ghas-sospensjoni tal-ezekuzzjoni tas-sentenza. Isegwi li mhux ritenut opportun li l-ilment tas-socjetà rikorrenti ghar-rikuza tal-Imhallfin sedenti jintlaqa'.

Ghaldaqstant it-talba ghar-rikuza hija michuda stante li mhix gustifikata u tordna li jitkompla minnufih is-smigh tar-rikors dwar is-sospensjoni tal-ezekuzzjoni tas-sentenza.

Bl-ispejjez ta' dan l-episodju jibqghu a karigu tas-socjetà rikorrenti Aluminium Extrusions Limited.

Silvio Camilleri Prim Imhallef	Tonio Mallia Imhallef	Joseph Azzopardi Imhallef

Deputat Registratur
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