

Qorti ta' l-Appell  
(Kompetenza Inferjuri)

Imħallef Anthony Ellul

Appell numru:- 6/2017

**Heikki Niemelä, Mika Lehto**  
**t-tnejn fil-kapaċità personali tagħhom ta' diretturi ta' Nemea Bank plc;**  
**Nemea Plc (C 45025);**  
**Nevestor SA (890.311.134); u**  
**Nemea Bank plc (C 45026)**  
**(appellati)**

**Vs**

**L-Awtorità għas-Servizzi Finanzjarji ta' Malta**  
**(appellant)**

5 ta' Novembru, 2018.

1. Din is-sentenza titratta appell li sar mill-Awtorita' għas-Servizzi Finanzjarji ta' Malta minn parti tad-deċiżjoni preliminari li ta t-Tribunal għal Servizzi Finanzjarji fis-16 ta' Jannar 2017, fejn iddeċieda li "*it is the opinion of the Tribunal that it was legally possible to file this appeal also in the name of the company Nemea Bank plc*".
2. Il-fatti l-iktar rilevanti għal din is-sentenza huma:
  - 2.1. Permezz ta' appell lit-Tribunal dwar is-Servizzi Finanzjarji preżentat fil-11 ta' Mejju 2016, **Heikki Niemelä, Mika Lehto** t-tnejn fil-kapaċità personali tagħhom ta' diretturi ta' Nemea Bank plc; **Nemea Plc (C 45025); Nevestor SA (890.311.134); u Nemea Bank plc (C 45026)** talbu li jiġu revokati diversi deċiżjonijiet tal-Awtorità għas-Servizzi Finanzjarji ta' Malta bejn tat-12 t' April 2016 u s-26 t' April 2016. Deċiżjonijiet li jikkonċernaw Nemea Bank plc:
    - '(i) *The Directive of the 12 April 2016 – issued in terms of art. 4B of the Banking Act and art. 16(2)(b) of the Malta Financial Services Act and inter alia imposing on the bank the obligation to inject fresh capital of €3,000,000;*
    - (ii) *The Directive of the 15 April 2016 – issued in terms of art. 4B of the Banking Act and inter alia prohibiting withdrawals of any deposits held with*

- the Bank by shareholders, members of the Board of Directors and senior Management officials;*
- (iii) *The Directive of the 26 April 2016 – issued in terms of art. 4B of the Banking Act and inter alia prohibiting withdrawals by customers in excess of €250 per day;*
  - (vi) *The Decision of the 26 April 2016 – issued in terms of art. 29(1)(c) and 29(1)(d) of the Banking Act and art. 15A(1)(b) and (c) of the Investment Services Act by means of which inter alia a competent person was appointed to administer Nemea Bank plc’.*

2.2. L-Awtorità għas-Servizzi Finanzjarji ta' Malta wieġbet illi t-talbiet tal-appellanti għandhom jiġu miċħuda, kemm fil-mertu kif ukoll in vista tal-eċċeżzjonijiet preliminari segwenti:

- (i) *'the absence of any locus standi for the bank to bring this appeal since the appeal was not filed by the person vested with legal and judicial representation of the bank at the time of filing';*
- (ii) *'Mr. Heikki Niemelä, Mr. Mika Lehto do not have the required locus standi to appeal the directives and the decision issued by the MFSA between 12 April 2016 and 26 April 2016'; u*
- (iii) *'neither Nemea Plc, nor Nevestor SA, have the locus standi to appeal the directives and the decision issued by the MFSA between 12 April 2016 and the 26 April 2016'.*

2.3. Permezz ta' deċiżjoni *in parte* mogħtija fis-16 ta' Jannar 2017, it-Tribunal iddeċieda billi ċaħad l-eċċeżzjonijiet preliminari kollha tal-Awtorità intimata u ordna l-prosegwiment tas-smiegh tal-każ fil-mertu, bl-ispejjeż tas-sentenza preliminari kontra l-Awtorità.

2.4. In sinteži, id-deċiżjoni tat-Tribunal dwar l-eċċeżzjonijiet preliminari 'I fuq numerati (ii) u (iii) kienet ibbażata fuq il-kunsiderazzjoni segwenti:

*'That the tribunal has considered that the impugned Directives are not limited, in their effect and consequences, to the appellant Nemea Bank plc, but provide repercussions to the other Appellants as well. Repercussions which, in the tribunal's opinion, are sufficient to radicate these other Appellants' juridical interest ....*

*That the tribunal therefore concludes that the Appellants Niemelä, Lehto, Nevestor SA and Nemea Plc have the juridical interest to institute and continue these proceedings'.*

2.5. Għal dak li jikkonċerna mbagħad l-eċċeżzjoniji preliminari dwar l-allegat nuqqas ta' *locus standi* tal-Bank innifsu peress li allegatament l-appell

ma ġiex prezentat by the person vested with legal and judicial representation of the bank at the time of filing, il-konsiderazzjonijiet tat-Tribunal kienu s-segwenti:

*'That different considerations apply to the Respondent's preliminary pleas in so far as Nemea Bank plc is concerned ... the dispute lies with regard to whether the appeal filed by Nemea Bank plc was filed upon the direction, order or instruction of the person or persons having the judicial or legal representation of such company. The Respondent grounds its objection on the fact that, with effect from the 16th April 2016, a controller was appointed for Nemea Bank plc. which appointment excludes any control or power which the Appellants may have had on the said company.*

*That Article 29(3)(a) and (b) of the Banking Act is of particular reference to the issue at hand:*

...

*That the provisions of Article 15A for the Investment Services Act are substantially identical to those of Article 29 of the Banking Act.*

*That it also noteworthy to add that, in terms of Article 21(7) of the Malta Financial Services Act "An appeal made under this article shall not suspend the operation of any decision or directive from which the appeal is made."*

*That by operation of the above cited provisions of the law, it transpires that at the moment of the institution of this appeal, all powers over Nemea Bank plc were vested in the person appointed by the Respondent in virtue of its Directive of the 26th April 2016.*

*That it is the Respondent's submission that an appeal against its Directives could only be instituted by the person appointed by the said Respondent by virtue of its Directive of the 26th April 2016.*

*The tribunal disagrees with this submission, and grounds its disagreement on two reasons.*

*Firstly, this tribunal is duly listed in the First Schedule of the Administrative Justice Act (Chapter 490 of the laws of Malta), and is consequently bound by the principles arising from the said Act, with special reference to Article 3. The said Article 3 in fact obliges this tribunal to apply principles of good administrative behaviour. In terms of the cited legislation, this would involve respecting the parties' right to a fair hearing ...*

...

*However it is the opinion of this tribunal that it was legally possible to file this appeal also in the name of the company Nimea Bank plc. The effect of paragraphs (a) and (b) of Article 29(3) of the Banking Act, above cited, have application in regard to paragraph (a), "... relating to any assets or business of which the person appointed under either of the paragraphs aforesaid is placed in charge or control", and in regard to paragraph (b), "in respect of such property, partnerships, firms or other business as the competent authority may specify and in which the credit institution has an interest.". It is clear that judicial proceedings are not specifically included within the ambit of these provisions. The provisions found in Article 29(1) further support this Tribunal's conclusion, in that the powers therein awarded to the appointed person refer to the conduct of the business of the credit institution, and not to any and all matters concerning that institution.*

*Since the law clearly grants a right of appeal to any aggrieved person, and since Nimea Bank plc is clearly such an aggrieved person, it follows that this company has a right of appeal which can, in no conceivable manner, be limited or controlled by the Respondent. The appointment of the Competent Persons, executed by the Directive dated 26th April 2016, does not include within its effect the expulsion or ejection of the directors from office. So much so that the said Directive contains various orders, aimed at the same directors, to ensure their cooperation with the Competent Person.*

*It follows that those powers not conferred upon the Competent Persons shall constitute residual powers which remain vested in accordance with the Memorandum and Articles of Association. In this case, in the Co-Chairmen who were entitled to proceed with this appeal on behalf of Nimea Bank plc.*

*Additionally, the tribunal is of the view that it would be unreasonable and anomalous to expect that the Respondent-appointed competent person would consider opening proceedings against its own appointer, to whom such person reports, for the purpose of contesting and undermining such person's own appointment'.*

3. L-Awtorità għas-Servizzi Finanzjarji ta' Malta appellat minn din id-deċiżjoni limitatament għal dik il-parti tagħha fejn it-Tribunal iddeċċieda li "it is the opinion of the tribunal that it was legally possible to file this appeal also in the name of the company Nemea Bank plc". Tgħid illi din il-parti tad-deċiżjoni tat-Tribunal hija bbażata fuq interpretazzjoni u applikazzjoni ġażina ta' punt ta' dritt.
4. L-appellati opponew għall-aggravju mressaq mill-Awtorità appellanti u ssottomettew li d-deċiżjoni appellata hija ġusta u timmerita konferma.

### **Konsiderazzjonijiet.**

5. Permezz tal-aggravju tagħha, l-Awtorità tilmenta li l-konsiderazzjonijiet li wasslu lit-Tribunal jikkonkludi li, “*it was legally possible to file this appeal also in the name of the company Nemea Bank plc*” huma bbażati fuq interpretazzjoni u applikazzjoni ħażina tal-liġi. Dawn kienu jirreferu għal:
- 5.1. l-artikolu 29(3)(a) u (b) tal-Kap. 371; u
  - 5.2. l-prinċipji ta’ *good administrative behaviour* inkluż id-dritt ta’ smiegh xieraq.
6. L-Awtorità tibda billi tirreferi għal dik il-parti tad-deċiżjoni appellata fejn it-Tribunal irrefera għas-subinċiż 29(1) u (3) tal-Kap. 371. Iżda b’ referenza għas-subartikolu (2)(b) u (c), kif ukoll is-subartikoli (5) u (6) tal-istess artikolu, tikkontendi li huwa pależi minn dawn id-dispozizzjonijiet li r-rappreżentanza kemm legali u kemm ġudizzjarja fil-kwistjonijiet kollha *ex lege* jvestu fil-competent person maħtur mill-Awtorità.
7. Da parti tagħhom l-appellati jgħidu li minn qari ta’ dan l-artikolu jirriżulta b’ mod ċar u inekwivoku li la fl-artikolu 29(1)(c) u (d), taħt liema dispozizzjonijiet ġiet maħtura l-persuna kompetenti, u lanqas fl-artikolu 29(3)(a) u (b) ma jingħad li r-rappreżentanza legali u ġudizzjarja tal-Bank appellat taqa’ f’idejn il-persuna kompetenti appuntata mill-Awtorità appellanta fil-kwistjonijiet kollha.
8. L-imsemmi artikolu 29 tal-Kap. 371 tal-Liġijiet ta’ Malta jiprovd i-għas-setgħa tal-awtorità kompetenti li tieħu kontroll ta’ istituzzjonijiet ta’ kreditu. Fiċ-ċirkostanzi jixraq li dan l-artikolu jiġi riprodott testwalment fl-intier tiegħu, b’ enfasi miżjud għal dawk il-partijiet li għalihom jagħmlu referenza t-Tribunal jew il-partijiet:
- '29.(1) Jekk, kemm minn xi rapport magħmul taħt l-artikolu 20 jew l-artikolu 22 jew xort'ohra, ikun jidher lill-awtorità kompetenti illi tkun tapplika xi waħda mic-ċirkostanzi indikati fl-artikolu 9(2), l-awtorità kompetenti, wara konsultazzjoni mal-Bank Ċentrali, tista' bla ħsara għad-dispozizzjonijiet tal-artikolu 9(2) –*
- (a) *teħtieġ lill-istituzzjoni ta’ kreditu minnufih biex tieħu dawk il-passi li l-awtorità kompetenti tqis meħtieġa biex tirrimedja jew tirrettifika l-materja;*
  - (b) *tinnomina persuna kompetenti biex tagħti parir lill-istituzzjoni ta’ kreditu dwar it-tmexxija xierqa tal-kummerċ tagħha;*
  - (c) *tinnomina persuna kompetenti biex tieħu f’idejha l-attiv tal-istituzzjoni ta’ kreditu jew xi parti minnha sabiex jiġu mħarsa l-interessi tad-depożitanti;*
  - (d) *tinnomina persuna kompetenti biex tieħu f’idejha kontroll tal-kummerċ tal-istituzzjoni ta’ kreditu u jew li*

*tkompli tmexxi dak il-kummerċ jew li tagħmel dik il-funzjoni oħra jew funzjonijiet oħra dwar dak il-kummerċ jew parti minnu, kif tordna l-awtorità kompetenti;*

- (e) teħtieġ lill-istituzzjoni ta' kreditu biex tillikwida l-kummerċ tagħha jew biex tillikwida l-kummerċ tagħha f'Malta;
- (f) tinnomina persuna kompetenti biex tagħmilha ta' stralčjarju għall-l-likwidazzjoni tal-affarijiet tal-istituzzjoni ta' kreditu;
- (g) tistabbilixxi r-rimunerazzjoni li għandha titħallas mill-istituzzjoni ta' kreditu lil kull persuna kompetenti nominata skont dan is-subartikolu.

**(2) Meta persuna tiġi nominata mill-awtorità kompetenti –**

- (a) skont is-subartikolu (1)(b) l-istituzzjoni ta' kreditu għandha taġixxi skont il-parir mogħti minn dik il-persuna kemm-il darba u sakemm l-awtorità kompetenti ma tordnax xort'oħra;
- (b) skont is-subartikolu (1)(c) l-istituzzjoni ta' kreditu għandha tikkonsexa lil dik il-persuna l-attiv kollu li hi tkun inkarigata minnu, u s-setgħat, il-funzjonijiet u d-dmirijiet kollha tal-istituzzjoni ta' kreditu dwar dak l-attiv sew jekk eżerċitabbi mill-kumpannija f'laqqha ġenerali jew mill-bord tad-diretturi jew minn xi persuna oħra, inkluża r-rappreżentanza legali u ġudizzjarja tal-istituzzjoni ta' kreditu, qħandhom jiġu eżerċitati minnha u nvestiti fiha bl-eskluzjoni tal-istituzzjoni ta' kreditu;
- (c) skont is-subartikolu (1)(d) l-istituzzjoni ta' kreditu għandha tissottometti l-kummerċ tagħha għall-kontroll minn dik il-persuna; u għandha tiprovdha b'dawk il-facilitajiet li hija tista' teħtieġ biex tkompli tmexxi dak il-kummerċ jew biex taqdi l-funzjonijiet mogħtija lilha taħt dak il-paragrafu, u s-setgħa, il-funzjonijiet u d-dmirijiet tal-istituzzjoni ta' kreditu, sew jekk eżerċitabbi mill-kumpannija f'laqqha ġenerali jew mill-bord tad-diretturi jew minn xi persuna oħra, inkluża r-rappreżentanza legali u ġudizzjarja tal-istituzzjoni ta' kreditu fil-kwistjonijiet kollha qħandhom jiġu eżerċitati minnha u vestiti fiha bl-eskluzjoni ta' kull persuna oħra.

**(3) Meta persuna tiġi nominata skont is-subartikolu (1)(c) jew(d) –**

- (a) kull funzjoni, setgħa jew dmir li jistgħu jiġu eżerċitati minn xi persuna oħra, inkluż il-kuraturi ta' fallut jew xi persuna oħra nominata minn jew taħt xi li ġi oħra, u li għandhom x'jaqsmu ma' xi attiv jew kummerċ li l-persuna nominata taħt xi wieħed mill-imsejha paragrafi tkun inkarigata minnu jew li jkun taħt il-kontroll tagħha għandhom, kemm-il darba jew sakemm l-awtorità kompetenti ma tordnax xort'oħra jew xi dispożizzjoni espressa ta' li ġi ma tispecifikax xort'oħra, jieq fu milli jkunu hekk eżerċitabbi;
- (b) il-persuna nominata skont xi wieħed mill-imsemmija paragrafi jkollha, dwar dik il-proprijetà, soċjetajiet, ditti

*jew kummerċ ieħor kif l-awtorità kompetenti tista' tispecifika u li fihom l-istituzzjoni ta' kreditu ikollha interess, sew direttamente sew indirettamente inkluż kull interessa li jinħoloq minn avvanzi jew self magħmula jew facilitajiet ta' kreditu mogħti jew minn xi responsabbiltà meħħuda, dawk is-setgħat, funzjonijiet u dmirijiet, inkluža r-rappreżentanza legali u ġudizzjarja, li l-awtorità kompetenti tista' tordna, u kull setgħa, funzjoni jew dmir bħal dawk ikunu eżerċitabbi minn dik il-persuna u vestiti fiha bl-esklużjoni ta' kull persuna oħra:*

*Iżda:*

- (i) *l-awtorità kompetenti għandu jkollha s-setgħa li tordna li kull jew xi setgħa, funzjoni jew dmir kif intqal qabel għandhom ikunu eżerċitabbi minn xi persuna oħra, u f'kull każ bħal dan, b'seħħi minn dik id-data jew dati li l-awtorità kompetenti tista' tispecifika u kemm-il darba u sakemm l-awtorità kompetenti ma tordnax xort'oħra, is-setgħat, il-funzjonijiet u d-dmirijiet li għalihom japplika l-ordni tal-awtorità kompetenti għandhom ikunu eżerċitabbi minn dik il-persuna l-oħra nominata għal hekk u jkunu vestiti fiha bl-esklużjoni ta' kull persuna oħra;*
- (ii) *meta l-awtorità kompetenti tkun tal-fehma illi istituzzjoni ta' kreditu ma jkunx baqagħiha ebda interessa kif intqal qabel, hija għandha tordna li kull setgħa, funzjoni u dmir eżerċitabbi skont dan il-paragrafu jieq fu milli jibqgħu hekk eżerċitabbi, iżda kull direttiva bħal dik ma tolqot ebda ħaġa li tkun saret jew li tkun naqset milli ssir bis-sahħha ta' jew minħabba xi waħda mill-imsemmija setgħat, funzjonijiet jew dmirijiet;*
- (c) *il-persuna nominata skont xi wieħed mill-imsemmija paragrafi jkollha s-setgħa li teħtieg lil kull persuna oħra biex tiprovdha b'dawk il-faċilitajiet li jidhrilha meħtieġa biex taqdi kull waħda mis-setgħat, funzjonijiet jew dmirijiet skont dan l-artikolu;*
- (d) *id-dispożizzjoni tal-ligi dwar il-falliment u b'mod partikolari t-Taqsima III tal-Kodiċi tal-Kummerċ għandha tieqaf milli tappliku u għandha tieqaf milli taħdem dwar kull proprijetà, soċjetà, ditta jew kummerċ ieħor specifikati mill-awtorità kompetenti skont il-paragrafu (b), kemm-il darba u sakemm jew ħlief sa fejn, l-awtorità kompetenti ma tordnax xort'oħra; u f'kull każ bħal dak il-persuna nominata kif intqal qabel għandha, suġġett għal kull direttivata l-awtorità kompetenti mogħtija fl-interassi tal-kredituri, taġixxi bħallikieku dawk id-dispożizzjonijiet ma kienux jeżistu u daqslikieku ma kienet saret ebda dikjarazzjoni ta' falliment;*
- (e) *kull persuna li tiġi nominata skont xi waħda mid-dispożizzjonijiet ta' dan l-artikolu għandha tissottometti rapporti ta' kull sitt xhur tal-attività tiegħu u kontijiet annwali tal-operazzjonijiet tiegħi fil-qadi ta' dawk il-funzjonijiet verifikati minn uditur indipendenti lill-Ministru li jqiegħed dawk ir-rapporti u dawk il-kontijiet fuq il-mejda tal-Kamra tad-Deputati fi żmien ħmistax-il ġurnata.*

(4) Meta persuna tiġi nominata skont is-subartikolu (1)(f), dik il-persuna tkun l-istralcjarju tal-kumpanija għall-finijiet kollha tal-liġi bl-esklużjoni ta' kull persuna oħra.

(5) ***Id-dispozizzjonijiet ta' dan l-artikolu għandu jkollhom effett minkejja kull dispozizzjoni oħra ta' kull liġi, u minkejja dak kollu li jinsab f'kull att, kuntratt, kitba jew dokument ieħor ikun liema jkun.***

(6) ***Id-dispozizzjonijiet ta' qabel dan l-artikolu li jagħtu setgħat esklussivi ta' rappreżentanza f'persuna nominata mill-awtorità kompetenti bis-saħħha tagħhom għandhom japplikaw ukoll għal kull att jew proċediment mibdija jew li saru qabel ma dik ir-rappreżentanza ġiet vestita kif intqal qabel, u dwar kull għemil jew proċedimenti bħal dawk kull persuna oħra li taġixxi jew li tidher li tkun qed taġixxi, jew li dwarha tittieħed azzjoni, f'dik il-kariga għandha tieqaf milli tkun parti fi, u għandha tiġi eskużża minn, kull att jew proċedimenti bħal dawk.***

(7) Ebda persuna ma għandha b'xi mod tfixkel persuna nominata skont is-subartikolu (1) fil-qadi ta' xi waħda mill-funzjonijiet, setgħat jew dmirijiet skont dan l-artikolu.

(8) Dwar kull istituzzjoni ta' kreditu li tkun qed taħdem f'Malta u x'imkien ieħor l-uffiċċi u l-fergħat f'Malta ta' dik l-istituzzjoni ta' kreditu għandhom, jekk l-awtorità kompetenti hekk tordna u safejn hi hekk tordna, jitqiesu li jikkostitwixxu istituzzjoni ta' kreditu separata.

(9) Meta tirċievi rapport kif imsemmi fis-subartikolu (1), l-awtorità kompetenti għandha tinforma lill-Bank Ċentrali dwar jekk ikunx ser jieħu azzjoni fuq dak ir-rapport u dwar kull azzjoni li jkun bi ħsiebu jieħu fuqu'.

9. Jirriżulta li permezz ta' deċiżjoni maħruġa mill-Awtorità llum appellanti lill-Nemea Bank plc fis-26 ta' April 2016, liema deċiżjoni tinsab meħmuża marrikors promutur bħala 'Document 4', ġiet appuntata d-ditta PricewaterhouseCoopers qua persuna kompetenti a tenur tal-artikoli 29(1)(c) u 29(1)(d) tal-Att dwar il-Kummerċ Bankarju u a tenur tal-artikolu 15A(1)(b) u (c) tal-Att dwar Servizzi ta' Investment. Fl-imsemmija deċiżjoni jingħad is-segwenti:

*'The Competent Person shall:*

- take charge of all the assets of Nemea Bank, including any assets relating directly to its investments services business and interests arising from advances, loans or credit facilities given, for the purpose of safeguarding the interests of depositors, investment services clients and creditors; and
- assume control of the banking and investment services business and to continue carrying on that business until such time as the MFSA may direct.

...

*The Bank is required to co-operate and take all necessary actions to ensure that the Competent Person is able to carry out its responsibilities accordingly. To this effect, the Bank shall, in terms of Article 29(2)(b) and (c) of the Banking Act and Article 15A(2)(b) and (c) of the Investment Services Act, deliver to the Competent Person all the assets of the Bank and control of the banking and investment services business and shall act in accordance with its obligations under the said provisions.*

...

*In terms of its mandate, the Competent Person shall, inter alia,*

- *assume all the powers, functions and duties of the Bank in respect to all assets, whether exercisable by the Bank in general meeting or by the Board of Directors or by any other person, including the legal and judicial representation of the Bank, in terms of Article 29(2)(b) and (c) of the Banking Act and Article 15A(2)(b) and (c) of the Investment Services Act, to the exclusion of the Bank;*
- *...*
- *assume any other powers conferred by the MFSA in terms of Article 29 of the Banking Act and Article 15A of the Investment Services Act ...'.*

10. Fil-fehma ta' din il-Qorti huwa čar għalhekk li mhuwiex il-każ li d-diretturi tal-Bank appellat ġew svestiti kompletament mill-poteri kollha tagħhom u li l-istess poteri għaddew *in toto* fil-persuna magħżula mill-Awtorità, kif pretiż mill-appellant. Kemm mil-liġi nnifisha kif ukoll mid-deċiżjoni jirriżulta li rrappreżentanza legali u ġudizzjarja li tispetta lill-persuna kompetenti fil-każ odjern hija **limitata** għaċ-ċirkostanzi partikolari li għalihom jirreferu s-subparagrafi (b) u (c) tal-artikolu 29(2) tal-Kap. 371.
11. L-artikolu 29(2)(b) tal-Kap. 371 irid li meta l-Awtorità tinnomina persuna kompetenti biex tieħu f'idejha l-attiv tal-istituzzjoni ta' kreditu jew xi parti minnha sabiex jiġu mħarsa l-interessi tad-depożitanti, ir-rappreżentanza legali u ġudizzjarja tal-istituzzjoni ta' kreditu tiġi eżerċitata mill-persuna kompetenti maħtura mill-istess Awtorità biss għall-dak li għandu x' jaqsam ma' dak l-attiv li tkun ġiet hekk inkarigata minnu.
12. L-artikolu 29(2)(c) tal-Kap. 371 jitrattra imbagħad dwar in-nomina ta' persuna kompetenti biex tieħu f'idejha kontroll tal-kummerċ tal-istituzzjoni ta' kreditu. Hi l-fehma ta' din il-Qorti li huwa biss għal dan il-ġhan li rrappreżentanza legali u ġudizzjarja tal-istituzzjoni ta' kreditu fil-kwistjonijiet kollha għandhom jiġu eżerċitat minnha u vestiti fiha bl-eskużjoni ta' kull persuna oħra.

13. Kieku ma kienx hekk, u r-rappreżentanza legali u ġudizzjarja kienet vestita fil-persuna kompetenti fil-kwistjonijiet kollha kif tippretendi l-Awtorità, ma kienx ikun hemm il-ħtieġa li l-legislatur jirrepeti ruħu taħt l-intestaturi (b) u (c) u lanqas kien ikollu għalfejn jagħmel referenza specifika għan-nomina partikolari tal-persuna kompetenti skont is-subartikolu (1)(c) u (1)(d) rispettivament.
14. Kif diġa' ntqal, l-appellanti appellaw quddiem it-Tribunal minn diversi deciżjonijiet li ttieħdu mill-Awtorità għas-Servizzi Finanzjarji ta' Malta bejn it-12 t'April 2016 u s-26 t'April 2016 kontra Nemea Bank plc. Deciżjonijiet li ttieħdu għaliex l-appellanti kkonkludiet li kien hemm wrongdoing min-naħha ta' Nemea Bank plc. Hekk per eżempju f'waħda mill-ordnijiet tal-MFSA tas-26 ta' April, 2016 ġew imposti restrizzjonijiet fuq il-bank, "*On the basis of the present uncertainty on the financial soundness of the Bank and the serious shortcomings identified in the joint inspection report drawn up by the ECB and the MFSA*". Dakinhar stess l-appellanti tat ordni oħra li biha ħatret lil Pricewaterhouse bħala l-persuna kompetenti sabiex twettaq il-funzjonijiet li jissemmew fl-ordni. Ordni li l-appellata mmotivat fuq il-konklużjoni li, "*serious regulatory shortcomings by the Bank have been identified as outlined in Section 2 of the On-Site Inspection report, including a serious lack of provisioning by the Bank*".
15. Deciżjonijiet jorbtu l-Bank appellat irrispettivament min minn għandu f'idejh l-attiv jew min għandu kontoll tal-kummerċ tiegħu. Għalhekk, minkejja li l-ewwel tlett deciżjonijiet hawn elenkti bla dubju jeffetwaw kemm l-attiv tal-Bank appellat kif ukoll il-kummerċ li jista' jiġi eżerċitat, ***per se, il-fakoltà ta' appell minn dawn id-deciżjonijiet tmur lil' hinn mill-ezerċizzu tal-kummerċ tal-Bank appellat li ġie fdat lill-persuna kompetenti***. *Multo magis, id-deciżjoni tal-Awtorità mogħtija fis-26 t'April 2016 tirrigwarda proprju l-ħatra ta' dik il-persuna kompetenti.*
16. Isegwi għalhekk li, kuntrajament għal dak pretiż mill-appellanti, l-fakoltà ta' appell minn dawn id-deciżjonijiet teżorbita mir-rappreżentanza legali u ġudizzjarja spettanti lill-persuna kompetenti f' kwisjonijiet kummerċjali dwar l-attiv u l-kummerċ tal-Bank in kwistjoni.
17. Is-subparagrafu (6) tal-artikolu 29 tal-Kap. 371, li l-Awtorita' rreferiet għalih, isemmi *'id-dispożizzjonijiet ta' qabel dan l-artikolu*. Għalhekk għandu jinqara' fil-kuntest tad-dispożizzjonijiet hawn fuq citati. Waħdu ma jagħtix

id-dritt assolut ta' rappreżentanza legali u ġudizzjarja lill-persuna nominata mill-Awtorità appellanti kif pretiż minnha.

18. Inoltré, mhuwiex il-każ li fid-deċiżjoni appellata l-artikolu 29 ma nghatax effett minħabba xi dispozizzjoni ta' liġi oħra jew xi haġa li tinsab f' xi att, kuntratt, kitba jew dokument ieħor. Għalhekk, lanqas ir-referenza għall-artikolu 29(5) tal-Kap. 371 ma ssostni l-argument tal-Awtorità appellanti kif pretiż minnha.
19. L-Awtorità appellanti tilmenta mbagħad minn dik il-parti tad-deċiżjoni appellata fejn saret riferenza għall-principji ta' *good administrative behaviour* inkluż id-dritt ta' smiegħ xieraq.
20. L-appellanti effettivament ma tikkontestax l-applikabilità ta' dawn il-principji, iżda tikkontendi li *se mai*, id-deċiżjoni fl-ismijiet ***Amadeo Barletta et vs L-Awtorità għas-Servizzi Finanzjarji ta' Malta*** jiġiustifika l-appell li għamlu l-azzjonisti tal-Bank f' isimhom proprju iżda mhux l-appell tal-Bank. F' dan il-kuntest l-appellanti tergħi tirreferi għall-interpreazzjoni tagħha tal-artikolu 29 tal-Kap. 371 u ttendi li ma jistax ikun hemm *residual powers* li jibqgħu vestiti fid-diretturi tal-Bank kif deċiż mit-Tribunal peress li l-poteri kollha li qabel il-ħatra tal-*competent person* kienu eżerċitabbli mid-diretturi / azzjonisti, saru eżerċitabbli mill-*competent person* wara l-ħatra tiegħi. Tikkontendi ukoll li l-*competent person* għandu mhux biss id-dritt iżda d-dover li jappella saħansitra kontra l-ħatra tiegħi stess jekk din il-ħatra ma tkunx fl-interess tal-entità fir-rigward ta' liema jkun inħatar. F' kull każ, l-Awtorità tilmenta li mhux fid-diskrezzjoni tat-Tribunal li jiaprova jiinterpreta l-liġi b' mod li twassal għal eżitu li fl-opinjoni tat-Tribunal hija raġjonevoli.
21. Rigward id-deċiżjoni *in parte* fl-ismijiet ***Amadeo Barletta et vs L-Awtorità għas-Servizzi Finanzjarji ta' Malta***, tal-Prim' Awla tal-Qorti Ċivili tat-23 ta' April 2013,<sup>1</sup> huwa minnu li dan il-każ kien promoss mill-azzjonisti tas-socjetà in kwistjoni f' isimhom proprju. Madanakollu, din il-parti tad-deċiżjoni tat-Tribunal ma kinitx sorretta unikament fuq l-imsemmija deċiżjoni iżda saret referenza ukoll għal diversi deċiżjonijiet tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, senjatamente ***Credit and Industrial Bank vs. The Czech Republic*** (App. No. 29010/95) u ***Capital Bank AD vs. Bulgaria*** (App. No. 49429/99).
22. L-appellanti ma tagħmel l-ebda referenza għal dawn id-deċiżjonijiet fir-rikors tal-appell tagħha iżda targumenta li l-*competent person* għandu d-dover li

<sup>1</sup> Id-deċiżjoni finali tinsab differita għall-15 ta' Novembru 2018

jappella kontra l-ħatra tiegħu stess f' każ li l-ħatra tiegħu ma tkunx fl-interess tal-entità fir-rigward ta' liema jkun inħatar. Apparti l-fatt li din l-ipotesi hija għal kollex inverosimili, u fil-fatt ma jirriżultax li l-*competent person* appella minn xi waħda mid-deċiżjonijiet surriferiti, dan l-argument jinjora għal kollex il-ġurisprudenza li għaliha seret referenza fid-deċiżjoni appellata.

23. Fil-każ **Credit and Industrial Bank vs. The Czech Republic** il-Qorti Ewropea għad-Drittijiet tal-Bniedem iddeċidiet illi:

*'69. ... As from that date, the powers and functions of the statutory organ of management of the bank were suspended and transferred to the compulsory administrator, who alone was authorised to represent the bank and to appoint a legal representative to conduct proceedings on the bank's behalf. The Court observes that, in its judgment of 30 November 2000, the Supreme Court held that, until the date of entry in the Register, the applicant bank's own statutory body remained empowered to act on the bank's behalf (see paragraph 35 above). However, the Court notes that the entry was in fact made on the day after publication of the CNB's original decision in the Commercial Bulletin. In these circumstances, even assuming that the decision of the CNB was liable to be judicially reviewed and that in any such proceedings the civil courts would have had jurisdiction to review the grounds on which the compulsory administration had been imposed, the Court finds that the applicant bank had no practical possibility of bringing or pursuing such review proceedings through its statutory management body.*

...

*72. ... The Court, like the Commission, finds that, even assuming the scope of review in such an appeal would have been wide enough to satisfy the requirements of Article 6 of the Convention, the applicant bank had no effective access to court to obtain such a review'.*

24. Fil-każ fl-ismijiet **Capital Bank AD vs. Bulgaria** fejn il-Qorti Ewropea saħqet l-istess kunċett:

*'117. Concerning the second limb of the complaint, the Court notes that in the proceedings on the BNB's petition the applicant bank was represented by persons who were dependent, to varying degrees, on the other party to those proceedings – the Central Bank. Before the Sofia City Court the applicant bank was represented by the BNB-appointed special administrators (see paragraph 25 above). Since the Sofia City Court's judgment was immediately enforceable (see paragraphs 28 and 64 above), in the ensuing stages of the proceedings the applicant bank was represented by the liquidators appointed by the insolvency court from a panel of qualified persons selected by the BNB (see paragraph 63 above). The liquidators could be struck off the list kept by the BNB and that would automatically result in their discharge by the insolvency*

*court (ibid.). In view of the resulting dependence of the liquidators on the BNB, it is not surprising that they did not lodge any appeal against the Sofia City Court's judgment or petition for review of the judgment of the Supreme Court of Cassation's three-member panel, and that they acted in concert with the BNB throughout the proceedings (see paragraphs 29 and 30 above). If the prosecutor's office had not acted in support of the applicant bank and had not lodged an appeal and a petition itself, the bank would have been deprived of access to an appellate jurisdiction (see, mutatis mutandis, Credit and Industrial Bank, cited above, § 72).*

*118. The rights of access to a court and of adversarial proceedings, enshrined by Article 6, imply, among other things, the possibility for the parties to a civil or criminal trial to be able to effectively participate in the proceedings (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, p. 13, § 24; and Stanford v. the United Kingdom, judgment of 23 February 1994, Series A no. 282-A, pp. 10-11, § 26) and adduce evidence and arguments with a view to influencing the court's decision. The litigants' confidence in the workings of justice is based on, inter alia, the knowledge that they have had the opportunity to express their views (see Pellegrini v. Italy, no. 30882/96, § 45, ECHR 2001-VIII). As it was represented by persons dependent on the other party to the proceedings, the applicant bank was unable, especially when the case was being examined by the Supreme Court of Cassation, to properly state its case and protect its interests. It is true that the prosecutor's office came to its aid, but that cannot remedy the fact that it was denied the opportunity to present its case before the courts (see, mutatis mutandis, Philis v. Greece (no. 1), judgment of 27 August 1991, Series A no. 209, pp. 20-23, §§ 58-65). The Court notes in this connection that in July 1999 the Supreme Court of Cassation held that the debtor itself, not the liquidator, had standing to appeal against the winding-up order, for reasons similar to those set out above (see paragraph 62 above). However, that did not happen in the instant case.'*

25. Applikati dawn il-principji għall-każ odjern, it-Tribunal ma setax ma jasalx għall-konklużjoni li l-fatt li l-persuna kompetenti inħatret mill-Awtorità appellanti joħloq dipendenza mill-imsemmija persuna kompetenti fuq l-istess Awtorità li tipprekludi l-Bank appellat milli jressaq il-każ tiegħu kontra l-istess Awtorità tramite l-persuna kompetenti b' mod effettiv u in konformità mad-dettami tad-dritt għal smiegħ xieraq.
26. Nemea Bank plc altru milli għandu nteress li jikkontesta d-deċiżjoni li għamel *wrongdoing* u għalhekk hi persuna aggravata. Ċertament dak l-appell mhuwiex ser isir mill-persuna kompetenti li nhäatret mill-MFSA, u li żgur li ma gietx maħtura sabiex tikkontesta l-ordnijiet tal-MFSA iżda sabiex twettaq dak li ordnat l-MFSA fl-ordni tas-26 ta' April, 2016. Fiċ-ċirkostanzi lanqas ma jista' jingħad li l-persuna kompetenti hi l-persuna li għandha locus standi sabiex fl-interess tal-bank tikkontesta l-ordnijiet tal-appellant.

**Għal dawn il-motivi tiċħad l-appell tal-Awtorità għas-Servizzi Finanzjarji ta' Malta, bl-ispejjeż kollha kontriha.**

**Ir-Registratur għandu jibgħat l-atti tal-każ l-İt-Tribunal sabiex ikun jista' jissokta bis-smiegħ tal-każ.**

Anthony Ellul.