MALTA

QORTI TAL-APPELL
(Sede Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-3 ta' April, 2024

Appell Inferjuri Numru 82/2023 LM

MC Trustees (Malta) Limited (C 48412)
('l-appellata')

vs.

Malta Financial Services Authority
('l-appellanta')

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mill-**Malta Financial Services Authority** [minn issa 'l quddiem 'l-Awtorità appellanta'], mid-deċiżjoni tat-Tribunal Dwar Servizzi Finanzjarji [minn issa 'l quddiem 'it-Tribunal'] tal-5 ta' Lulju, 2023, [minn issa 'l quddiem 'id-deċiżjoni appellata'], fejn iddeċieda l-appell tas-soċjetà **MC**

Trustees (Malta) Limited (C 48412) [minn issa 'l quddiem 'is-soċjetà appellata'] kif ġej:

> *"65. On the basis of the above the Tribunal has no other option than to consider the Decision taken by the Authority as being defective and hence null and void.*
>
> *On the basis of the above, the Tribunal finds that the Authority acted in breach of the provisions of Article 11 of Chapter 330 of the Laws of Malta and hence upholds the plea raised by the Appellant, namely that there is a lack of due process and impartiality in the manner in which the Authority determines the action that it takes against a regulated entity, and hence considers the Decision as null and void.*
>
> *On the basis of the above, the Tribunal need not enter into the merits of the other pleas raised by the Appellant in its Appeal.*
>
> *For the avoidance of any doubt, this decision should be reflected in any public pronouncements made or issued by the Authority in relation to the Decision.*
>
> *Costs are to be borne by the Authority."*

Fatti

2. Is-soċjetà appellata kienet ġiet reġistrata hawn Malta fil-11 ta' Diċembru, 2009, u fl-4 ta' Frar, 2010 kienet ġiet awtorizzata mill-Awtorità appellanta sabiex taġixxi bħala amministratur ta' skema tal-irtirar. B'hekk hija saret l-amministratriċi ta' żewġ skemi tal-irtirar personali, waħda minnhom magħrufa bl-isem 'MCT Malta Private Retirement Scheme', li kienet ingħatat il-liċenzja mingħand l-Awtorità appellanta fid-19 ta' Frar, 2010, u l-oħra 'MCT Maltese Retirement Scheme', li ngħatat il-liċenzja mill-istess Awtorità appellanta fil-31 ta' Diċembru, 2013, fejn ġiet ukoll awtorizzata tamministra l-attivitajiet ta' skema tal-irtirar mwaqqfa bħala *trust.* Fit-22 ta' Frar, 2021, l-Awtorità appellanta bagħtet *minded letter* lis-soċjetà appellata, fejn infurmatha li hija

kienet ikkonstatat diversi kontravenzjonijiet waqt l-investigazzjoni li hija kienet ikkonduċiet, u għaldaqstant kienet qiegħda tipproponi li tiġi mposta multa kumulattiva ta' €160,000. Fl-istess ittra, is-soċjetà appellata ġiet infurmata wkoll li hija kienet qiegħda tingħata l-opportunità tagħmel is-sottomissjonijiet tagħha, liema sottomissjonijiet effettivament saru fit-23 ta' Marzu, 2021. Sussegwentement permezz ta' ittra tas-16 ta' April, 2021, l-Awtorità appellanta kkomunikat id-deċiżjoni tagħha lis-soċjetà appellata fejn ingħad kif ġej:

> *"On the basis of the abovementioned breaches and after careful deliberation and consideration of all the cirumstances of the case including the Representations provided by the RSA, the Authority is of the view that the Representations do not justify a reconsideration of the MFSA's minded position as indicated in the Authority's letter of 22 February 2021.*
>
> *In this regard, the Authority decided to proceed with the imposition of an administrative penalty of one hundred and sixty thousand Euro (€160,000) on MCTM in terms of the powers granted to the Authority as per Article 17(6) of the Special Funds (Regulation) Act; Article 46 of the Retirement Pensions Act; and Article 51(7) of the Trusts and Trustees Act.*
>
> *In determining the quantum of this penalty, the MFSA has taken into consideration, amongst others, the gravity and duration of the infringements, the aspect of proportionality, the level of cooperation and the measures in place to prevent such infringements. In this regard, the administrative penalty has been determined as follows:*

Relevant Law	**Administrative Penalty**
Part B 2.3.1 of the Standard Operational Conditions for Retirement Scheme Administrators	*€20,000*
Part B 2.6.4 (g) of the Standard Operational Conditions for Retirement Scheme Administrators	*€20,000**

Part B 2.7.1 of the Standard Operational Conditions for Retirement Scheme Administrators	
Part B 2.7.2 (a) of the Standard Operational Conditions for Retirement Scheme Administrators *Licence Conditions applicable to MCTM and MCT Malta Scheme*	*€20,000**
Article 21(1) & (2) of the Trusts & Trustees Act *Paragraph 6.0 of the Trustees Code of Conduct*	*€50,000**
Article 19(1)(l) of the Special Funds (Regulation) Act	*€20,000*
Part B 1.4.4 of the Pension Rules for Service Providers	*€30,000*
Total	***€160,000***

**Although the Authority has found MCTM to have breached more than one requirement, for the purpose of determining the administrative penalty, the identified breaches were considered as one breach.*

...

In terms of Article 16(8) of the MFSA Act and Article 46(4) of the Retirement Pensions Act, and as part of the Authority's standard enforcement policy, and administrative sanction or measure, of whatever type, will be published on the MFSA's website and in such other medium as may be deemed warranted in accordance with the MFSA's publication policy."

Mertu

3. Is-soċjetà appellata appellat minn dik id-deċiżjoni quddiem it-Tribunal fl-14 ta' Mejju, 2021, fejn talbet sabiex id-deċiżjoni tal-Awtorità appellanta tiġi ddikjarata nulla jew tiġi mibdula. L-aggravji li ressqet huma s-segwenti: (a)

b'mod preliminari, il-proċess sħiħ li permezz tiegħu ġiet imposta l-penali amministrattiva, kien wieħed leżiv tad-dritt tagħha għal smigħ xieraq; (b) il-penali amministrattiva kienet sproporzjonata u manifestament inġusta; (ċ) fil-mertu, l-allegati nuqqasijiet kienu infondati fil-fatt u fid-dritt.

4. L-Awtorità appellanta wieġbet fil-15 ta' Ġunju, 2021, fejn sostniet li l-allegazzjonijiet tas-soċjetà appellata kienu infondati fil-fatt u fid-dritt għal dawk ir-raġunijiet li hija tgħaddi sabiex tfisser, u għaldaqstant l-appell tagħha kellu jiġi miċħud, bl-ispejjeż kontra s-soċjetà appellata.

Id-deċiżjoni appellata

5. It-Tribunal ikkonstata u ddeċieda kif ġej:

> *"Preliminary Pleas:*
>
> ***Lack of Fair Hearing and Due Process – Manifest Unfairness***
> ***Lack of Impartiality***
>
> *10. The Tribunal will address the two preliminary please together.*
>
> *11. In its first plea, the Appellant raised breach of its fundamental right to a fair hearing in the determination of its own civil rights and obligations as protected by Article 39(2) of the Constitution of Malta and Article 6 (*Right to a Fair Trial*) of the European Convention on Human Rights ("**ECHR**"). The Appellant maintains that the manifest breach of the Appellant's fundamental right to a fair trial constitutes* "manifest unfairness" *thereby giving a right of Appeal before this Tribunal under Article 21(9)(b) of the Malta Financial Services Authority Act (Chapter 330 of the Laws of Malta) ("the **Act**") on the basis of which this Tribunal has the power to annul the Decision under Article 21(13)(a) of the Act.*
>
> *12. The Appellant argues that the unfairness of MFSA's Decision is further aggravated by the way MFSA dealt with the Appellant and reached its* "conclusions" *within unrealistic timeframes.*

13. *The Appellant refers to the fact that in its Minded Letter the Authority refers to "*discussions held during a compliance visit carried out by the Authority at MCTM offices in July 2016" *and on the basis of these discussions (and documentation provided by the Appellant to the Authority), the Authority found the Appellant to be in breach of a number of its standard license conditions issued in terms of the Special Funds (Regulation) Act (now repealed) and the RPA as well as provisions of the TTA.*

14. *It is however clear that in its first plea, the main contestation of the Appellant is based on the fact that the discretionary excessive penalties imposed by the Authority are intrinsically criminal sanctions which must be judged and determined by a* 'court' *(and not by the Authority) in order to ensure that the person so charged is afforded a fair hearing within a reasonable time by an independent and impartial court established by law in terms of Article 39 of the Constitution.*

15. *The Appellants refer to the judgements in the names* ***Angelo Zahra vs Prim Ministru*** *and* ***Rosette Thake noe. et v. Kummissjoni Elettorali et****.*

16. *The Appellants therefore claim that the decision-making process lacked the proper guarantees for a fair hearing and the principles of natural justice (the right to a fair hearing, amongst others). Furthermore, the Appellants submit that the whole process impinges on its right to a fair hearing because it has been found guilty by the Authority acting as judge and prosecutor only being given the opportunity to defend itself against an already declared pre-determined minded position by its adjudicator that brought the charges against it.*

17. *The Appellant also argues that that it was not privy to any opinions, recommendations or documentary evidence which formed part of the Authority's investigation which led to the imposition of the fine and this fact alone goes against the principles of* 'transparency' *and* 'equality of arms' *which are fundamental to the right to a fair hearing.*

18. *The Appellant reserved the right to request the Tribunal to order that the Appellant's file and its content is made available to this Tribunal and the Appellant (fn. 10. No such request was made. However the Authority presented its evidence and the officers whose affidavit the Authority presented were duly cross-examined. Furthermore the said affidavits were accompanied by a number of documents.)*

19. *In its second plea, the Appellant argues that the investigative and decision-making bodies of the MFSA overlap, leaving no room for real impratiality in the whole process. Accordingly, the whole process is in breach of the principles of natural justice and of the constitutionally protected fundamental right to a fair hearing also because the unit within the MFSA which investigated the Appellant forms part of the same body that in turn evaluated that unit's same findings and the Appellant's representations with a view to reaching the Decision.*

20. *The Authority rebutted both pleas by arguing that the grievance raised by the Appellant in this respect is not aimed at the Authority, but aimed at the legislation in virtue of which the Authority acted. The Authority thus argued that the Tribunal does not have the competence or jurisdiction to determine such a grievance and referred to the decision of the Tribunal of the 28th of September 2012, in the case* ***Christopher Pace vs L-Awtorità Għas-Servizzi Finanzjarji ta' Malta*** *wherein it was in fact held that:*

"...l-lanjanza tal-appellant hija kontra dawk id-disposizzjonijiet tal-liġi li jagħtu lill-Awtorità s-setgħa li taġixxi kif aġixxiet. ...B'konsegwenza ta' dan, l-allegazzjoni tal-appellant ma tirrigwardax l-egħmil tal-Awtorità per se, iżda l-liġi li tawtorizza u teżiġi dawk l-egħmil. ...[din il-materja] ma tista' qatt tiġi deċiża minn dan it-tribunal. Dik li qed jissolleva l-appellant hija kwistjoni dwar il-konformità tad-disposizzjonijiet tal-liġi relattivi mal-Kostituzzjoni u mal-Konvenzjoni Ewropea, liema kwistjoni hija mil-liġi espressament riservata għall-qrati ta' ġurisdizzjoni kostituzzjonali."

21. *Without prejudice to its argument that the Tribunal lacks the jurisdiction to analyse this matter, the Authority still noted that all the reasons and facts on the basis of which the Authority was minded to impose the administrative penalty were communicated to the Appellant in the Minded Letter. The fact that the Authority was not convinced to change its mind following the Representations should not be taken to imply that the Authority had already taken its decision before communicating the Minded Letter to the Appellant.*

22. *The Authority also remarked that there were other instances wherein the Authority was convinced otherwise following receipt of an appellant's representations, however, this was not the case with regards to the case under examination and this* "as this Tribunal is aware" *(fn. 11 No evidence was presented in* ***these*** *proceedings as to which cases the Authority referred to in its reply to this Appeal).*

23. *The Authority further referred to the built safeguards and structures specifically designed to ensure a fair hearing and that the organ of the Authority deciding on the imposition of the penalty is different from those persons who would have investigated the case in question. In this particular case, a review was first carried out by the Insurance and Pensions Supervision function after which the matter was then referred to the Enforcement function to assess whether there are grounds which merit the taking of Enforcement action, and the decision was eventually taken by the Executive Committee.*

24. *The Tribunal is being requested to determine that the actions of the Authority breach its fundamental human rights and effectively order that the said actions are deemed as null and void.*

25. *The Tribunal refers to:*

Article 46 of Chapter 514 of the Laws of Malta (RPA) which states the following:

Without prejudice to any other powers assigned to the competent authority in terms of this Act, where a licence holder or an officer, or any other person responsible for a licence holder contravenes or fails to comply with any of the conditions imposed in a licence and, or where the competent authority is satisfied that a person's conduct amounts to a breach of any of the provisions of this Act, regulations or Pension Rules made thereunder, including failure to cooperate in an investigation, the competent authority may by notice in writing and without recourse to a court hearing impose on the licence holder, officer and, or any other person, as the case may be, an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) in respect of each infringement or failure to comply, as the case may be and, where such infringement or failure to comply continues, a further penalty not exceeding one hundred and sixteen euro (€116) for each day during which the infringement or failure to comply continues.

Article 17(6) of the Special Funds (Regulation) Act (Chapter 450 (fn. 12 Repealed by Chapter 514)):

Where a retirement funds administrator or retirement scheme administrator contravenes or fails to comply with any of the conditions imposed under this article, the Authority may without recourse to a court hearing impose an administrative penalty which may not exceed ninety-three thousand and one hundred and seventy-four and ninety-four cents (93,174.94).

Article 51(7) of the Trusts and Trustees Act (Chapter 331):

a) Without prejudice to any other powers assigned to the Authority in terms of this Act, where a trustee, or a director of a trustee company or any other

person entrusted with the management and administration thereof, or any other person having obligations with respect to the trustee, contravenes or fails to comply with any of the conditions imposed in an authorisation issued under article 43, or the conditions imposed in article 43A, or the conditions imposed by the Authority upon registration in accordance with article 43B, and, or where the Authority is satisfied that the trustee's or the person's conduct amounts to a breach of any provisions of the Act, regulations or rules issued thereunder, or of any directive, obligations or other requirement made or given by the Authority, including failure to cooperate in an investigation, the Authority may by notice in writing and without recourse to a court hearing, impose an administrative penalty which may not exceed one hundred and fifty thousand euro (€150,000) for each infringement or failure to comply, as the case may be.

(b) Administrative penalties or other measures that may be imposed by the Authority on a trustee or any of thepersons referred to in paragraph (a) as may be specified, may be imposed in the form of a fixed penalty, a daily penalty, or both.

26. *All the above-quoted Acts nominate the Appellate Authority as the Authority or the Competent Authority referred to in the above-quoted articles.*

27. *The Decision subject of this Appeal was taken by the Authority on the strength of the powers granted to it by the above-quoted laws. Hence, the request of the Appellant effectively means that the Tribunal is being requested to determine that the Authority breached the Appellant's rights when it acted according to the powers conferred to it at law.*

28. *The Court of Appeal in the case* ***Smash Communications Limited vs. L-Awtorita tax-Xandir et.*** *(fn. 13 481/2004 delivered on the 24th June 2016) held:*

10. L-Argument tal-konvenuti huwa validu. Huwa minnu illi, taħt l-art. 469A(1)(a) tal-Kodiċi ta' Organizzazzjoni u Proċedura Ċivili, il-qorti fil-kompetenza "ordinarja" tagħha tista' tħassar għemil amministrattiv jekk dan "jikser il-Kostituzzjoni"; madankollu, dik il-ġurisdizzjoni tolqot bis l-għemil amministrativ u mhux il-liġi li taħtha jsir, b'mod illi, jekk l-għemil ikun sar kif tridu l-liġi meta l-liġi ma tħalli ebda diskrezzjoni dwar kif għandu jsir dak l-għemil amministrattiv, il-qorti ma tistax tgħid illi l-liġi għandha titqies li ma għandhiex effett, għax dak tista' tagħmlu biss fil-kompetenza "kostituzzjonali" tagħha, u lanqas ma jkollha l-possibilità li tinterpreta l-liġi ordinarja b'mod "konformi" mal-Kostituzzjoni jekk dik l-interpretazzjoni ma tkunx possibbli mingħajr ma, effettivament, tgħid illi l-liġi ma tiswiex. Dan ma jfissirx illi meta l-liġi tagħti diskrezzjoni u l-Awtorità tinqeda b'dik id-diskrezzjoni b'mod li

jikser il-Kostituzzjoni dak l-għemil ma jistax jitħassar taħt l-art. 469A(1)(a), għax diskrezzjoni mogħtija b'liġi xorta tista' tinqeda biha b'mod li jikser il-kostituzzjoni; li jfisser hu illi, jekk il-liġi ma tħallix għażla dwar kif l-Awtorità għandha timxi, hija biss il-qorti fil-kompetenza tagħha kostituzzjonali li tista' tħassar dak l-għemil billi tgħid illi l-liġi ma għandhiex ikollha effett.

11. Inċidentalment, għandu jingħad illi l-Prim'Awla tal-Qorti Ċivili għandha s-setgħa, taħt l-art. 46(3) tal-Kostituzzjoni, illi tassumi kompetenza "kostituzzjonali" wkoll f'kawża "ordinarja", iżda fil-każ tallum dan ma għamlitux, x'aktarx għax il-kwistjoni ta' ksur tal-Kostituzzjoni ma "qamitx" waqt il-proċeduri iżda kienet effettivament waħda mill-premessi tal-talbiet tal-attriċi mill-bidunett tal-kawża u għalhekk il-kwistjoni kellha titqajjem ab initio b'rikors kostituzzjonali.

12. Naturalment, dan kollu jiswa jekk tassew il-konvenuti mxew kif trid il-liġi u ma kellhomx għażla li jimxu mod ieħor; għalhekk imiss issa li naraw jekk il-konvenuti tassew imxewx kif trid il-liġi – kif qegħdin jgħidu huma – jew imxewx ma' "konvenzjonijiet" maħluqa "abużivament' minnhom stess, kif tgħid Smash.

13. Il-kwistjoni mela hi jekk il-konvenuti setgħux jimxu mod ieħor flok ma tinħareġ l-akkuża minn organu tal-Awtorità – fil-każ tallum mill-Kap Esekuttiv tagħha – biex tingħata deċiżjoni fuq dik l-akkuża mill-istess Awtorità. Qari tal-art. 41 tal-Kap. 350 juri illi hija effettivament l-Awtorità li toħroġ "avviż ta' akkuża" u li tiddeċiedi dwar dik l-akkuża. Għalhekk ma setax isir mod ieħor ħlief illi jingħata l-"avviż ta' akkuża" mill-Awtorità jew minn organu tagħha sabiex eventwalment l-istess Awtorità tiddeċiedi jekk hemmx ħtija taħt l-akkuża wara li "tosserva l-garanziji ta' smigħ xieraq u fil-pubbliku". Fi kliem ieħor, l-akkuża ma setgħetx inħarġet minn xi persuna jew korp ieħor li ma jkunx parti mill-Awtorità, kif effettivament tgħid illi kellu jsir is-sentenza appellata.

14. Għalhekk, għar-raġunijiet mogħtija fuq, is-sentenza tal-ewwel qorti effettivament hija "disapplikazzjoni" tal-liġi, ħaġa li l-qorti fil-kompetenza "ordinarja" tagħha ma setgħetx tagħmilha. Dan l-aggravju tal-konvenuti għalhekk għandu jintlaqa' u ma jibqax meħtieġ li nqisu l-aggravji l-oħra.

29. *It is thus clear that in as much as Ordinary Court cannot deem an authority as having acted in breach of a person's rights when it applied the law, likewise, this Tribunal is not vested with the jurisdiction to determine the matter raised by the Appellant in its first two pleas, since it is clear that the Appellate Authority acted in accordance with the provisions of Article 17(6) of the Special Funds (Regulation) Act, Article 46 of the Retirement Pensions Act and Article 5(7) of the Trusts and Trustees Act when it imposed the penalty on the Appellant.*

On the basis of the above, the first two pleas of the Appellant, in so far as they relate to the powers of the Authority, are being rejected.

30. *The other facet of the said prelimary pleas when read together, is the lack of due process and impartiality in the manner in which the Authority determines the action that it takes against a regulated entity.*

31. *The procedure used by the Authority in this case was initiated by a site visit which occurred in 2016 and continued with internal investigations, exchanges and sharing of information with the Appellant, the issue of a minded letter, the reply of the Appellant to the said minded letter and the issue of the Decision.*

32. *The Appellants argue that the simple fact that the Minded Letter was issued years after the site visit is certainly indicative of a haphazard approach by the Appellate Authority. Furthermore the Appellant argues that the way the investigations were carried out and the referral to the Executive Committee of the Authority for it to issue a Minded Letter, which Committee would ultimtely also issue the Decision, breaches the rights of the Appellant since the decision is not taken by an Impartial decision taker.*

33. *The Authority referred to the built safeguards and structures specifically designed to ensure a fair hearing and that the organ of the Authority deciding on the imposition of the penalty is different from those persons who would have investigated the case in question. In this particular case, a review was first carried out by the insurance and Pensions Supervision function after which the matter was then referred to the Enforcement function to assess whether there are gorunds which merit the taking of Enforcement action, and the decision was eventually taken by the Executive Committee.*

34. *The Tribunal considers that the powers of the Appellate Authority are entrenched in Article 4 of Chapter 330 of the Laws of Malta. The said powers include the power to regulate, supervise and monitor as well as the power to enforce.*

35. *Article 5(1) of Chapter 330 then states that the main organs of the Authority are the Board of Governors, the Executive Committee and Directorates as may be established by the Board of Governors from time to time.*

36. *Article 9(1) of Chapter 330 states:*

    The Executive Committee shall be responsible for the implementation of the strategy and policies of the Authority, for the approval of regulation, for the

approval of and for the issuing of licences and other authorisations, and for the monitoring and supervision of persons and other entities licensed or authorised by the Authority in the financial services sector, for the enforcement of the regulatory framework in the financial services sector, for carrying out the day-to-day management and the finances of the Authority including human resources and ancillary services, and for the general coordination of the Authority's administrative affairs.

37. *Finally, Article 11(1) of Chapter 330 states:*

The Enforcement Decisions Committee shall decide or take such action as it considers appropriate, promptly and without delay, in relation to any recommendation for enforcement action brought before it by the Chief Officer responsible for Enforcement or any other official from the Directorate responsible for enforcement;

38. *According to Article 11(12) of Chapter 330, the said Committee shall be considered as independent from the Board of Governors and the Executive Committee and according to Article 11(8), before arriving at a decision, it must notify the entity subject of the enforcement action of the intended action, with the said entity given a time to respond.*

39. *In its additional note of submissions, the Authority concedes that the Decision was taken by the Executive Council and not the Enforcement Decisions Committee, but refers to Article 11(1) which states:*

Provided that the Executive Committee may take any enforcement action itself if:

(a) it considers that, in the particular case, the action proposed should occur before it is practicable or possible to convene the Enforcement Decisions Committee; or
(b) it considers that, in the particular case, an urgent decision on the proposed action is necessary to protect the interests of consumers.

40. *The Authority argues that on the basis of the afore-mentioned proviso to Article 11(1) the Executive Committee is authorised to take enforcement action itself.*

41. *The Provisions of the current Article 11 were introduced through Article 9 of Act VII of 2019 and the said Act came immediately into force upon its enactment (fn. 14 29th March 2019).*

42. *Hence, one would expect that immediately after the introduction of Article 11, the Enforcement Decisions Committee would have been established and its members appointed by the Board of Governors (fn. 15 Vide Article 11(4) and*

11(5)). The Executive Committee, with the approval of the Board of Governors, should have established a detailed remit for the Enforcement Decisions Committee (fn. 16 Vide Article 11(3)). In reality, through the powers granted to it through the provisions of Article 11(3), on the 22nd December 2022, the Executive Committee issued the Policy Document on Non-Material Enforcement Action. To date there is no evidence that the Enforcement Decisions Committee is actually appointed (fn. 17 https://www.mfsa.mt/about-us/enforcement-decisions-committee/) and from the further submission made by the Authority in its additional note of submission it would seem that this Committee has not been yet appointed. Neither does it seem that there is any detailed remit document as required under the provisions of Article 11(3).

43. *The Decision in this case was issued on the 16th April 2021 and the Minded Letter was issued on the 22nd February 2021. The latter was signed by the Chief Officer of Enforcement whereas the Decision was attached to a letter issued by the same Chief Officer of Enforcement.The Decision contains no information as to which organ of the Authority considered the submissions of the Appellant, or which organ actually decided on the matter. Neither does it contain any reference to any date when it was taken and is seemingly unsigned.*

44. *The minded letter refers to a meeting held at the offices of the Appellant in July 2016, and clearly the investigation by the Authority into the manner through which the Appellant was carrying out its activities started prior to the said site visit and continued after. The Minded Letter was issued 4 years after the site visit. At no stage did the Authority provide any evidence to sustain its argument that the Executive Committee had to take action itself because* 'in the particular case, the action proposed should occur before it is practicable or possible to convene the Enforcment Decisions Committee; or ... in the particular case, an urgent decision on the proposed action is necessary to protect the interests of consumers."

45. *The above-listed timelines also clearly indicate that there was no objective reason why the Authority, through its Executive Committee, should have used the exceptional procedures established in the Proviso to Article 11(3) rather than the procedure established in the rest of Article 11.*

46. *It is pertinent to note that the appointment of the Enforcement Decisions Committee falls completely within the remit of the Authority in that its*

members are appointed by the Board of Governors (fn. 18 Vide Article 11(2)) of the Authority. Hence the Authority certainly cannot claim that it was not practical or possible to convene the Enforcement Decisions Committee (fn. 19 Article 11(1), Proviso (a)). If that were the case then the Authority would easily circumvent all the procedures involving the Enforcement Decisions Committee simply by not appointing such a Committee.

47. *Furthermore, the exceptional procedure established in the Proviso to Article 11(1) is clearly related to* "the particular case" *that is being determined rather than to generic circumstances.*

48. *Having established that the Proviso to Article 11(1) does not apply to this particular case, the Tribunal has to now determine whether the fact that the Executive Committee determined the matter involving the Appellant, rather than the Enforcement Decisions Committee, impinges on the validity of the Decision.*

49. *Prior to the enactment of Act VIII of 2019, the enforcement powers of the Appellate Authority were exclusively vested in the Executive Committee. As from 2019, the powers of the Executive Committee in relation to supervision and enforcement did not really change since according to Article 9(1):*

"The Executive Committee shall be responsible for the implementation of the strategy and policies of the Authority, for the approval of regulation, for the approval of and for the issuing of licences and other authorisations, and for the monitoring and supervision of persons and other entities licensed or authorised by the Authority in the financial services sector, for the enforcement of the regulatory framework in the financial services sector, for carrying out the day-to-day management and the finances of the Authority including human resources and ancillary services, and for the general coordination of the Authority's administrative affairs."

50. *On the otherhand, the Enforcement Decisions Committee, which is certainly not a sub-committee of the Executive Committee (fn. 20 This is a matter of bad legislative drafting since Article 2 describes the Enforcement Decisions Committee as a sub-committee of the Executive Committee, when this is clearly not the case since this is not a sub-committee of the Executive Committee appointed under Article 9(2) of Chapter 330. Also the Enforcement Decisions Committee must report about its progress to the Board of Governors and acts independently from the Board of Governors and the Executive Committee in accordance with Article 11(12)), was give a very specific remit as specified in Article 11(1):*

"The Enforcement Decisions Committee shall decide or take such action as it considers appropriate, promptly and without delay, in relation to any recommendation for enforcement action broguht before it by the Chief Officer responsible for Enforcement or any other official from the Directorate responsible for enforcement:"

51. *The provisions of the law are clear enough and the Authority clearly acted in breach of the provisions of the law when it simply ignored the provisions of Article 11, by first failing to appoint the Enforcement Decisions Committee, and then by failing to recognise the distinction between the roles of its Executive Committee and the Enforcement Decisions Committee.*

52. *It is quite clear that as from the date of the coming into force of Act VIII of 2019, the Authority had to refer decisions relating to enforcement to the Enforcement Decisions Committee. This was certainly not done in this particular case.*

53. *The provisions of Article 11 and more specifically the role, functions and powers of the Enforcement Decisions Committee, were intended to create a system through which decisions are taken by a committe that is deemed as independent and distinct from the Board of Governors and the Executive Committee of the Authority. The Tribunal will not delve into whether this mechanism has the necessary safeguards to ensure that the principles of natural justice are observed since this matter goes beyond the remit of this Tribunal, and more specifically goes beyond the remit of this Appeal. The principle however remains that in this case, the procedures established under article 11 of chapter 330 of the Laws of Malta were not observed.*

54. *As already explained, the Enforcement Decisions Committee is not a sub-committee of the Executive Committee. Hence one cannot certainly argue that the decision was infact taken by the competent organ within the Authority rather than a sub-committee of the competent organ. Neither can one argue that the Enforcement Decisions Committee has not been vested with the exclusive jurisdiction to take enforcement action on matters falling under the supervision of the Authority other than in the limited and exceptional circumstances listed in the Proviso to Article 11(1) and the minor matters listed in Article 11(3).*

55. *This failure tantamounts to a serious breach by the Authority and a departure from the provisions of Chapter 330 of the Laws of Malta. The action taken against the Appellant is of a serious nature not only because of the value of the penalty imposed, but also because of the subjective assessment made by*

the Authority in relation to the manner through which the Appellant operated its licensed activity.

56. *The Authority is responsible for this failure of observance of the law and, as already explained, the failure to refer the matter to the Enforcement Decisions Committee in accordance with the provisions of Article 11 cannot be justified.*

57. *David Fabri (fn. 21* Studies in Maltese Regulation: Financial Services Law, *2022) notes that:*

"The power and the right to impose administrative sanctions, including the withdrawal of licences and the imposition of penalties, against licence-holders and others are one of the most important parts of the armoury in the hands of a strong regulatory agency. Throughout its existence since 1988, this power was always vested in the Executive Committee, or in the Supervisory Committee which had for some years replaced it ... ...

New Article 11 introduced a few years back purported to change this situation and added a new organ wherbey the regulators were no longer empowered to issued administrative sanctions directly themselves, but could henceforth only issue recommendations. The Enforcement Decisions Committee (EDC) ... was set up to receive these recommendations and decide upon them. This way, the MFSA could shed the accusation, often made, that the Executive Committee was acting as the proverbial prosection, judge and jury. Enforcement decisions were now to be taken by a different body whose sole function was to receive, accept or reject such recommendations." *(fn. 22 Pp. 41)*

*The same Authority whilst being very criticial, and rightly so, of the drafting and incoherence of certain provisions regulating the Enforcement Decisions Committee, clearly concludes that the role of the said Committee is intended to create a create demarcation or roles and duties within the Authority – "*The EDC is not just another debating committee, but has a special, specific and very significant role and powers. It is now the most important enforcement decision-taker within the MFSA." (*fn. 23 Supra pp.42)*

58. *Procedural rules are intimately connected to the rules of Natural Justice and procedural ultra vires may lead to consequences in relation to the validity of the decision take.* "In public law, a requirement may be "mandatory" or "directory". A breach of a directory norm does not bring about the nullity of the administrative act, but that of a mandatory one does." *(fn. 24 Tonio Borg, Maltese Administrative Law, 2021, pp. 173)*

59. *In* **Denise Buttigieg vs Rector University of Malta** *(fn. 25 First Hall Civil Court per Mr. Justice N. Cuschieri decided on the 22n December 2003) the Court held*

that failure in an examination on a subject that was not declared in writing to be a core subject, was declared without effect:

"Mill-banda l-oħra però mil-lat purament legali ma jistax jiġi njorat il-fatt li, kuntrarjament għal dak stipulat fir-regolament numru 10, ma rriżulta minn imkien in iscriptum li dak is-suġġett huwa wieħed obbligatorju. Dan ir-regolament jirrikjedi f'termini espressi u ċari li fil-katalogu jkun hemm indikat is-suġġetti meqjusa bħala obbligatorji, u in mankanza ta' dan, ma jistax jingħad in stricto jure li xi study unit huwa obbligatorju fit-termini tar-regolament imsemmija magħmula mill-istess Università.

Ir-ratio legis f'dan ir-rigward huwa manifest u ċioe' li dawk l-istudy units li huma obbligatorji u li ghalhekk fuqhom tiddependi l-ħajja universitarja tal-istudenti fil-korsijiet rispettivi jkunu indikati f'mod ċar, u li l-obbligatorjietà tagħhom tkun tirriżulta inekwivokabilment bil-miktub; b'hekk ikunu magħrufa lil min, u verifikabbli minn, kull min hu involut u interessat, bil-konsegwenza li tiġi eliminata sitwazzjoni ta' inċertezza li tista' tkun ta' preġudizzju għall-istudenti. Ir-regolament jirrikjedi espressament li s-suġġett jiġi ndikat bħala obligatorju fil-katalogu ppubblikat, u għalhekk mhux suffiċjenti li fil-bidu, jew matul, is-sena l-għalliema jinformaw lill-istudenti verbalment li dawk is-suġġetti elenkati fil-handout huma obbligatorji in toto jew in parte."

60. *In* **Attard vs Prof. Roger Ellul Micallef noe** *(fn. 26 Court of Appeal 4th March 1998), the Court declared null a change in admission requirements to a University Course, since the changes were not done through the enactment of subsidiary legislation as mandated by law.*

61. *The failure to observe the provisions of Article 110(1) of the Constitution in relation to disciplinary proceedings against public officers through the Public Service Commission renders the action null (fn. 27 Denis Tanti vs Prim Ministru et, Court of Appeal 16th November 2004) .*

62. *The UK Court of Appeal in the case* ***Bradbury vs Enfield LBC*** *(fn. 28 Decided on the 23rd August 1967 (1WLr 1311) held:*

"It is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.

63. *Similarly there are numerous other examples where the failure to observe mandatory procedures were deemed as null by the UK Courts (fn. 29 Administrative Law, Wade 7 Forsyth 11th Edit) pp. 185 et seq).*

64. It is amply clear that in accordance with the provisions of Article 11 of Chapter 330 of the Laws of Malta, matters relating to enforcement had, as from March 2019, to be referred and determined by the Enforcement Decisions Committee. This procedure is mandatory in nature and the failure to observe the provisions of the law and this specific requirement, impinge on the validity of the Decision."

L-Appell

6. L-Awtorità appellanta intavolat ir-rikors tal-appell tagħha fil-25 ta' Lulju, 2023, fejn qiegħda titlob għar-revoka tad-deċiżjoni appellata, bl-ispejjeż kontra s-soċjetà appellata, billi wkoll il-Qorti tibgħat lura l-atti tal-appell quddiem it-Tribunal sabiex dan jiddeċiedi l-bqija tal-aggravji tagħha. Tgħid li l-aggravji tagħha huma dawn: (i) id-deċiżjoni appellata hija *ultra vires* u t-Tribunal ma kellu l-ebda setgħa sabiex ta dik id-deċiżjoni; (ii) id-deċiżjoni appellata hija wkoll *ultra vires* għaliex hija laqgħet aggravji li kienu ta' natura kostituzzjonali; (iii) it-Tribunal kien skorrett meta qajjem il-punt in kwistjoni *ex officio,* u qiesu bħala wieħed ta' ordni pubbliku; (iv) it-Tribunal kien żbaljat meta ddikjara li d-deċiżjoni tagħha kienet nulla minħabba nuqqas ta' ħarsien ta' rekwiżit proċedurali; u (v) hija ma kellhiex l-opportunità li tiddefendi ruħha kontra l-eċċezzjoni li saret mit-Tribunal *ex officio,* filwaqt li s-suppożizzjonijiet tat-Tribunal ma kienux jistrieħu fuq prova.

7. Is-soċjetà appellata wieġbet fis-7 ta' Novembru, 2023 fejn issottomettiet li d-deċiżjoni appellata għandha tiġi kkonfermata, u l-appell odjern miċħud, bl-ispejjeż kontra l-Awtorità appellanta.

Konsiderazzjonijiet ta' din il-Qorti

8. Din il-Qorti ser tgħaddi sabiex tikkunsidra l-aggravji li qiegħda tressaq l-Awtorità appellanta, u dan fid-dawl ta' dak li ddeċieda t-Tribunal, u meħud in konsiderazzjoni s-sottomissjonijiet magħmulin mis-soċjetà appellata.

9. L-Awtorità appellanta tibda billi filwaqt li tirrileva li l-kompetenza tat-Tribunal hija limitata skont kif jipprovdi s-subartikolu 21(9) tal-Att dwar l-Awtorità għas-Servizzi Finanzjarji ta' Malta, tissottometti li t-Tribunal ikkunsidra u laqa' żewġ aggravji li kienet ressqet quddiemu s-soċjetà appellata hekk imsejħa 'PRELIMINARY PLEAS', fejn qabel xejn din kienet iddikjarat li *"The Appellant respectfully submits that the whole process impinges on the Appellant's right to a fair hearing for the following reasons",* u ttrattathom bħala "*Lack of Fair Hearing and due Process – Manifest Unfairness"* u *"Lack of Impartiality".* Issostni li dawn m'huma xejn għajr ilmenti ta' xejra kostituzzjonali, u għalhekk eċċepiet li t-Tribunal m'għandux kompetenza jikkunsidrahom. L-Awtorità appellanta minn hawn għaddiet sabiex spjegat il-proċess li kien seħħ quddiem it-Tribunal, fejn wara li l-proċeduri kienu ġew differiti għas-17 ta' Mejju, 2023 għal deċiżjoni, u saħansitra ġew ippreżentati n-noti ta' sottomissjonijiet rispettivi tal-partijiet fil-15 ta' Mejju, 2023, jumejn qabel il-jum li fih kellha tingħata d-deċiżjoni tat-Tribunal, dan ħareġ digriet fejn issospenda l-prolazzjoni tad-deċiżjoni. Tgħid li fl-imsemmi digriet, it-Tribunal għamel riferiment għaż-żewġ aggravji preliminari appena msemmija, u filwaqt li kkunsidra d-disposizzjonijiet tas-subartikolu 11(1) tal-Kap. 330, stqarr li *"the procedures used by the Authority and the compliance or otherwise of such procedures with the provisions of the applicable law are matters that the*

Tribunal should consider and being a matter of public order, may also be raised ex officio". B'hekk tgħid li t-Tribunal ikkunsidra li l-ħarsien tar-rekwiżiti proċedurali *ai termini* tal-liġi, kellu jiġi kkunsidrat taħt l-aggravji tas-soċjetà appellata, u dan skont l-Awtorità appellanta fejn saħansitra ma kienet ġiet issollevata l-ebda kwistjoni bħal din fir-rikors tal-appell tagħha jew fil-provi jew anki fin-nota ta' sottomissjonijiet. Tkompli tgħid li t-Tribunal għalhekk ikkonċeda terminu ta' ħmistax-il jum sabiex il-partijiet jippreżentaw is-sottomissjonijiet ulterjuri tagħhom bil-miktub fuq din il-kwistjoni. L-Awtorità appellanta tissottometti li fid-deċiżjoni appellata, it-Tribunal ħoloq distinzjoni bejn in-natura kostituzzjonali tal-aggravji, u dik li tirrigwarda "*the lack of due process and impartiality in the manner in which the Authority determines the action that it takes against a regulated entity",* liema distinzjoni qatt ma kienet saret mis-soċjetà appellata, li fir-rikors tal-appell tagħha quddiem it-Tribunal indikat li l-aggravji in kwistjoni kienu ta' natura kostituzzjonali. L-Awtorità appellanta tirrileva li saħansitra fl-introduzzjoni tagħha għar-rikors, is-soċjetà appellata qalet *"The Appellant respectfully submits that the whole process impinges on the appellant's right to a fair hearing for the following reasons.".* Tissottometti li t-Tribunal għadda sabiex laqa' l-appell tas-soċjetà appellata u ddikjara d-deċiżjoni tagħha nulla wara li kkunsidra punt li ma kienx ġie ssollevat mill-imsemmija soċjetà appellata, iżda li qajjem huwa stess *ex officio* fid-digriet tiegħu kif ġjà spjegat. B'hekk hija tgħaddi sabiex tispjega l-ewwel aggravju tagħha.

L-ewwel aggravju: *[id-deċiżjoni appellata hija* ultra vires*]*

10. Qabel xejn l-Awtorità appellanta ssostni li r-raġunijiet li ser tgħaddi sabiex tispjega ħalli turi għaliex fil-fehma tagħha d-deċiżjoni appellata hija *ultra vires,* huma estraneji għan-natura kostituzzjonali tal-aggravji li t-Tribunal laqa' u b'hekk ammetta l-appell tas-soċjetà appellata. Tibda billi tiddikjara li t-Tribunal ma kellu l-ebda setgħa sabiex jiddeċiedi kif għamel, u tgħaddi sabiex tiċċita d-disposizzjonijiet tas-subartikolu 21(9) tal-Kap. 330 in sostenn tal-argument tagħha. Tgħid li għalkemm is-soċjetà appellata ma ndikatx taħt liema provvediment tal-liġi hija kienet qiegħda tressaq l-aggravju tagħha ta' *"Lack of Fair Hearing and Due Process",* wieħed għandu jippreżumi li hija kienet qiegħda tressqu taħt il-kappa ta' inġustizzja manifesta, u dan ġaladarba ma kienx jaqa' taħt il-provvedimenti l-oħra tas-subartikolu riferut. Issostni li għalhekk it-Tribunal kellu jinvestiga jekk id-deċiżjoni appellata kienitx waħda inġusta manifestament *o meno,* fid-dawl taż-żewġ aggravji li saru mis-soċjetà appellata. Iżda tgħid li t-Tribunal wasal għall-konklużjoni tiegħu li d-deċiżjoni appellata hija nulla għaliex skont hu ma ttieħditx mill-Kumitat dwar Deċiżjonijiet tal-Infurzar bi ksur tas-subartikolu 11(1) tal-Kap. 330, u għaldaqstant kien żbaljat għal diversi raġunijiet. Hija tfisser is-segwenti: (i) it-Tribunal ma spjegax kif fil-fehma tiegħu d-deċiżjoni tagħha kienet manifestament inġusta; (ii) il-konsiderazzjonijiet tiegħu ma kienux jinkwadraw fid-definizzjoni ta' inġustizzja manifesta; (iii) il-konsiderazzjonijiet tat-Tribunal kienu jaqgħu fl-ambitu ta' stħarriġ ġudizzjarju. Tirrileva li skont is-subinċiż (b) tas-subartikolu 21(9) tal-Kap. 330, it-termini *'inġusta manifestament'* huma marbutin mad-deċiżjoni nnifisha li hija tkun ħadet u mhux ma' xi att amministrattiv kif jitlob stħarriġ ġudizzjarju. Fil-każ odjern, il-punt li tqajjem *ex officio* mit-Tribunal, jiġifieri li kien il-Kumitat Eżekuttiv li ħa d-deċiżjoni, bl-ebda mod ma jolqtu l-validità sostantiva

ta' dik id-deċiżjoni, tant hu hekk li t-Tribunal iddikjara li huwa ma kienx qed jħoss il-bżonn li jinvestiga l-mertu tal-appell. Għalhekk fil-fehma tagħha, id-deċiżjoni tagħha ma kienitx waħda manifestament inġusta, u t-Tribunal kien żbaljat meta laqa' r-rikors tas-soċjetà appellata *ai termini* tal-aggravji preliminari tagħha. Tgħid li l-kwistjoni proprja li tqanqlet kienet dwar osservanza *o meno* ta' rekwiżiti proċedurali, iżda hija kienet ser tittratta wkoll il-kwistjoni ta' nuqqas ta' osservanza tal-prinċipji tal-ġustizzja naturali, stante li t-Tribunal stess wara li ċaħad ż-żewġ aggravji preliminari tas-soċjetà appellata mil-lat kostituzzjonali tagħhom, irrileva li *"The other facet of the said preliminary pleas when read together, is the lack of due diligence process and impartiality in the manner which the Authority determines the action that it takes against a regulated entity".* Meħud in konsiderazzjoni dak li qal it-Tribunal, l-Awtorità appellanta tikkontendi li għalhekk dak li wasslu għad-deċiżjoni tiegħu m'għandux jiġi kkunsidrat *ai termini* ta' inġustizzja manifesta, iżda *ai termini* tan-nuqqas *o meno* tal-osservanza ta' rekwiżiti proċedurali fl-ambitu tal-prinċipji ta' ġustizzja naturali. Tissottometti li dak li jikkontemplaw id-disposizzjonijiet tas-subartikolu 21(9) tal-Kap. 330, ma jkoprix ilmenti dwar nuqqas ta' osservanza ta' rekwiżiti proċedurali jew ta' tħaris tal-prinċipji tal-ġustizzja naturali, u għalhekk it-Tribunal ma kellu l-ebda setgħa li jiddeċiedi kif għamel, u konsegwentement id-deċiżjoni appellata hija *ultra vires.* Tgħid li dan għall-kuntrarju ta' dak li jseħħ f'proċeduri ta' stħarriġ ġudizzjarju, u bħala eżempju hija tiċċita l-artikolu 469A tal-Kap. 12. L-Awtorità appellanta tissottometti li applikata l-massima kardinali *ubi lex voluit dixit, ubi noluit tacuit,* għandu jingħad li l-leġislatur ma riedx jippermetti aggravji msejsa fuq il-ħarsien ta' rekwiżiti proċedurali jew tal-prinċipji tal-ġustizzja naturali. Tikkontendi li l-

kompetenza ta' kull tribunal stabbilit mil-liġi, għandha tiġi interpretata b'mod restrittiv, u dan għandu jirrispetta l-limiti tal-poteri tiegħu skont il-liġi. L-aħħar sottomissjoni tal-Awtorità appellanta tirrigwarda r-riferiment tat-Tribunal għad-disposizzjonijiet tal-Kap. 490. Tgħid li hija ma taqax fid-definizzjoni mogħtija f'dik il-liġi ta' *'tribunal amministrattiv',* u għaldaqstant id-dispożizzjonijiet tiegħu ma kienux applikabbli fil-konfront tagħha, iżda wkoll ma kienux jagħtu lok għall-estensjoni tal-poteri tat-Tribunal mogħtija permezz tas-subartikolu 21(9) tal-Kap. 330 sabiex jissindika d-deċiżjonijiet tagħha taħt dik il-liġi.

It-tieni aggravju: *[id-deċiżjoni appellata hija wkoll* ultra vires *għaliex hija laqgħet aggravji li kienu ta' natura kostituzzjonali]*

11. Il-Qorti ser tittratta t-tieni aggravju tal-Awtorità appellanta għaliex hawnhekk ukoll hija qiegħda tissolleva l-kwistjoni li d-deċiżjoni appellata hija *ultra vires,* għalkemm għal raġunijiet diversi minn dawk appena spjegati, iżda dak li ser tgħid il-Qorti jolqot proprju ż-żewġ aggravji. L-aggravju tal-Awtorità appellanta hawnhekk huwa li d-deċiżjoni appellata hija *ultra vires,* għaliex l-ewwel żewġ aggravji tas-soċjetà appellata li ġew milqugħa mit-Tribunal huma ta' natura kostituzzjonali, u għalhekk ma kellu l-ebda kompetenza jiddeċidihom. Tissottometti li s-soċjetà appellata saħansitra fetħet is-sottomissjonijiet tagħha fir-rikors tal-appell tagħha quddiem it-Tribunal billi stqarret li *"The Appellant respectfully submits that the whole process impinges on the Appellant's right to a fair hearing for the following reasons".* L-Awtorità appellanta tirrileva li l-pożizzjoni tat-Tribunal qabel id-deċiżjoni appellata kienet li huwa m'għandu l-ebda kompetenza sabiex jindirizza lmenti bħal dawn, u in sostenn tal-argument

tagħha hija tagħmel riferiment għad-deċiżjoni tat-Tribunal tat-28 ta' Settembru, 2012 fl-ismijiet **Christopher Pace *vs.* L-Awtorità Għas-Servizzi Finanzjarji ta' Malta**. Dan ukoll fejn l-appellant ikun ittenta jagħmel l-argument tiegħu taħt il-kappa ta' inġustizzja manifesta *ai termini* tal-para. (b) tas-subartikolu 21(9) tal-Kap. 330, u hawnhekk tagħmel riferiment għal deċiżjoni tat-Tribunal fl-ismijiet **JD Capital p.l.c. *vs.* MFSA** tat-30 ta' Ġunju, 2021. Tgħid li l-argumenti li ressqet is-soċjetà appellata fir-rigward tal-ewwel żewġ aggravji tagħha, huma kollha marbutin mal-allegazzjoni tagħha ta' ksur tad-drittijiet fundamentali tagħha, fejn fl-għeluq tas-sottomissjonijiet tagħha dwar it-tieni aggravju, issostni li *"[t]hese breaches of the Constitution and the European Convention on Human Rights vitiate the MFSA's Decision and render it intrinsically and manifestly unfair".* L-Awtorità appellanta ssostni li *ictu oculi* huwa ċar li dawn l-aggravji preliminari tas-soċjetà appellata huma ta' natura kostituzzjonali, u li ma hemm l-ebda *'facet'* ieħor kif suġġerit mit-Tribunal. Għalhekk l-istess Tribunal ma kellu l-ebda kompetenza li jittrattahom, u tgħid li huwa stess ammetta dan meta ċaħadhom fejn dawn kienu jolqtu l-kostituzzjonalità *o meno* tal-proċedura addottata minnha sabiex ittieħdet id-deċiżjoni fil-konfront tas-soċjetà appellata. Issostni li t-Tribunal ma kellu qatt jagħmel distinzjoni bejn *'facet'* kostituzzjonali u dak li mhux, u filwaqt li tissottometti li hija tinsab ferm perplessa dwar dak li ddeċieda t-Tribunal, issottomettiet li dan sar biss sabiex l-imsemmi Tribunal jinkwadra argument li huwa kien qajjem *ex officio* fil-parametri tal-aggravji li kienet ressqet quddiemu s-soċjetà appellata.

12. Is-soċjetà appellata ssostni li d-deċiżjoni appellata hija waħda ġusta, studjata, u korretta fil-liġi u fil-fatti, tant hu hekk li m'għandhiex tiġi disturbata malajr. Tibda billi tirrileva li t-Tribunal iddikjara kemm-il darba fid-deċiżjoni appellata li huwa ma kienx ser jidħol f'kwistjonijiet ta' natura kostituzzjonali, u għalhekk ċaħad *in parte* l-eċċezzjonijiet preliminari li hija kienet ressqet. Tgħid li minflok, it-Tribunal sab li l-Awtorità appellanta ma kienitx imxiet mal-liġi li tirregolaha, u dan kien biżżejjed sabiex jannulla d-deċiżjoni tagħha. Is-soċjetà appellata tisħaqq għal darb'oħra li t-Tribunal sabiex ma jassumiex setgħat tal-Qorti Kostituzzjonali, qal ukoll fil-para. 53 tad-deċiżjoni appellata li huwa ma kienx ser jidħol fil-mertu dwar jekk l-Awtorità appellanta kienitx ukoll kisret il-prinċipji ta' ġustizzja naturali, u dan filwaqt li ddikjara li ma setax jinjora nuqqas daqstant serju. Hawnhekk is-soċjetà appellata tissottometti li kienet l-Awtorità appellanta li wettqet l-investigazzjoni, ikkunsidrat dak li hija kienet qalet għad-difiża tagħha, u mponiet penali li kienet kompitu tal-*Enforcement Decisions Committee* kif kienet titlob il-liġi. Tagħmel l-argument li l-proċeduri meħuda kellhom in-natura ta' proċeduri kriminali minħabba n-natura tal-piena imposta, u għalhekk l-Awtorità appellanta bħala awtorità b'setgħat kważi ġudizzjarji, kellha tapplika l-prinċipji tal-ġustizzja naturali. Hija tiddefendi d-deċiżjoni appellata fid-dawl tal-parzjalità evidenti li kienet tirriżulta min-naħa tal-Awtorità appellanta, anki jekk din ma kinitx qorti jew tribunal. Tikkontendi li dawn il-kwistjonijiet jaqgħu fl-ambitu tad-dritt amministrattiv, u għalhekk it-Tribunal seta' jiddeċidihom mingħajr il-bżonn ta' referenza għal proċeduri oħra anċillari jew supplimentari quddiem qorti ta' ġurisdizzjoni kostituzzjonali.

13. Il-Qorti ser tibda billi tikkunsidra dak li ssottomettiet is-soċjetà appellata fir-rikors tal-appell li hija ressqet quddiem it-Tribunal. Tirrileva li taħt il-kap

"PRELIMINARY PLEAS", hija taqsam l-ilmenti tagħha fi tnejn, fejn l-ewwel wieħed huwa ntestat "*Lack of Fair Hearing and Due Process – Manifest Unfairness",* u t-tieni wieħed '*lack of impartiality'.* Meta tfisser l-ewwel ilment, is-soċjetà appellata mill-ewwel qalet li hawnhekk hija kienet qiegħda tqajjem kwistjoni ta' ksur serju tad-dritt fundamentali tagħha għal smigħ xieraq kif protett mis-subartikolu 39(2) tal-Kostituzzjoni ta' Malta u l-Artikolu 6 tal-Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fundamentali. Hija argumentat li l-ksur manifest ta' dan id-dritt tagħha jikkostitwixxi '*manifest unfairness'* li jagħti dritt ta' appell quddiem it-Tribunal skont il-para. (b) tas-subartikolu 21(9) tal-Kap. 330. Qalet li fl-ewwel lok il-penali diskrezzjonarji u eċċessivi mposti mill-Awtorità appellanta wara l-investigazzjoni tagħha stess, għandhom jitqiesu fin-natura tagħhom bħala sanzjonijiet kriminali, u għalhekk setgħu biss jiġu imposti minn qorti u mhux mill-Awtorità appellanta. B'hekk is-soċjetà appellata sostniet li kien ser jiġi assigurat smigħ xieraq *ai termini* tal-artikolu 39 tal-Kostituzzjoni. Dwar it-tieni lment ta' *'lack of impartiality',* is-soċjetà appellata rrilevat li l-korp investigattiv tal-Awtorità appellata u l-korp li jieħu d-deċiżjonijiet mhumiex distinti, u għalhekk m'hemm l-ebda imparzjalità fil-proċess sħiħ, u dan bi ksur tal-prinċipji tal-ġustizzja naturali u tad-dritt għal smigħ xieraq kif protett mill-Kostituzzjoni u mill-Konvenzjoni Ewropea. Sostniet li dan il-ksur tal-Kostituzzjoni u tal-Konvenzjoni Ewropea jivvizzjaw id-deċiżjoni tal-Awtorità appellata, u jagħmluha manifestament inġusta, tant hu hekk li għandha tiġi revokata mit-Tribunal.

14. Minn dan kollu jirriżulta b'mod ċar li l-aggravji tas-soċjetà appellata quddiem it-Tribunal kienu ta' natura kostituzzjonali u konvenzjonali, u

għaldaqstant it-Tribunal kellu jastjeni milli jieħu konjizzjoni tagħhom. Iżda minflok huwa ċaħadhom fuq binarju differenti, fejn b'mod kontradittorju għall-aħħar iddikjara li huwa ma kellu l-ebda ġurisdizzjoni li jiddeċiedi l-kwistjoni li s-soċjetà appellata kienet qiegħda tissolleva fl-ewwel żewġ aggravji tagħha għaliex skont hu l-Awtorità appellanta kienet aġixxiet *ai termini* tas-subartikolu 17(6) tal-Kap. 450, l-artikolu 46 tal-Kap. 514, u s-subartikolu 51(7) tal-Kap. 331. Dan qal li kien jikkostitwixxi l-ewwel '*facet*' tal-ewwel żewġ aggravji, u għadda sabiex ikkunsidra t-tieni *'facet'* tagħhom, li jispjega li huwa n-nuqqas ta' smigħ xieraq u ta' imparzjalità fil-mod li l-Awtorità appellanta tiddeċiedi fil-konfront ta' entità regolata.

15. It-Tribunal hawnhekk ikkunsidra l-proċess li wassal għall-impożizzjoni tal-penali amministrattiva, u sab li l-Awtorità appellanta kienet aġixxiet bi ksur tal-liġi meta warrbet id-disposizzjonijiet tal-artikolu 11 tal-Kap. 330, billi m'appuntatx l-*Enforcement Decisions Committee,* u sussegwentement billi naqset milli tosserva d-distinzjoni bejn ir-rwol tal-*Executive Committee* tagħha u dak tal-imsemmi *Enforcement Decisions Committee.* B'hekk iddikjara li l-proċeduri stabbiliti permezz tal-artikolu 11 tal-Kap. 330 ma kienux ġew osservati, u dan kien iwassal sabiex id-deċiżjoni tal-Awtorità appellata kienet waħda difettuża, u għalhekk nulla.

16. Il-Qorti ma tistax tifhem kif dan kollu jista' jinkwadra fil-parametri tal-ilmenti li ressqet is-soċjetà appellata quddiem it-Tribunal għaliex tassew jaqgħu lil hinn mill-ambitu tal-kwistjoni sħiħa li kienet qiegħda tiġi ssollevata u li tagħha huwa ma kellu l-ebda kompetenza. Tgħid li ma kien hemm bżonn l-ebda interpretazzjoni ta' dak li kienet qiegħda tissottometti s-soċjetà appellata,

għaliex hija kienet tassew ċara fl-argumenti tagħha, u l-Qorti tinsab ferm perplessa kif tassew it-Tribunal qabad ħsieb li mhux biss mhuwiex rifless fis-sottomissjonijiet tas-soċjetà appellata, iżda wkoll huwa legalment żbaljat għall-aħħar. Jekk il-Qorti kellha taċċetta li l-ewwel żewġ aggravji preliminari tas-soċjetà appellata kellhom jiġu kkunsidrati kif deherlu t-Tribunal, mil-lat ta' proċedura difettuża addotata mill-Awtorità appellanta, dan seta' biss jagħmlu jekk kien permess *ai termini* tas-subartikolu 21(9) tal-Kap. 330. Madankollu jirriżulta biċ-ċar mid-dispożizzjonijiet ta' dan is-subartikolu, li huwa ma kellu l-ebda kompetenza jittratta l-ilmenti tas-soċjetà appellata. Kif sewwa fehmet l-Awtorità appellanta, is-soċjetà appellata ttentat tqiegħed l-ilmenti tagħha fl-ambitu tal-imsemmija disposizzjonijiet, senjatament dawk tas-subinċiż (b), fejn dan jagħti lok għal appell meta hemm allegazzjoni li d-deċiżjoni tal-Awtorità appellanta hija 'inġusta manifestament'. Iżda l-Qorti tgħid li l-aggravji tagħha jittrattaw ksur tad-dritt ta' smigħ xieraq riżultat tal-proċess li wassal għall-impożizzjoni tal-penali amministrattiva, filwaqt li s-subinċiż suriferit jikkunsidra appell minn deċiżjoni tal-Awtorità appellanta meta din tkun manifestament inġusta fil-mertu. Għaldaqstant hawnhekk ukoll it-Tribunal kien kompletament żbaljat fid-deċiżjoni tiegħu.

<u>Decide</u>

Għar-raġunijiet premessi l-Qorti taqta' u tiddeċiedi billi tilqa' l-appell tal-Awtorità appellanta għaliex it-Tribunal ma kellu l-ebda kompetenza jiddeċiedi l-ewwel żewġ aggravji tas-soċjetà appellata, tħassar u tirrevoka d-deċiżjoni

appellata, u tibgħat l-atti tal-proċeduri odjerni lura quddiem it-Tribunal sabiex dan jisma' u jiddeċiedi l-kumplament tal-aggravji tas-soċjetà appellata.

L-ispejjeż tal-ewwel istanza u ta' dan l-appell għandhom ikunu a karigu tas-soċjetà appellata.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur