MALTA

QORTI CIVILI
PRIM' AWLA
(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF
LINO FARRUGIA SACCO

Seduta ta' l-4 ta' Mejju, 2009

Rikors Numru. 39/2005

Paul Muscat u Joseph Muscat
vs
Avukat Generali u Ministru tal-Gustizzja u b'digriet tat-12 ta' Lulju 2005 gie kjamat fir-rikors ir-Registratur Qrati Civili u Tribunali

Il-Qorti,

A. RIKORS:
Rat ir-rikors tar-rikorrenti li bih esponew:

Illi r-rikorrent huwa konvenut appellant fil-kawza fl-ismijiet "John u Josephine konjugi Bugeja f'isimhom personali u ghan-nom u in rapprezentanza tas-socjeta` Sports Hotel Limited u b'digriet ta' l-10 ta' Frar 2000 il-gudizzju gie trafuz fil-persuna ta' Giuseppina armla Bugeja, Charmaine mart Antonio Napoli u Sandro Bugeja sabiex ikomplu l-kawza minflok l-attur John Bugeja li miet fil-mori tal-kawza

-vs- Caral Limited u ghal kull interess li jista’ jkollhom Paul Muscat u Joseph Muscat’’ (Citazzjoni Nru. 2766/97RCP).

Illi fil-31 ta’ Ottubru 2002 l-Onorabbli Qorti Civili Prim’Awla tat sentenza fil-meritu fl-imsemmija kawza. Ir-rikorrent appella mis-sentenza permezz ta’ rikors ipprezentat fl-20 ta’ Novembru 2002. Barra minn hekk, huwa ried ukoll jattira l-attenzjoni tal-Qorti ghall-fatt li saru diversi cedoli ta’ depozitu tal-kera dovut, liema cedoli ma ssemmewx fis-sentenza appellata. Ir-rikors ta’ l-appell tar-rikorrent gie ipprezentat mill-Assistent Avukat ghall-Ghajnuna Legali mahtur mill-Istat, cioe` mill-intimat Ministru tal-Gustizzja.

Illi l-imsemmi appell tar-rikorrent gie dikjarat dezert fl-20 ta’ Novembru 2003.

Illi l-kawza tikkoncerna x-xiri ta’ lukanda. Kif jirrizulta mill-folder tar-rikors ta’ l-appell, l-indirizzi gew maqlubin bi zball u l-indirizz ta’ l-intimat gie indikata bhala ”Olinda Hotel, St. George’s Road, St. Julian’s’’. Izda l-atturi appellati, cioe` Josephine Bugeja *proprio et nomine* u Giuseppina Bugeja, Charmaine Napoli u Sandro Bugeja joqghodu band’ohra. Minhabba din l-indikazzjoni zbaljata, l-appelllati ma nstabux f’dak l-indirizz u ma gewx notifikati fi zmien sena, u allura l-appell tieghu gie dikjarat dezert.

Illi minhabba f’hekk, ir-rikorrent bhala konvenut appellant bata u ser ibati pregudizzju kbir, intortament.

Illi permezz ta’ rikors ipprezentat fit-13 ta’ Settembru 2004 ir-rikorrent talab lill-Onorabbli Qorti ta’ l-Appell thassar u tirrevoka ‘*contrario imperio*’ d-digriet taghha li bih ordnat id-dezerzjoni tal-kawza.

Illi b’digriet moghti fil-15 ta’ Settembru 2004, l-Onorabbli Qorti ta’ l-Appell tat is-segwenti provvediment:
“Tosserva li kien ir-rikorrent (appellant) stess, cioe` Paul Muscat li tramite l-legali tieghu, ta l-indirizz ‘Olinda Hotel’, St. George’s Road, St. Julian’s, bhala l-indirizz fejn kellu jigi notifikat ‘l-intimat’ (ara l-folder relattiv), u fi zmien sena

shiha ma ghamel assolutament xejn biex jikkorregi l-izball tieghu;

It-talba, ghalhekk, ma hix wahda gustifikata u konsegwentement din il-Qorti qed tichadha.'''

Illi fir-realta`, l-indirizz skorrett ta' l-intimat ma tnizzilx mir-rikorrent appellant izda mill-Assistent Avukat ghall-Ghajnuna Legali u Prokuratrici Legali li giet inkarigata mill-Assistent Avukat ghall-Ghajnuna Legali sabiex tiehu hsieb il-prezentata tar-rikors ta' l-appell. Ghalhekk, ir-rikorrent mhux biss ma kellu l-ebda tort ghall-izball li sar, izda lanqas biss kien jaf x'ghandu jsir proceduralment u liema terminu kellu jigi osservat. Konsegwentement, il-konkluzjoni li huwa ikkommetta xi zball jew li "fi zmien sena shiha ma ghamel assolutament xejn biex jikkoregi l-izball tieghu'' hija, bir-rispett kollu, wahda skorretta.

Illi r-rikorrent ressaq rikors iehor li fih rega' talab it-thassir tad-digriet ta' dezerzjoni. Izda l-Onorabbli Qorti ta' l-Appell fl-4 ta' Novembru 2004 iddegretat hekk:
"tosserva li dan ir-rikors ma jzid xejn sostanzjali ma' dak tas-7 ta' Settembru, 2004, u dan peress li n-notifika ta' Josephine Bugeja f'indirizz korrett bl-inkartament ta' l-ghajnuna legali ma ghandu x'jaqsam xejn man-notifika tar-rikors ta' l-appell (il-Marixxal u obbligat li jinnotifika, jew jipprova jinnotifika, att fl-indirizz lilu moghti riferibbilment ghal dak l-att – u huwa proprju dan li ghamel il-Marixxal Stivala, ara riferta, l-unika riferta, tat-30 ta' April, 2003);

Tosserva wkoll li l-appellant kellu minn April 2003 sal-20 ta' Novembru, 2003 biex jinnotifika fl-indirizz korrett, izda ma ghamel xejn minn dan.

Konsegwentement tichad it-talba.''

Illi fil-kaz ta' **Escolano et v. Spain** tal-25 ta' Jannar 2000, il-Qorti Ewropea ghad-Drittijiet tal-Bniedem irriteniet illi l-interpretazzjoni ta' regola ta' procedura b'mod partikolarment strett ipprivat lill-applikanti mid-dritt ta' access lill-Qorti sabiex jinstemghu l-pretensjonijiet taghhom:

"……The Court reiterates that the rules governing time-limits for appeals are intented to ensure a proper administration of justice. That being so, the rules in question or their application, should not prevent litigants from using an available remedy. … Since the issue concerns the principle of legal certainty, it is not merely a problem of intepretation of a legal provision in the usual way but an unreasonable construction of a procedural requirement which prevented a claim for compensation being examined on the merits and thereby entailed a breach of the right to the effective protection of the courts. The parties must be able to avail themselves of the right to bring an action or to lodge an appeal. Otherwise, the courts could substantialy reduce the time for loding an appeal or even render any appeal impossible ….. The court consequently considers that the domestic courts' particularly strict interpretation of procedural rule deprived the applicants of the right of access to a court (see 'mutatis mutandis' the ***Perez de Rada Cavanilles v. Spain*** *judgement of 28 October 1998, pp. 3256-57, #9). There has been therefore a violation of Article 6(1) of the Convention".*

Illi fil-kaz **Manibardo v. Spain** tal-15 ta' Frar 2000, l-Audencia Privincial ta' Tarragona iddikjara appell inammissibbli skond il-ligi Spanjola minhabba n-nuqqas ta' depozitu ta' somma flus skond ordni ta' qorti ta' l-ewwel istanza. Izda l-Qorti Ewropea irriteniet:
"…... *the applicant's appeal was declared inadmissble owing to her failure to deposit the requisite amount. She was thus deprived of a remedy which could have proved decisive for the outcome of the dispute. The Court fins that by obliging her to pay the amount order, the Audencia Provincial prevented the applicant from using an existing and available remedy, such that a disproportionate hindrance was put in the way of her right of access to a court. Consequently there has been a violation of Article 6(1)."*

Illi fil-kaz **Beles et v. The Czech Republic** tat-12 ta' Novembru 2002, il-Qorti Ewropea qalet:

“The court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6(1) of the convention, must be contrued in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective legal remedy enabling them to assert their civil rights …. It further reiterates that the rules governing the formal steps to be taken and the time-limits to be complield with in lodging an appeal are aimed at ensuring the proper administation of justice and compliance, in particular, with the aforementioned principle of legal certainty. That being so, the rules in quesiton or the manner in which they are applied, should not prevent litigants from using an available remedy…. a procedural rule has been contrued in such a way as to prevent the applicants’ action being examined on the merits, with the attendant risk that their right to effective protection would be infringed. ….. Consequently, the Court finds that in deciding, on the basis of a particularly strict construciton of a procedural rule, not to examine the merits of the case, the domestic courts undermine the very essence of the applicants’ right to a court, which is part of their right to a fair trial guaranteed by Article 6(1) of the Convention. There has therefore been a violation of Article 6(1) of the Convention.”

Illi, fir-rigward ta’ nuqqas kommess minn avukat mahtur mill-Istat, fil-kaz **Czekalla v. Portugal** deciz fl-10 ta’ Frar 2002, il-Qorti Ewropea kellha quddiemha fatti simili hafna u rriteniet kif gej;
“53. The applicant complainted of the inadequacy of the legal assistance he had been given, as a result of which he had been denied access to the Supreme Court on account of the mistake made by the lawyer officially appointed to assist him, Ms T.M.,who failed to include submissiosn in her pleading. In addition, the Sintra District Court had in the end decided to dismiss the appeal he had submitted himself on 3 August 1995.

54. The applicant submitted that the mistake had been such a crass error that it had to be regarded as a “manifest failure” within the meaning of the Court’s case-

*law in **Kamasinski v. Austria** (judgment of 19 December 1989, Series A no. 168). It had been all the more serious because it had made it impossible for him to have his appeal heard …..*

*55. The Government, referring to **Kamasinski**, cited above, and to **Artico v. Italy** (judgment of 13 May 1980, Series A no.37) and **Daud v. Portugal** (judgment of 21 April 1998, Report of Judgments and Decisions, 1998-II, pp.739 et seq.) submitted that a State could not, except in very exceptional circumstances, be held responsible for the acts and omission of a lawyer appointed under the legal aid scheme. ….*

68. That being said, the decisive point is the officially-appointed lawyer's failure to comply with a simple and purely formal rule when lodging the appeal on points of law to the Supreme Court. In the Court's view, that was a "manifest failure'' which called for positive measure on the part of the relevant authorities. The Supreme Court could, for example, have invited the officially-appointed lawyer to add to or rectify her pleading rather that declare the appeal inadmissble. …..

71. The circumstances of the case therefore imposed on the relevant court the positive obligation to ensure pratical and effective respect for the applicant's right to due process. As that was not the case, the Court can only find a failure to comply with the provisions of paragraphs 1 and 3 (c) of Article 6 of the Convention, taken together. There has therefore been a violation of those provisions.''

Illi ghalhekk, ir-rikorrent jinsab konfortat mill-gurisprudenza tal-Qorti Ewropea ghad-Drittijiet tal-Bniedem.

Illi fl-umili fehma tar-rikorrent, id-digriet ta' dezerzjoni moghti fl-20 ta' Novembru 2003 kif ukoll iz-zewg digrieti konfermatorji moghtija fil-15 ta' Settembru 2004 u fl-4 ta' Novembru 2004 jilledu d-dritt fundamentali tar-rikorrent ghal smigh xieraq, ghal assistenza legali u ghad-dritt ta'

access lil qorti, kif jinsabu garantiti bl-Artikolu 6 tal-Konvenzjoni Ewropea (L-Ewwel Skeda tal-Kapitolu 319) u bl-Artikolu 39 tal-Kostituzzjoni ta’ Malta.

Ghaldaqstant, ir-rikorrent talab illi din l-Onorabli Qorti joghgobha (1) tiddikjara u tiddeciedi li bid-digriet ta’ dezerzjoni moghti fl-20 ta’ Novembru 2003 u bid-digrieti moghtija fil-15 ta’ Settembru 2004 u fl-4 ta’ Novembru 2004 mill-Onorabbli Qorti ta’ l-Appell gew miksura d-drittijiet tar-rikorrent ghal smigh xieraq, ghal assistenza legali u ghal access ghal qorti kif jinsabu garantiti mill-Artikolu 6(1) tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kapitolu 319) u mill-Artikolu 39 tal-Kostituzzjoni; (2) konsegwentement thassar l-imsemija digrieti tal-20 ta’ Novembru 2003, tal-15 ta’ Settembru 2004 u tal-4 ta’ Novembru 2004 fl-ismijiet hawn fuq imsemmija u tordna l-prosegwiment ta’ l-appell minnu interpost fl-20 ta’ Novembru 2002; (3) taghmel dawk l-ordnijiet, tohrog dawk l-atti u taghti dawk id-direttivi li tqis xierqa sabiex twettaq u tizgura t-twettiq ta’ l-Artikolu 39 tal-Kostituzzjoni ta’ Malta u ta’ l-Artikolu 6 (1) tal-Konvenzjoni Ewropea (l-Ewwel Skeda tal-Kapitolu 319). Bl-ispejjez u b’riserva ghal kull azzjoni ghad-danni sofferti minnu.

Rat il-lista tax-xhieda u d-dokumenti prezentati mir-rikorrenti.

B. RISPOSTA:

Rat ir-risposta ta’ l-intimati li biha esponew:

1. Illi preliminarjament, in kwantu din hija kwistjoni ta’ notifika ta’ att gudizzjarju, l-intimati Avukat Generali u Ministru tal-Gustizzja m’humiex legittimi kuntraditturi.

2. Illi preliminarjament, in kwantu din hija kwistjoni ta’ notifika t’att gudizzjarju, ghandu jkun kjamat fil-kawza r-Registratur Qrati Civili u Tribunali.

3. Illi preliminarjament ukoll ir-rikorrenti ghandhom jindikaw b’mod car il-mod kif, skond huma, il-fatti kif esposti fir-rikors promutur, allegatament kisrulhom id-dritt

taghhom ghal smigh xieraq, peress li din l-indikazzjoni hi nieqsa mir-rikors promutur.

4. Illi fil-mertu izda minghajr pregudizzju ghal dak li inghad iktar ’il fuq, huwa car li l-ghan tar-rikorrenti f’dawn il-proceduri kostituzzjonali huma li jkunu revokati d-digrieti dwar dezerzjoni. Ir-rikorrenti issottomettew li dan hu abbuz tal-procedura kostituzzjonali. Il-Prim’Awla f’sede kostituzzjonali ma tistax terga’ tezamina digrieti moghtija minn Qorti ohra, jew tara jekk Qorti ohra applikatx il-ligi korrettement jew le. Jekk tintalab twettaq dan, tkun qed tintalab tagixxi ta’ Qorti ta’ Revizjoni, f’dan il-kaz ta’ Qorti tat-tieni appell, liema funzjoni la tista’ twettaqha (ghax fis-sistema taghna ma jezistix stadju tat-tieni appell), u lanqas ma hi fil-mansjoni taghha li twettaqha (ghax hi Qorti ta’ gurisdizzjoni kostituzzjonali u mhux Qorti t’appell).

5. Illi dwar il-fatti trid tingieb il-prova mehtiega dwar dan l-allegat zball fin-notifika, u dwar l-imgieba tar-rikorrenti fil-perjodu ta’ qabel id-digriet ta’ dezerzjoni, u ghalhekk ma jistax ikun prezunt li kien hemm zball jew xi nuqqas iehor qabel dan ikun ippruvat, kif jittentaw jaghmlu r-rikorrenti fir-rikors promutur.

6. Illi fir-rigward tal-fatti kif elenkati fir-firkors promutur, irid ikun ezaminat ukoll xi rwol kellhom ir-rikorrenti fl-ghoti tal-informazzjoni lill-Assistent Avukat ghall-Ghajnuna Legali , kif ukoll kemm huma wrew interess fil-procediment tal-kawza u jekk avvicinawx lill-istess avukat ta’ l-ghajnuna legali. Jekk jirrizulta li, kif probabbli gara, ir-rikorrenit ma wrewx interess bizzejjed, allura mbaghad ma jistghux jilmentaw mill-ksur tad-dritt ghas-smigh xieraq minhabba nuqqas taghhom stess.

7. Illi fi kwalunkwe kaz, (minghajr ma l-intimati qeghdin jammettu xejn) anke jekk jirrizulta xi zball b’nuqqas min-naha tal-Assistent Avukat ghall-Ghajnuna Legali, dan ma jifissirx awtomatikament li kien hemm ksur tad-dritt ghal smigh xieraq. Biex dan il-ksur jissussisti jridu jkunu segwiti u sodisfatti r-rekwiziti kollha ta’ l-aritikoli tal-ligi li jipprotegu dan id-dritt.

8. Illi fi kwalunkwe kaz ma kien hemm ebda ksur tad-dritt ghal smigh xieraq fil-proceduri li taw lok ghal dan l-ilment u dan minhabba s-segwenti ragunijiet:

- Ir-rikorrenti jsemmu li ma kellhomx access ghall-qorti. L-intimati Avukat Generali u Ministru tal-Gustizzja issottomettew li fil-fatt ir-rikorrenti kellhom dan id-dritt t'access. Fil-fatt il-proceduri kienu nbdew u huma ipprezentaw ir-rikors t'appell taghhom. Il-Qorti ta' Strasbourg kellha okkazjoni tiddeceidi li regoli ta' procedura li jwaqqfu l-proceduri fi stadju t'appell ma jiksrux dan id-dritt ghal access ghal qorti, peress li dan l-istess dritt mhux wiehed assolut.
- Ir-rikorrenti jallegaw li nkisrilhom id-dritt ghall-assistenza legali. L-intimati Avukat Generali u Ministru tal-Gustizzja issotomettew li fil-fatt ir-rikorrenti nghataw ghajnuna legali u fil-fatt ir-rikors t'appell kien iffirmat minn avukat ta' l-ghajnuna legali u kienu wkoll appuntati avukat u prokauratur legali ta' l-ghajnuna legali mill-elenku biex jassistuhom. Jinghad ukoll li l-Qorti ta' Strasbourg kellha okkazjoni tiddeciedi wkoll li l-istat mhux responsabbli ghal xi nuqqasijiet li jista' jwettaq l-avukat ghall-ghajnuna legali fil-qadi ta' dmiru.
- Ir-rikorrenti jallegaw ukoll ksur tad-dritt ghal smigh xieraq. L-intimati Avukat Generali u Ministru tal-Gustizzja issottomettew li ma kien hemm ebda ksur ta' dan id-dritt ghaliex il-Qorti mxiet mal-ligi tal-procedura b'mod korrett u r-rikorrenti kellhom smigh adegwat u xieraq. Ma jregix l-argument tar-rikorrenti li minhabba d-digriet ta' dezerzjoni, ma kellhomx smigh xieraq ghaliex allura nistghu narmu l-ligi tal-procedura, meta fil-fatt din il-ligi nnifisha hija salvagwardja tad-dritt ghal smigh xieraq. Fost ohrajn ir-regola tad-dezerzjoni tiddixxiplina klijenti li ma jiehdux interess fil-kawza taghhom stess.
- Illi fi kwalunkwe kaz ma jissussisti l-ebda ksur tad-dritt ghal smigh xieraq jew ta' xi dritt fundamentali iehor, la taht il-Kostituzzjoni u lanqas taht il-Konvenzjoni fil-konfront tar-rikorrenti, u ghalhekk dan ir-rikors ghandu jkun michud bl-ispejjez kontra r-rikorrenti.

Salv eccezzjonijiet ohra jekk ikun il-kaz.

Rat id-digriet tat-12 ta' Lulju 2005 li permezz tieghu giet awtorizzata l-kjamata fir-rikors tar-Registratur, Qrati Civili u Tribunali.

Rat risposta tar-Registratur, Qrati Civili u Tribunali li biha espona:

1. Illi huwa mhux il-legittimu kontradittur f'dina l-kawza u ghandu jigi liberat mill-osservazzjoni tal-gudizzju, bl-ispejjes kollha stante:

1.1 Illi l-kawza *de quo* tittratta allegat ksur ta' drittijiet fundamentali tal-bniedem konsegwenti zewg digrieti moghtija mill-Qorti ta' l-Appell u ghalhekk, u fuq skorta ta' gurisprudenza ormai assodata r-Registratur, Qrati Civili u Tribunali ma jirrispondix u ma jirrapprezentax l-operat tal-Qrati tal-Gustizzja, (ara **Lombardo et vs Kunsill Lokali Fgura**, Qorti Kostituzzjonali deciza nhar is-7.X.05.)

1.2 Illi fi kwalunkwe kazi d-digrieti lamentati huma bazati fuq konsiderazzjonijiet u konkluzjonijiet korretti.

1.3 Illi inoltre r-Registratur, Qrati Civili u Tribunali ma jirrispondix ghall-agir u/jew ghal nuqqasijiet ta' l-Ghajnuna Legali u/jew l-Assistenti tieghu jew l-agenti tieghu stante li l-ufficcju ta' l-Avukat ghal Ghajnuna Legali ma jaqax taht ir-responsabilita` tar-Registratur, Qrati Civili u Tribunali jew tad-Direttur Generali (Qrati); anzi jirrizulta li l-istess Ufficcju jopera awtonomament u ghandu finanzjarjament provdut taht il-vot ta' l-Ufficcju ta' l-Avukat Generali.

2. Fir-rigward ta' l-eccezzjonijiet ohra, ir-Registratur, Qrati Civili u Tribunali qieghed jaghmel riferenza ghan-nota risponsiva ipprezentata mill-Avukat Generali a fol 7 tal-process u a skans ta' ripetizzjoni qieghed jadottaha u jaghmilha tieghu safejn kompatibbli u mhux konfliggenti ma' din il-prezenti risposta.

Salv eccezzjonijiet ohra jekk ikun il-kaz.

Rat l-atti kollha tal-kawza.

Semghet lix-xhieda bil-gurament.

Semghet l-abili difensuri.

Ikkunsidrat

C. PROVI:

Rat li fit-12 ta’ Lulju 2005 b’referenza ghat-tielet eccezzjoni, Dr. Tonio Azzopardi irrefera ghal pagna 4 tar-rikors u specjalment ghad-dokument imsemmi fil-kawza fl-ismijiet **Czekalla vs Portugal**.

Fl-istess data giet irtirata t-tieni eccezzjoni a fol 7.

Fid-29 ta’ Awissu 2005 ir-rikorrenti ipprezentaw nota li permezz taghha sostnew li t-talbiet taghhom huma msejsa fuq l-artikolu 6(1)(3)(c) tal-Konvenzjoni Ewropeja, Kap 319. Semma li l-lanjanza tar-rikorrenti torigina mill-fatt li l-Qorti ta’ l-Appell irriteniet li zball li sar mill-Assistent Avukat ta’ l-Ghajnuna Legali kien zball tar-rikorrent, u in sostenn ta’ dan ikkwotaw **Czekalla vs Portugal** u **Daud vs Portugal**. Irreferew ghal *officially appointed lawyer’s failure*.

Paul Muscat ipprezenta affidavit (fol 20 *et*) li fih semma li hu kien konvenut fil-kawza **John Bugeja *et* vs Caral Limited u ghal kull interess li jista’ jkollhom Paul Muscat u Joseph Muscat**, Citazz. 2766/97RCP. Inghatat sentenza fil-31 ta’ Ottubru 2002 mill-Prim’Awla li iddikjarat li s-socjeta Caral Limited moruza fil-hlas tac-cens u konsegwentement xolta l-koncessjoni enfitwetika u ordna ir-reverzjoni tal-proprjeta` favur l-atturi b’terminu ghall-izgumbrament. Ipprezenta appell u talab li jigi ammess ghall-beneficcju ta’ l-ghajnuna legali. Ir-rikors ta’ l-appell sar fl-20 ta’ Novembru 2002 u iffirmat minn Dr. Malcolm Mifsud. Lilu hadd ma kellmu aktar u kien dejjem jistenna l-avviz ghas-smigh ta’ l-appell. Ghadda z-zmien u sar jaf li l-appell gie dikjarat dezert mill-Qorti ta’ l-Appell, li kien mar dezert fl-20 ta’ Novembru 2003. Irrizulta li r-rikors ta’ l-appell ma harigx ghan-notifika ghax kien jonqos l-inkartament ta’ l-ghajnuna legali, u hareg ghan-notifika

biss fit-28 ta' April 2003. Fit-28 ta' Jannar 2003 spicca Dr. Mifsud u gew mahturin Dr. Tonio Azzopardi u l-P.L. Luisa Tufigno. Irrefera ghad-digriet tal-Qorti ta' l-Appell tal-15 ta' Settembu 2004 fejn giet michuda t-talba wara li l-Qorti osservat li ghal zmien sena shiha hu ma kien ghamel xejn biex jikkoregi l-izball tieghu. Ipprezenta t-tieni rikors li wkoll gie michud. Semma li ser isofri danni kbar u dan wara l-izball li sar meta l-avukat jew il-p.l. nizzel l-indirizz ta' l-intimati (cioe` l-atturi appellati) bhala Olinda Hotel, St. George's Road, St. Julian's meta fil-fatt l-indirizz taghhom huwa 73, George Borg Olivier Street, Sliema, li kien l-indirizz tar-rikorrenti, u ikkonferma lil Dr. Mifsud lilu qatt ma qallu li r-rikors ta' l-appell irid jigi notifikat fi zmien sena. Irrefera ghall-fatt li Dr. Mifsud gie mahtur bhala Assistent Avukat ghall-Ghajnuna Legali mill-Istat, u precizament mill-Ministru responsabbli ghall-Gustizzja.

Xehed Paul Muscat u qal li hu kien baqa' jistaqsi lil Dr. Schembri jekk l-appell sarxu dankien dejjem jghidlu li fadallu ghax idum xi sena, izda wara qalulu li l-kawza dezerta. Ma' Dr. Mifsud kien rega' tkellem wara li l-kawza marret dezerta.

Xehed Dr. Joseph Schembri permezz ta' affidavit u irrefera ghall-pariri li ta lil Paul Muscat u li kien ipprezenta c-cedoli ta' depozitu. Kien zied ukoll dwar il-possibbilta` ta' fidi ta' cens.

Gie prezentat affidavit ta' Dr. Malcolm Mifsud li fih semma li jokkupa l-kariga ta' Assistent Avukat Ghall-Ghajnuna Legali u kien jokkupa l-istess kariga fl-2002. Ftakar li Paul Muscat kellu sentenza li ried jappella minnha u kien cempillu Dr. Schembri f'dan is-sens. Kien kellem lil Dr. Schembri dwar il-possibbilta` li xi hadd mill-ufficcju tieghu jabbozza appell u b'hekk ma jkunx hemm ghalfejn li hu jaqra l-process kollu. Paul Muscat kien mar b'dan l-abbozz ghandu u kull ma kellu jaghmel kien li jiffirma u ghamillu talba wkoll biex jinghata avukat ghall-ghajnuna legali. Sostna li Paul Muscat kien jaf li ser ikollu avukat differenti minnu u bhala konsegwenza spjegalu li kellu jmur ir-Registru tal-Qorti madwar tliet gimghat wara sabiex jinghata d-dettalji ta' l-avukat li ser jassistih. Iddikjara li

ma jaqbilx mal-affidavit ta' Paul Muscat fejn jghid li qallu li kellu jistenna l-avviz tas-smigh ta' l-appell. Kien ghamilha cara lil Paul Muscat li avukat iehor kien ser jassistih fl-appell.

Semma li fil-fatt gie appuntat Dr. Tonio Azzopardi bhala avukat ghall-ghajnuna legali li ghalhekk kellu l-obbligu li jassisti lill-persuna koncernata u li ghalhekk ma jkunx aktar ir-rwol ta' l-Assistent Avukat Ghall-Ghajnuna Legali li jaghmel dan. Il-*folder* tar-rikors ta' l-appell sar mill-P.L. Joanna Dingli izda din kienet assistiet lil Dr. Mifsud personali u mhux lir-rikorrent odjern. L-ewwel li rega' sema' minghand ir-rikorrent kien li l-appell tieghu kien gie dezert. Kien staqsieh jekk kellimx lill-avukat ta' l-ghajnuna legali u r-rikorrent irrispondieh li le. Ir-rikorrent kien qallu li ma kienx jaf li kellu jerga' jitkellem.

D. KUNSIDERAZZJONIJIET:

Ghalhekk irrizulta li l-indirizzi ta' l-appellant u appellat fil-*folder* ta' l-appell ma kienux korretti.

Irrizulta wkoll li fiz-zmien bejn il-prezentata tar-rikors ta' l-appell u d-dezerzjoni ta' l-appell, ir-rikorrent ma kienx f'kuntatt mal-Assistent Avukat ta' l-Ghajnuna Legali izda mal-avukat privat li kien jippatrocinah qabel u forsi wkoll mal-avukat li qed jippatrocinah issa u li f'dak l-istadju kien mahtur bhala avukat ta' l-ghajnuna legali tieghu. Jidher li hadd minn dawn ma idderigieh jivverifika l-atti.

Fis-sena qabel l-appell tar-rikorrenti mar dezert, ir-rikorrenti jew il-konsulenti legali taghhom ma ivverfikawx mal-atti biex jaraw in-notifika saritx jew le.

Ir-rikorrenti sostna li minhabba li sar zball, hu m'ghandux isofri *a disporportionate burden* ghax altrimenti jkun hemm vjolazzjoni ta' l-artikolu 6 tal-Kap 319. Dwar l-aspett ta' *disporportionate hindrance* jew *disproportionate restriction*, ir-rikorrent iccita silta mill-paragrafu 11.191 fis-*Second Annual Updating Supplement* ta' "*The Law of Human Rights*" ta' l-awturi Richard Clayton QC u Hugh Tomlinson QC:

*"The refusal of an appeal court to hear an appeal because the appellant had failed to deposit a sum of money was **a disporportionate hindrance** to the right of access to a court. The applicant should have received legal aid and an exemption from the deposit requirement but did no do so because of judicial negligence (**Garcia Manibardo v. Spain** (2002) 34 EHRR 196."*

Irrefera wkoll ghall-kaz deciz mill- Qorti Ewropea fil-kaz **Polejowski v. Poland** (4 ta' Marzu 2008) fejn ukoll gie applikat il-kuncett ta' *disproportionate restriction*.

A bazi ta' dan ir-rikorrent jargumenta li r-regoli procedurali m'ghandhomx jigu applikati b'mod li jcahhdu persuna mir-rimedji disponibbli ghalih, u jiccita **Bels et v. The Czech Republic,** 12 ta' Novembru 2002, fejn il-Qorti Ewropea kienet qalet:
"49. The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see, among other authorities, ***Brumărescu v. Romania*** [GC], no. 28342/95, § 61, ECHR 1999-VII). It further reiterates that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the aforementioned principle of legal certainty. That being so, the rules in question, or the manner in which they are applied, should not prevent litigants from using an available remedy."

Ir-rikorrent isostni li l-interperetazzjoni ta' l-artikolu 963 tal-Kap 12 mill-Qorti ta' l-Appell fil-fehma tieghu kienet wahda strettissima u li din tammonta ghal vjolazzjoni tad-drittijiet fundamentali tieghu. Kawza ta' dan l-appell ma seta' qatt jinstema' fil-mertu, u tilef ic-cans li kawza tigi deciza mill-Qorti, liema dritt hu kellu.

Ikkwota s-sentenza **Mario Schembri et vs Dr. Anthony Galea Debono et** moghtija fil-5 ta' Gunju 2003 mill-Onorabbli Qorti Civili Prim' Awla:
"Illi ghal zmien twil, id-dispozizzjonijiet tal-ligi ghar-rigward gew imfissra u applikati b'mod iebes u intransigenti ghall-ahhar u dan bil-hsieb li jigi mhares in-nuqqas ta' dewmien mhux mehtieg fil-kawzi. Min-naha l-ohra jidher li huwa daqstant xieraq u misthoqq li l-ligi tassikura li s-sanzjonijiet mahsuba fl-istitut tad-dezerzjoni ma jintefghux fuq il-parti li tonqos li twettaq il-partikolari taghha fiz-zmien stabbilit minkejja r-rieda taghha, jew jekk turi li trid tuza l-hila kollha taghha biex tilhaq lill-parti l-ohra, jew fejn il-parti l-ohra tirrinunzja ghall-eccezzjoni;"

Fil-fehma tal-Qorti hafna mir-responsabbilta` ghal din id-dezerzjoni taqa` fuq ir-rikorrent li ma hax hsieb jaghmel il-verifiki necessarji. Apparti mill-izball li jidher fuq il-*folder* dwar l-indirizzi, hija haga ferm stramba li fuq haga daqshekk serja r-rikorrent jaghzel li ma jaghmel xejn fuqha u ghaddiet aktar minn sena. Ma jirrizultax min ta l-informazzjoni bl-indirizz mhux tajjeb. Certament hija responsabbilta` tar-rikorrent li jara li l-atti huma korretti u li jsegwihom. Biex jinghata tort lil xi hadd irid l-ewwel nett jigi ippruvat li r-rikorrent stess ha l-passi kollha necessarji biex jaghmel l-affarijiet kollha kif suppost u li mhux propju tort tieghu dak li gara. Irid jigi ippruvat li dak li gara, gara minkejja r-rieda tieghu, haga li fil-fehma tal-Qorti, ir-rikorrent ma rnexxielux jippruvaha.

Ir-rikorrenti ma segwewx l-appell taghhom stess, u dan anke jekk stess kien hemm xi tort imputabbli lil haddiehor ukoll. Kieku r-rikorrenti segwew l-appell, kieku l-izball kien ikun skopert u l-haga kienet tkun rimedjata. Imma dan ma sehhx. Hu car li d-dover li jsegwi kawza u li jaggorna ruhu ma' dak li jkun qed jigri, jinkombi l-ewwel nett fuq l-attur innifsu. Ghalhekk a bazi ta' dawn il-fatti, u stante li l-attur naqas minn dmiru fil-kawza tieghu stess, ma jistax issa jilmenta dwar in-nuqqas tieghu stess, u ghalhekk ma jistax ikun hemm ksur tad-drittijiet tar-rikorrenti.

Sewwa jghid l-Avukat Generali li:

“Id-dritt t’access ghall-qorti certament kien protett u segwit f’dan il-kaz. Dan id-dritt hu interpretat fis-sens li persuna tithalla tadixxi lill-qorti. Jigifieri hawn qed nitkellmu fuq id-dahla ta’ persuna quddiem il-qorti. Certament ir-rikorrenti kellhom access liberu u shih fiz-zewg istanzi, kemm fil-Prim’Awla kif ukoll fl-appell. Ma kien hemm xejn xi jzomm lir-rikorrenti milli jipprezentaw il-kaz taghhom quddiem il-Qorti tal-Appell. Pero` mbaghad il-ligi tal-procedura hadmet kontrihom, forsi b’nuqqas taghhom ukoll, kif ga inghad.

Ili rigward id-dritt t’access ghall-ghajnuna legali, ir-rikorrenti kellhom access liberu wkoll ghal din l-ghajnuna. Hadd ma cahhadhom milli jikkonsultaw u jiehdu l-parir minghand avukat ta’ l-ghajnuna legali. Jidher car li kienu iggwidati tajjeb mill-avukat ta’ l-ghajnuna legali. Jidher car li kienu ggwidati tajjeb mill-avukat in kwistjoni. Pero` jista` jkun li marru ghandu tard wisq.”

L-Istat mhux responsabbli ghal dak li jaghmlu l-avukati ta’ l-ghajnuna legali hlief meta dawn ma jaghtux assistenza effettiva lill-klijient taghhom. Infatti fis-sentenza li ghamilha jaghmlu spiss referenza ghaliha r-rikorrenti, u cioe` **Czekalla vs Portugal** il-Qorti qalet:
“a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal aid scheme or privately financed. The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see Daud, cited above, pp. 749-50, § 38).”

Il-punt deciziv fil-kawza ta’ **Czekalla** li l-avukat li kien gie mqabbad mill-Istat naqas dwar affrijiet semplici u formali meta gie intavolat l-appell fuq punti ta’ ligi li kien “*manifest failure*”, dan hu totalment differenti mill-kaz odjern ghax fil-kaz ta’ **Czekalla** kien l-avukat li naqas li jinkludi certu talbiet, li propju huma irrendew l-appell mhux ammissibbli

u dan minhabba nuqqas ta’ forma. Fil-kaz *de quo*, ma irrizultax li l-appell ma kienx wiehed validu ghax l-indirizz zbaljat fuq il-*folder* ma jwassalx ghal xi nullita` ta’ l-appell, u kieku r-rikorrenti ivverifika x’qed isir mill-appell u ghaliex ma saritx in-notifika, kieku dan kollu ma kienx jigri. Dan kollu fil-fehma tal-Qorti, b’ebda mod ma jwassal ghal nuqqas ta’ smigh xieraq.

E. KONKLUZJONIJIET:

Ghalhekk il-Qorti tilqa’ l-eccezzjonijiet minn 4 ’il quddiem fir-risposta ta’ l-Avukat Generali u ghalhekk tiddikjara li ma tistax jintlaqghu t-talbiet tar-rikorrenti. Ghalhekk mhux il-kaz li jigu ezaminati l-eccezzjonijiet l-ohra.

Minhabba n-natura tal-kaz, spejjez bla taxxa.

< Sentenza Finali >

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