

Kopja Informali ta' Sentenza



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON**

Seduta tat-12 ta' Dicembru, 2011

Citazzjoni Numru. 1145/2008

Said International Limited (C2680)

kontra

Bank Centrali ta` Malta

Il-Qorti :

I. Preliminari

Rat ir-rikors mahluf prezentat fis-17 ta` Novembru 2008 li jaqra hekk –

Illi s-socjeta` esponenti kkonkorriet ghas-sejha ghal stimi Quotation No. 03/2008 bl-isem "Participation in

Pagna 1 minn 26

Qrati tal-Gustizzja

MCDC Programme" datata l-5 ta` Marzu 2008 (Dok A) mahrug mill-Bank intimat ghal "established organizations to market and sell numismatic coins outside Malta" permezz tal-offerta taghha mehmuz mal-ittra taghha tal-24 ta` Marzu 2008 (Dok B) ;

Illi s-socjeta` esponenti offriet illi tixtri hamsa u disghin fil-mija (95%) tal-muniti li l-Bank Centrali ta` Malta kienet ser tohrog u cioe` elfejn, tliet mija u hamsa u sebghin (2,375) mill-elfejn u hames mitt (2,500) munita tad-deheb u erbatax-il elf mitejn u hamsin (14,250) mill-hmistax-il elf munita (15,000) tal-fidda ;

Illi permezz ta` email datata 23 ta` April 2008 (Dok. C), il-Bank intimat talab lis-socjeta` esponenti xi kjarifiki inkluz jekk hija kinitx disposta taghti garanzija permezz ta` "Bank Performance Bond" ;

Illi fir-risposta taghha tal-24 ta` April 2008 (Dok. D), is-socjeta` esponenti stqarret li fl-ebda parti mis-sejha ghall-istimi tal-istess Bank Centrali ta` Malta ma kien hemm rikjest il-hrug ta` "Bank Performance Bond" u li l-istatus kurrenti taghha mal-istess Bank Centrali kien dak ta` "Cash-On-Delivery basis" ;

Illi permezz ta` email datata 8 ta` Mejju 2008 (Dok. E), il-Bank intimat gharraf lis-socjeta` mittenti illi hija kienet giet "shortlisted" ghall-ghoti tal-Quotation imsemmija, u li xtaqet li ssir laqgha sabiex jigi diskuss l-abbozz (Dok. F) ta` ftehim li ntbaghat ma` l-istess email ;

Illi fl-imsemmi abbozz, precizament f`klawzola 10.1, irrizulta li l-Bank Centrali ta` Malta kien qieghed jitlob li l-mittenti taghti lill-istess Bank Centrali kontemporanjament ma` l-iffirmar ta` l-imsemmi ftehim, garanzija bankarja irrevokabbli minn bank kummercjali f`Malta, pagabbli mal-ewwel sejha tal-Bank Centrali ta` Malta, fl-ammont ta`

seba` mija u erbgha u sebghin elf u wiehed u erbghin euro u sitta u sittin euro centezmi (€794,041.66). Barra minn hekk fi klawzola 4 irrizulta li l-Bank Centrali ta` Malta kien ser jissupplixxi l-muniti minghajr "packaging", kundizzjoni li wkoll ma kinitx inkluzja fis-sejha originali ;

Illi f`laqgħa li saret nhar it-12 ta` Mejju 2008 bejn rapprezentanti tal-Bank intimat u tas-socjeta` esponenti sabiex jigi diskuss l-abbozz fuq imsemmi, filwaqt li għal dak li jirrigwardja l-"packaging" kien jidher car li l-partijiet setghu jaslu għal kompromess, għal dak li jirrigwardja l-"Bank Performance Bond" is-socjeta` esponenti għamlet zewg suggerimenti; jew li ssir konsenja wahda ta` muniti u l-mittenti thallas għall-ammont kollu permezz ta` pagament wiehed, jew li tagħti l-garanzija kif mitluba basta li din tonqos kull darba li jsir pagament b`ammont li jirrifletti l-pagamenti li kienu għa` saru ;

Illi dawn il-proposti gew irrifjutati mill-Bank Centrali ta` Malta li nsista fuq it-talba tiegħu tal-Bank Performance Bond għall-ammont kapitali kollu għal perjodu kollu tal-kuntratt. Illi s-socjeta` esponenti hasset li din it-talba ma kinitx gusta, mhux biss għaliex din il-garanzija ma kinitx kundizzjoni li kienet ser twassal għal htiega ta` kapital doppju da parti tal-istess socjeta` esponenti, u cioe` kapital għax-xiri tal-muniti, kif ukoll kapital ta` l-istess valur mogħtija bhala garanzija, meta fil-fatt il-kundizzjoni din ma kinitx necessarja ;

Illi permezz ta` ittra datata 14 ta` Mejju 2008 (Dok.G) is-socjeta` esponenti, filwaqt li kkonfermat l-offerta originali tagħha, insistiet li l-kalkoli u l-iskontijiet indikati fl-offerta tagħha kienu mahduma fuq dik l-informazzjoni inkluzja fis-sejha originali tal-Bank Centrali ta` Malta permezz ta` Quotation 03/2008, u li għalhekk jekk il-Bank Centrali ta` Malta kien qed jinsisti għall-"Bank Performance Bond" u l-"Packaging Material for both Silver and Gold coins" l-istess Bank Centrali ta` Malta kellu

jemenda s-sejha originali jew jerga` johrog sejha mill-gdid ;

Illi permezz ta` ittra datat 15 ta` Meju 2008 (Dok. H), il-Bank intimat gharraf lis-socjeta` esponenti li "due to various developments it has decided not to proceed with the award of this contract" ;

*Illi permezz ta` ittra datata 30 ta` Meju 2008 (Dok. I), il-Bank Centrali ta` Malta informa lis-socjeta` esponenti li hija kienet ser tohrog il-muniti tad-deheb u tal-fidda mertu tas-sejha ghall-istimi originali 03/2008, izda pero` li kien qiegħed joffri lill-istess socjeta` esponenti l-opportunita` li tixtri **biss** hames mitt (500) munita tal-fidda u mitejn (200) tad-deheb soggett għall-kundizzjoni li l-imsemmija muniti jridu jinxtraw f`salt u jithallsu fi zmien tlett ijiem mill-hrug ufficjali tal-muniti, kif ukoll soggett għal-kundizzjoni li jkun hemm hlas addizzjonali għal "presentation cases" f`kaz li dawn jigu ordnati ;*

Illi permezz ta` ittra datata 6 ta` Gunju 2008 (Dok. J), is-socjeta` esponenti talbet lill-Bank intimat jispjega sufficjentement x`kienu jikkonsistu l-izviluppi varji li gew indikati fl-ittra tagħha tal-15 ta` Meju 2008 li wassluha twaqqaf il-process għall-ghoti tal-kuntratt ;

Illi permezz ta` ittra datata 12 ta` Gunju 2008 (Dok. K), il-Bank Centrali ta` Malta stqarret li l-imsemmija zviluppi kienu jirreferu għal kundizzjonijiet godda li l-bank xtaq li jdahhal fil-ftehim mas-socjeta` mittenti, riferibbilment għal dawk indikati fl-ittra ta` l-istess socjeta` esponenti tal-14 ta` Meju 2008, u għalhekk il-Bank Centrali ta` Malta ddecieda li ma jkomplix bil-Quotation 03/2008 tal-5 ta` Marzu 2008 ;

Illi jirrizulta bl-aktar mod lampanti li l-offerta tal-Bank Centrali ta` Malta fl-ittra tiegħu lis-socjeta` esponenti tat-

30 ta` Meju 2008 hija ferm differenti mill-Quotation originali tieghu. Illi d-differenzi ma jikkonsistux biss fil-kundizzjonijiet godda li ghalihom jaghmel referenza l-Bank Centrali ta` Malta fl-ittra tieghu tat-12 ta` Gunju 2008, u cioe` dawk riferenti ghall-"Bank Performance Bond" u l-"packaging material", izda aktar minn hekk it-tieni offerta tkopri ammonti ta` muniti ferm anqas minn dawk originarjament offerti fis-sejha originali tal-5 ta` Marzu 2008 u dan bi pregudizzju serju ghas-socjeta` esponenti ;

Illi barra minn hekk is-socjeta` esponenti hija nfirmata li l-Bank intimat biegh lil terzi ammonti ferm akbar mill-ammonti offerti lis-socjeta` esponenti permezz tal-ittra tat-30 ta` Meju 2008 u b`kundizzjonijiet ferm aktar vantaggjuzi. Dan kollu sar minghajr ma` l-Bank intimat ta l-opportunita` lill-istess socjeta` mittenti li tikkonkorri u tixtri l-istess kwantitajiet ta` muniti u/jew b`kundizzjonijiet simili, minkejja li s-socjeta` esponenti kienet hi li kienet giet maghzula mill-Bank intimat sabiex tiffinalizza l-kuntratt mal-Bank intimat wara s-sejha tal-5 ta` Marzu 2008 u minkejja li tali kuntratt ma kienx gie konkluz minhabba karenzi ta` l-istess Bank intimat. Mhux hekk biss izda l-Bank intimat ghadha biex biegh l-imsemmija muniti minghajr ma lanqas saret sejha pubblika ghall-istess ;

Illi s-socjeta` esponenti thoss li hija kellha tkun mgħarrfa bi kwalunkwe sejha / offerta gdida li setghet saret wara li l-Bank intimat irtira s-sejha 03/2008 u konsegwentement hija kellha kull dritt li tippartecipa ghall-istess ;

Illi dan l-agir tal-Bank intimat huwa wiehed abbużiv u llegali ai termini tal-Artikolu 469A tal-Kap.12 tal-Ligijiet ta` Malta u jikkostitwixxi pregudizzju serju ghas-socjeta` esponenti.

Ghaldaqstant is-socjeta` esponenti titlob bir-rispett lil din l-Onorabbli Qorti :

1. *Tiddikjara illi d-decizjoni tal-Bank Centrali ta' Malta li jwaqqaf il-process tal-ghoti tal-kuntratt relatat mal-Quotation 03/2008 lis-socjeta` mittenti ; kif ukoll id-decizjoni tal-istess Bank Centrali ta' Malta li jbigħ lil terzi kwantitajiet ta' muniti akbar u b`kundizzjonijiet aktar vantaggjuzi għal dawk offerti lis-socjeta` esponenti permezz ta' l-ittra tat-30 ta' Mejju 2008, mingħajr ma s-socjeta` esponenti nghatat l-opportunita` illi tikkonkorri għall-istess offerta u mingħajr sejha pubblika, huma invalidi u mingħajr effett fil-Ligi billi ultra vires ai termini tal-Art. 469(A)(1)(b)(ii) u (iii) ;*

2. *Tiddikjara l-Bank intimat responsabbli għad-danni sofferti mis-socjeta` esponenti bhala konsegwenza tad-decizjonijiet fuq imsemmija ;*

3. *Tillikwida l-imsemmija danni sofferti mis-socjeta` esponenti ;*

4. *Tikkundanna lil Bank intimat ihallas lis-socjeta` esponenti d-danni hekk likwidati.*

Bl-ispejjez kontra l-istess Bank intimat mil-lum ingunt għas-subizzjoni.

Rat il-lista tax-xhieda ndikati mill-kumpannija attrici u l-elenku ta' dokumenti eseбити.

Rat ir-risposta mahlufa prezentata fil-11 ta' Dicembru 2008 li taqra hekk –

1) *Illi l-pretensjonijiet tas-socjeta` rikorrenti huma nfondati fil-fatt u fid-dritt u għandhom jigu michuda bl-ispejjez kontra tagħha għas-segwenți ragunijiet ;*

2) Illi l-esponenti qatt ma kiser is-subinciz indikat mir-rikorrenti fir-rikors odjern jigifieri l-Artikolu 469A(1)(b)(ii) ghas-semplici raguni illi l-esponenti qatt ma naqas li josserva l-principji tal-gustizzja naturali jew xi procedura mandatarja (li fil-fatt ma tezistix) waqt li kien jese gwixxi l-att amministrattiv jew meta kien qiegħed jiddelibera dwar l-istess att ;

3) Illi l-esponenti kellu kull dritt illi mhux biss li jwaqqaf l-offerta izda kellu kull dritt li jirrifjuta l-offerta anke lill-offerent li l-offerta tieghu setghet kienet l-aktar vantaggjuza.

Infatti fl-istess Quotation No. 03/2008 hemm dikjarat b`mod esplicitu illi "The Bank reserves the right to refuse even the most advantageous offer".

4) Illi minghajr pregudizzju tal-premess ir-rikorrenti wara li xehet l-offerta tieghu giet skambjata korrispondenza twila bejn il-partijiet fejn gew diskussi diversi kundizzjonijiet li kellhom jigu nkluzi fil-ftehim bil-miktub li kellu jigi konkjuz bejn il-partijiet, fosthom illi r-rikorrenti tipprovdi, "irrevocable bank guarantee" li r-rikorrenti rifjutat li tagħti ;

5) Illi kif jidher mill-istess dokumenti esebiti mir-rikorrenti stess saru diversi laqghat bejn il-kontendenti biex tinsab soluzzjoni tant li l-Bank għamel anki offerta bl-ittra (Doc. I) prezentata mill-istess rikorrenti fejn saret offerta lis-socjeta` rikorrenti biex tinghata "a pre issue opportunity" biex tixtri l-muniti taht certu kundizzjonijiet li ma gewx accettati ;

6) Illi fl-ahharnett ma huwiex minnu dak li ddikjarat mir-rikorrenti fir-rikors promotur illi l-Bank biegh lil terzi ammonti ferm akbar mill-ammonti offerti lis-socejta` rikorrenti kif għandu jirrizulta ahjar waqt it-trattazzjoni tal-kawza ;

7) *Salv eccezzjonijiet ulterjuri.*

Rat il-lista tax-xhieda ndikati mill-Bank intimat.

Rat ix-xiehda bl-affidavit ta` Remy Said (fol 44 sa 52) u d-dokument li kien hemm anness (fol 53).

Semghet ix-xiehda ta` Joseph Bonnici fl-udjenzi tat-23 ta` April 2009 (fol 57 sa 70), tas-6 ta` Lulju 2009 (fol 94 sa 98), tat-22 ta` Ottubru 2009 (fol 120 sa 127) u tat-22 ta` Marzu 2010 (fol 154 u 155) u rat id-dokumenti li kienu esebiti mix-xhud (fol 72 sa 92 u fol 116 sa 118)

Rat id-dokumenti li kienu prezentati mill-bank konvenut (fol 100 sa 114).

Rat ix-xiehda bl-affidavit ta` Sacha Said (fol 116).

Semghet id-deposizzjoni ta` Remy Said (fol 128 sa 130) u ta` Sacha Said (fol 131 u 132) fl-udjenza tat-22 ta` Ottubru 2009.

Semghet id-deposizzjoni ta` Albert Borg fl-udjenza tal-25 ta` Jannar 2010 (fol 136 sa 140) u fl-udjenza tat-22 ta` Marzu 2010 (fol 148 u 149) kif ukoll rat id-dokumenti li kienu esebiti mix-xhud (fol 143 sa 146).

Semghet id-deposizzjoni ta` Paul Muscat (fol 150 sa 153) fl-udjenza tat-22 ta` Marzu 2010.

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Semghet id-deposizzjoni ta` Godfrey Huber (fol 161 sa 170) fl-udjenza tat-3 ta` Gunju 2010.

Semghet ix-xiehda in kontroezami ta` Remy Said (fol 172 sa 178) fl-udjenza tas-26 ta` Ottubru 2010.

Rat id-dokument li kien esebit f`din l-udjenza tal-ahhar (fol 179).

Rat in-nota ta` osservazzjonijiet (fol 181 sa 203) li l-kumpannija attrici pprezentat fl-udjenza tas-16 ta` Dicembru 2010.

Rat in-nota ta` osservazzjonijiet tal-bank konvenut (fol 207 sa 223) li kienet prezentata fis-27 ta` Jannar 2011.

Rat il-verbal tal-udjenza tat-8 ta` Frar 2011 (fol 224) u tat-12 ta` April 2011 (fol 225 u 226).

Rat id-digriet taghha moghti fl-udjenza tal-ahhar fejn halliet il-kawza ghas-sentenza bil-fakolta` li l-kumpannija attrici tipprezenta nota ulterjuri u l-bank konvenut jipprezenta twegiba.

Rat in-nota ulterjuri tal-kumpannija attrici (fol 227 u 228) li kienet prezentata fil-11 ta` Mejju 2011.

Rat l-atti tal-kawza.

Ikkunsidrat :

II. L-Art.469A tal-Kap.12

In linea generali, il-kumpannija attrici (“Said”) qeghda tibbaza l-istanza taghha fuq l-Art.469A tal-Kap.12 li jaqra hekk –

(1) *Hlief hekk kif provdut mod iehor bil-ligi, il-qrati tal-gustizzja ta' kompetenza civili ghandhom gurdizzjoni biex jistharrgu l-validita ta' xi eghmil amministrattiv jew li jiddikjaraw dak l-eghmil null, invalidu jew minghajr effett fil-kazijiet li gejgin biss :*

(a) *meta l-eghmil amministrattiv jikser il-Kostituzzjoni ;*

(b) *meta l-eghmil amministrattiv ikun ultra vires ghal xi raguni minn dawn li gejgin :*

(i) *meta dak l-eghmil jitwettaq minn awtorita` pubblika li ma tkunx awtorizzata sabiex twettqu ; jew*

(ii) *meta l-awtorita` pubblika tkun naqset milli tosserva l-principji tal-gustizzja naturali jew htigiet procedurali mandatorji fit-twettiq ta' l-eghmil amministrattiv jew fid-deliberazzjonijiet ta' qabel dwar dak l-eghmil ; jew*

(iii) *meta l-eghmil amministrattiv jikkostitwixxi abbuz tas-setgha ta' l-awtorita` pubblika billi dan isir ghal ghanijiet mhux xierqa jew jissejjes fuq konsiderazzjonijiet mhux rilevanti ; jew*

(iv) *meta l-eghmil amministrattiv ikun imur mod iehor kontra l-ligi.*

Dwar din l-azzjoni, din il-Qorti (diversament presjeduta) **[PA/JRM]** qalet hekk fis-sentenza taghha tal-1 ta` Marzu 2004 fil-kawza “**Lawrence Borg noe vs Gvernatur tal-Bank Centrali ta` Malta**” li kienet konfermata b`sentenza tal-Qorti tal-Appell fid-9 ta` Marzu 2007 –

Illi llum huwa accettat li l-azzjoni ghal stharrig gudizzjarju msemmija fl-artikolu 469A tal-Kapitolu 12 tal-Ligijiet ta' Malta hija mahsuba biex taghti rimedju lill-individwu dwar l-imgieba tal-awtorita' pubblika fil-konfront tieghu. Is-setgha li tinghata mill-imsemmi artikolu lil Qorti fil-kompetenza taghha civili dwar ghemil amministrattiv hija jew (a) dik li tistharreg is-siwi ta' dak l-ghemil jew (b) li tiddikjarah ma jiswiex jew minghajr ebda effett. Dan tista' taghmlu meta l-ghemil jikser il-Kostituzzjoni jew meta jkun sar lil hinn mis-setgha ta' min wettqu (ultra vires). F'din l-ahhar ipotezi, dan l-eccess ta' setgha jista' jirrizulta meta l-att isir minn awtorita' pubblika li ma tkunx awtorizzata twettqu, jew meta dik l-awtorita', ghalkemm ikollha setgha twettaq dak l-ghemil, tkun naqset li thares il-principji ta' gustizzja naturali jew htiega procedurali li tabilfors trid thares qabel ma tasal ghal dak l-ghemil, jew jekk l-ghemil jikkostitwixxi abbuz tas-setgha ta' dik l-awtorita' billi jsir ghal xi ghan mhux xieraq jew fuq konsiderazzjoni irrilevanti, jew meta dak l-ghemil imur b'kull mod iehor li jkun kontra l-ligi. Bil-kelma "ghemil", il-ligi tifhem ukoll cahda jew rifjut ta' talba li ssir minn persuna lil xi awtorita' pubblika ;

Illi din l-impostazzjoni tal-azzjoni tabilfors tnissel il-htiega li l-Qorti tqis x'tip ta' stharrig ghandha taghmel skond il-ligi dwar l-ghemil tal-Bank imharrek. Tali ezercizzju huwa wiehed li jmiss l-aspetti sostantivi tal-kawza prezenti. Illum il-gurnata, l-azzjoni ta' stharrig gudizzjarju ta' ghemil amministrattiv tinsab imfissra u delinejata espressament fis-sistema procedurali taghna u l-Qorti hija marbuta li timxi mal-parametri li l-ligi tipprovdi ghal din l-ghamla ta' stharrig, sakemm il-ligi nnifisha ma tipprovdi mod. Wahda minn dawn il-limitazzjonijiet hija li l-ilment imressaq jew ir-rimedju mitlub ma jkunx jista' jinkiseb mod iehor amministrattivament quddiem qorti jew tribunal iehor kif provdut mil-ligi. Fil-kaz li ghandha quddiemha l-Qorti, ma ntweriex li l-kumpannija attrici kellha rimedju iehor procedurali jew statutorju ghall-ilment taghha jekk mhux quddiem din il-Qorti u b'din l-ghamla ta' azzjoni ;

Illi mit-tifsira ta' "awtorita' pubblika" moghtija fl-artikolu 469A(2), johrog car li l-Bank imharrek huwa awtorita' kif hekk infissra, u dan ukoll ghaliex huwa korp maghqud kostitwit permezz ta' ligi li ghandu funzjoni regolatrici pubblika u amministrattiva. Dawn l-elementi ma gew bl-ebda mod michuda mill-istess Bank u lanqas jidher li tqanqal xi dubju dwar jekk il-Bank huwiex il-kontradittur legittimu tal-azzjoni specjali mibdija kontra tieghu ...

DeSmith & Evans fil-Judicial Review of Administrative Action (Fourth Edition – pag. 278-9) ighidu hekk –

"A person aggrieved by the exercise of a discretionary power may, instead of attacking the merits of the exercise of the discretion, contend that the repository of the discretion has acted without jurisdiction or 'ultra vires' because of the non-existence of a state of affairs upon which the validity of the exercise of the discretion depends. Or he may contend that the repository of the discretion has failed to observe the rules of natural justice (if they are found to be applicable) or other essential procedural requirements. If his contentions are successful, the court will hold the discretionary act to be invalid, and the fact that the true reason for instituting proceedings will have been his dislike of the manner in which the discretion itself was exercised is not a valid objection to the proceedings. . . . The crucial question, however, is : In what circumstances and to what extent will the courts review the merits of the exercise of a statutory discretion which is neither made subject to appeal nor limited by the express provisions of a statute? The courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided."

Dan premiss, fil-kaz tal-lum, Said qeghda tikkontendi li l-eghmil amministrattiv tal-bank konvenut ("il-Bank Centrali") fil-kwistjoni mertu ta` din il-kawza kien

ultra vires għax twettaq **bi ksur tas-subincizi (ii) u (iii) tal-inciz (1)(b) tal-Kap.469A.**

Ikkunsidrat :

III. Analizi tal-provi saljenti

Minkejja l-ghadd ta` provi (inkluz dokumenti) li ressqu l-partijiet, bosta huma l-fatti li dwarhom hemm qbil.

Il-qbil jittratta l-aktar kif kienet kondotta s-sejha għall-offerti, it-trattativi li kien hemm wara bejn il-partijiet, u d-decizjoni tal-Bank Centrali li jirtira mis-sejha għall-offerti.

Id-divergenza ta` fehmiet tohrog fil-berah dwar dak li sar mill-Bank Centrali wara li kienet irtirata s-sejha għall-offerti.

Anke kif jirrizulta minn Dok A a fol 6 tal-process dak tal-lum ma kienx precizament process ta` *tendering* izda aktar wiehed ta` *quotation*. Il-process issejjah Quotation No. 03/2008 bl-isem "*Participation in MCDC Programme*". Fost il-kondizzjonijiet , il-Bank Centrali zamm id-dritt *to refuse even the most advantageous offer*.

Filwaqt illi esprimiet bil-miktub l-interess tagħha li tiehu sehem fil-*Programme*, Said ressqet il-proposti tagħha fosthom illi tixtri hamsa u disghin fil-mija (95%) tal-muniti li l-Bank Centrali kien ser tohrog. Fil-process ta` valutazzjoni tal-*quotation* ta` Said, sar skambju ta` emails bejn il-partijiet.

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Tlieta kienu l-entitajiet li tefghu offerta u cioe` Said, Lombard Bank u Eurocollect tal-Belgju. Saru negozjati ma` Said biss.

B`email tal-24 ta` April 2008, il-Bank Centrali ried ikun jaf minn Said *whether you would be willing to support this committment (u cioe` the purchase of 95% of the gold and silver coin by the end of the third month following their official launching) through the issue of a Bank Performance Bond*. B`ittra ta` dik il-gurnata stess, Said avzat lill-Bank Centrali li ma rieditx taccetta li jkollha tidhol ghal *Bond Performance Bond* ghaliex *in no part of the quotation has a Bank Performance Bond been mentioned*. Fit-8 ta` Mejju 2008, il-Bank Centrali baghat email lil Said fejn kienet avzata li *the Central Bank of Malta is pleased to inform you that Said International Ltd has been shortlisted for the award tal-quotation* in kwistjoni.

Bejn l-24 ta` April 2008 u t-8 ta` Mejju 2008 ma jidhirx li l-*Bank Performance Bond* rega` ssemmiet. Pero` bl-email tat-8 ta` Mejju 2008, il-Bank Centrali stieden lil Said ghal laqgha fit-12 ta` Mejju 2008 *to discuss a draft agreement*. Fl-abbozz ta` ftehim dahlet klawsola 10.1 li taqra hekk –

On the signing of this Agreement, Said shall favour the Central Bank with an irrevocable bank guarantee drawn on a Maltese commercial bank and payable at first request by the Central Bank for the amount of ... (€794,041.66) equivalent to ... (€355,684.52) being the price of the gold coins ; and ... (€438,357.14) being the price for the silver coins.

Dahlet ukoll klawsola 4 fejn *the coins shall be supplied by the Central Bank without packaging*.

Bhala fatt, fis-sejha originali ghall-quotations, dawn iz-zewg klawsoli ma kienux inkluzi. Il-bank ighid li lanqas eskluzi ma kienu.

L-inkontru sar izda ma ntlahaqx ftehim ghaliex Said baqghet tinsisti li l-offerta taghha kienet skond il-*quotation* originali waqt li l-Bank Centrali baqa` jinsisti li huwa seta` u ried jinkludi z-zewg klawsoli l-ohra.

Dwar dan l-inkontru, Remy Said fl-affidavit tieghu (fol 48) ighid hekk –

F`dan l-istadju nixtieq nghid li matul l-imsemmija laqgħa kien hareġ car illi f`kaz li ahna konn adisposti naccettaw l-abbozz kif propost, Said International kienet tingħata l-kuntratt minnufih. Il-laqgħa intemmet bil-qbil li ningħataw zmien biex nahsbuha ftit u li ahna konna ser nikkomunikaw id-decizjoni tagħna fi zmien qasir.

Fil-15 ta` Mejju 2008, il-Bank Centrali kiteb lil Said –

The Central Bank of Malta regrets to inform you that due to various developments it has decided not to proceed with the award of this contract. Notwithstanding, the Bank appreciates the work and effort made to provide your offer and would like to apologise for any inconveniences.

L-ufficjali tal-bank xehdu li l-muniti kienu se jigu ordnati u kienu se jrin jithallsu mill-bank. Imbagħad min jiehu t-*tender* kien se jjer jagħmel il-pagament wara skond iz-zmien u t-termini l-ohra tal-kuntratt. Sabiex jigi evitat *exposure* riskjuz u allura mhux accettabbli għall-bank, dan insista insista li tidhol il-*bank guarantee* halli jekk issir ordni, l-bank ikollu l-assikurazzjoni li l-muniti jigu rtirati. Jekk le kien ikun hemm il-*bank guarantee* tagħmel tajjeb.

B`ittra tat-30 ta` Mejju 2008, il-Bank Centrali informa lil Said li kien ser johrog *a coin in a silver and a gold version under the Europa programme* u offra lil Said l-

opportunita` li tixtri hames mitt (500) munita tal-fidda u mitejn (200) tad-deheb soggett ghall-kundizzjoni li l-imsemmija muniti jridu jinxtraw f` salt u jithallsu fi zmien tlett ijiem mill-hrug ufficjali tal-muniti, kif ukoll soggett ghal-kundizzjoni li jkun hemm hlas addizzjonali ghal "presentation cases" f` kaz li dawn jigu ordnati.

Skond il-Bank Centrali, il-kwantita` ta` muniti offruti kienet skond kemm kienu gew akkwistati muniti s-sena ta` qabel. Infatti Lombard kienu offruti kwantita` inqas minn dawk offruti lil Said waqt fil-kaz ta` Eurocollect l-ammont ta` muniti offrut kien akbar (ara fol 72 u 73). L-offerta kienet rifjutata kemm minn Said kif ukoll minn Lombard u ghalhekk l-allokkazzjoni ta` Said u ta` Lombard inbieghet mill-Bank Centrali. Billi Eurocollect kien se jhallas b`pagament dirett, ma saret l-ebda talba ghal *bank guarantee*.

Fis-6 ta` Gunju 2008, l-avukati ta` Said kitbu lill-Bank Centrali u *inter alia* inghad hekk –

... for the purposes of Sec. 469A (1)(b)(iii) and (iv) of the Code of Organisation and Civil Procedure our clients call upon you to advise them formally what the 'various developments' quoted in the letter dated 15th May 2008 consist of. Your failure to provide satisfactory explanations to this request within seven days from today will be considered as a failure to provide legal justification for the withdrawal of the award, and will leave our clients no alternative but to proceed in terms of law.

Fir-risposta tieghu tat-12 ta` Gunju 2008, il-Bank Centrali fisser id-decizjoni tieghu illi *not to pursue with the quotation 03/2008 dated 5th March 2008* billi fil-kuntratt il-Bank ried idahhal il-kondizzjonijiet li ssemew qabel u li Said ma accettawx.

Fl-affidavit tieghu, Remy Said isemmi li kumpannija estera Jungher & Jungher akkwistat muniti bi kwantitajiet ferm oghla minn dawk offruti lil Said u ghalhekk setghet titlob prezz ghall-bejgh taghhom inferjuri ghal dak li setghet taghmel Said bin-numru inferjuri li kien offrut lilha bl-ittra tat-30 ta` Mejju 2008. Said stess xtrat minghand Modern Numismatics tal-Olanda 100 munita tal-fidda ghal prezz li juri vantagg car favur taghha. Dak affermat minn Remy Said kien kontestat mill-ufficjali tal-Bank Centrali li xehdu.

Ikkunsidrat :

IV. Is-subinciz (ii) tal-inciz (1)(b) tal-Kap.469A

Skond dan is-subinciz, l-eghmil amministrattiv ikun `ultra vires' –

meta l-awtorita` pubblika tkun naqset milli tosserva l-principji tal-gustizzja naturali jew htigiet procedurali mandatorji fit-twettiq ta' l-eghmil amministrattiv jew fid-deliberazzjonijiet ta' qabel dwar dak l-eghmil

Fid-dritt amministrattiv ta` pajjizna, li huwa fondat fuq il-ligi Ingliza (ara "**Cassar Desain vs Forbes noe**" - Qorti ta' l-Appell - 7 ta' Jannar 1935 u "**Lowell et vs Caruana et**" – Prim'Awla tal-Qorti Civili - 14 ta' Awwissu 1972) kemm il-principju tal-*judicial review* kif ukoll il-principji tal-gustizzja naturali kienu ilhom jigu applikati ferm qabel mal-Parlament Malti ghamel ligijiet *ad hoc* sabiex jirregola l-materja. Dan sehh ghaliex il-Qrati Maltin kienu affermaw illi fejn tkun tirrizulta *lacuna* fid-Dritt Pubbliku (u d-Dritt Amministrattiv huwa fergħa tad-Dritt Pubbliku) ghandha tapplika l-Ligi Ingliza.

Huwa risaput li l-principji tal-gustizzja naturali huma dawk il-principji minimi li ghandhom ikunu osservati waqt

proceduri anke ta' entita' amministrattiva illi ghandha l-kompitu li tiddeciedi dwar fatti li fuqhom imbaghad ghandha l-poter li tiehu decizjonijiet li jaffettwaw id-drittijiet tal-persuna.

Il-principju *audi alteram partem* jirrikjedi li qabel ma tittiehed decizjoni amministrattiva fil-konfront ta' persuna, dan ta' l-ahhar mhux biss ghandu jigi mgharraf, izda ghandu jinghata l-opportunita' li jghidu tieghu, fuq kollox jinghata widen tassew ghal dak li ghandu xi jghid, u fl-istess waqt jinghata l-opportunita' li jiddefendi l-kaz kif inhu xieraq.

Fis-sentenza Ingliza "**Ridge v. Baldwin**" (1964 – AC 40) 'the right to a fair hearing' gie iddikjarat bhala 'a rule of universal application'. F' dik is-sentenza, Lord Reid qal hekk –

'before attempting to reach any decision they were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence'.

Fil-kawza "**Board of Education v. Rice**" (1911 – AC 179), Lord Loreburn afferma li l-applikazzjoni tal-principji tal-gustizzja naturali 'is a duty lying upon everyone who decides anything'.

L-awturi **Wade and Forsyth** fil-ktieb "**Administrative Law**" (Tenth Edition – OUP – 2009 – pag.408) ighidu hekk :

"Experience has shown that there are remarkably few true exceptions to this 'duty lying upon everyone who decides anything', at any rate anything which may adversely affect legal rights or liberties"

Fis-sentenza “**Borg vs I-Awtorita' dwar it-Trasport Pubbliku**” deciza fil-21 ta' Mejju 2009 minn din il-Qorti diversament presjeduta (**PA/JRM**) inghad hekk dwar il-principji tal-gustizzja naturali -

“Bil-kemm ghandu jinghad li l-htiega li t-tribunal jew awtoritajiet amministrattivi jharsu b'mod skrupoluz it-thaddin ta' dawn il-principji hija wahda li m'ghandux ikun hemm disposizzjoni espressa tal-ligi sabiex wiehed japplikaha. It-tharis ta' dawn il-principji fit-tmexxija tal-amministrazzjoni pubblika ghandu jkun il-kejl minimu li jiggarrantixxi t-trasparenza u s-siwi tal-eghmil amministrattiv. Ghall-kuntrarju in-nuqqas ta' tharis ta' dawn il-principji jwassal ghall-irritwalita' tal-eghmejjel hekk imwettqa u ghat-thassir taghom.”

(ara wkoll – “**Debono vs Phoenicia Systems Ltd**” – Appell Inferjuri – 19 ta' Mejju 2004)

Fis-sentenza ta' din il-Qorti, diversament presjeduta, (**PA/RCP**) moghtija fis-27 ta' Jannar 2011 fil-kawza fl-ismijiet “**Falzon vs Ministru ghall- Affarjiet Rurali u l-Ambjent et**” kien ritenut hekk –

*“Illi ghalhekk hemm il-htiega li persuna jkollha pre-avviz tal-proceduri li jkunu ser isiru kontra tagha, nkluz l-akkuzi dwar l-istess u konsegwenzi li johorgu konsegwenza ta' l-istess, tant li fl-**Evans De Smith's Judicial Review of Administrative Action** (4th Edit. fol. 196) jinghad li “Natural Justice generally requires that the persons liable to be directly affected by the proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they might be in a position : (a) to make representations on their own behalf ; or (b) to appear at a hearing or inquiry (if one is to be held) ; and (c) effectively to prepare their own case and to answer the case (if any) they have to meet ... In a large majority of the reported cases where breach of the audi alteram partem rule has been alleged, no notice whatsoever of the action taken or proposed to be taken was given to the person claiming to be aggrieved, and failure to give him proper notice was tantamount to denial*

Kopja Informali ta' Sentenza

of an opportunity to be heard on that matter". ("Dr J.Cachia Fearne v. Segretarju Permanenti et" Prim Awla, 20 ta' Ottubru 2005 ; "A Gonzi v. Malta Drydocks Corporation", Prim Awla, 27 ta' Ottubru 2004)."

Fis-sentenza "A & J Ta` Miema Ltd vs Kummissarju tat-Taxxa fuq il-Valur Mizjud" deciza minn din il-Qorti (Sede Kostituzzjonali) diversament presjeduta (**PAK/TM**) fl-14 ta' Ottubru, 2004, kien ipprecizat li –

"ovvjament, il-principju audi alteram partem, ma jfissirx li l-parti milquta trid bil-fors tinstema', izda li tinghata l-opportunita' tressaq il-kaz taghha."

F`pagna 240 ta' *Garner`s Administrative Law* citat fis-sentenza tal-Qorti tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri (**AE**) fis-sentenza taghha tad-29 ta' Frar 2008 fil-kawza "Attard vs Kunsill Lokali tal-Munxar Ghawdex" jinghad hekk –

"the audi alteram partem rule – the essence of which is that, in certain contexts, prior to a decision being taken in the exercise of statutory power which may adversely affect the interests of individuals, those individuals should be alerted to the fact of, and the reasons for, the impending decision or action, and be permitted reasonable opportunity to make representations"

Fil-pagna 441 ta' Administrative Law ta' Wade & Forsyth (op. cit.) jinghad hekk –

"the rules of natural justice thus operate as implied mandatory requirements, non-observance of which invalidates the exercise of the power"

Kopja Informali ta' Sentenza

Ikompili jsostni Lord Bridge fil-kawza “**Lloyd vs McMahan**” tal-1987 citata f'pagna 335 tal-*Judicial Review Handbook* (1994) –

“the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates”

Apparti l-principji tal-gustizzja naturali, id-disposizzjoni titkellem ukoll dwar *htigiet procedurali mandatorji fit-twettiq ta' l-eghmil amministrattiv*. Fis-sentenza tal-1985 tal-House of Lords fil-kawza ‘**Council of Civil Service Unions and Others v. Minister for the Civil Service**’ inghad hekk minn Lord Diplock –

“I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

Ikkunsidrat :

V. Is-subinciz (iii) tal-inciz (1)(b) tal-Kap.469A

Skond dan is-subinciz, l-eghmil amministrattiv ikun ‘ultra vires’ –

meta l-eghmil amministrattiv jikkostitwixxi abbuz tas-setgha ta' l-awtorita` pubblika billi dan isir ghal ghanijiet mhux xierqa jew jissejjes fuq konsiderazzjonijiet mhux rilevanti

Fil-kuntest ta` din id-disposizzjoni, jidhol l-element ta` dak li huwa “ragonevoli” (*reasonableness*) u li ghandu jkun segwit mill-awtorita` pubblika meta tiddeciedi jew tezercita d-diskrezzjoni taghha.

Wade (“**Administrative Law**”) jikkumenta hekk –

A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is intended to do so – he must not in the exercise of his discretion do what he likes but what he ought. In other words, he must by the use of his reason ascertain and follow the course which reason directs. He must act reasonably.

Tqum il-kwistjoni dwar *the legal standard of reasonableness* li huwa mehtieg sabiex jigi sodisfatt dak ir-rekwizit ghax, kif jikkumenta l-istess awtur, *virtually all administrative decisions are rational in the sense that they are given for intelligible reasons but the question then is whether they measure up to the legal standard of reasonableness ... within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires.*

Kien ritenut ukoll li sabiex decizjoni titqies ragonevoli jehtieg li tkun bazata fuq kriterji oggettivi (“**Dingli et vs Kontrollur tad-Dwana et**” – Appell – 27 ta’ Marzu 2009 u “**Dalli vs Sollars et**” – PA/RCP – 20 ta’ Ottubru 2009)

Lord Greene MR fil-kawza “**Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation**” [1948] 1 KB 223 ighid hekk –

“It is true that the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’ Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the power of the authority. Warrington LJ in Short v Poole Corporation [1926] Ch 66 at 90, 91 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it may be described as being done in bad faith; and, in fact, all these things run into one another.” (enfasi ta` din il-Qorti).

Dwar ***irrelevant considerations*** Lord Esher MR fil-kawza “**R. vs St. Pancras Vestry**” (1890) qal hekk –

“they must fairly consider the application and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the exercise of their discretion, then in the eye of the law they have not exercised their discretion”

Skond il-**Garner's Administrative Law**, BL Jones & K Thompson, Tmien Edizzjoni, Butterworths, 1996 (pag.224) fid-Dritt Amministrattiv Ingliz, il-Qrati ghandhom is-setgha illi jissindakaw “ ... *that the decision making body addressed itself to all relevant factors, and ignored irrelevant factors, in coming to its conclusions*”. Fl-istess waqt skond Forbes J fil-kawza “**Pickwell v Camden London Borough Council**” (1983), 1983 osserva li r-rwol tal-qorti mhwiex li jghidu “*whether due or proper weight is given to a material consideration : the weight to be given to such a matter is for the body exercising the discretion to determine ; the court will no more substitute its own view of the importance of anyrelevant matter than it will do so for any other matter of statutory discretion*”

Ikkunsidrat :

VI. Risultanzi

L-argument kollu ta` Said fir-rifjut taghha illi taccetta z-zewg klawsoli li kienu inseriti fl-abbozz ta` kuntratt bejn il-partijiet huwa ghaliex dawk il-klawsoli speċjalment l-inkluzjoni ta` *bank guarantee* ma kienux jaghmlu parti mill-*quotation* originali u allura skond Said ma setghux ikunu nkluzi fil-kuntratt.

Mhuwiex il-kompitu ta` din il-Qorti illi tidhol fil-mertu fis-sens illi tissostitwixxi d-diskrezzjoni taghha ghal dik tal-Bank Centrali fil-vesti tieghu bhala awtorita` pubblika. Fl-istess waqt tosserva illi l-quantum tal-offerta ta` Said ma kenitx rigettata mill-Bank Centrali. In-nuqqas ta` ftehim kien principalment dwar il-*bank guarantee*. Din il-Qorti ssostni li fil-kuntest ta` kif kien propost li jithaddem il-kuntratt l-insistenza tal-Bank Centrali fuq *bank guarantee* kienet tissoddisfa l-kriterju tar-ragonevolezza (ara r-ragunijiet moghtija mix-xhud Godfrey Huber).

Ghall-fini tad-disposizzjonijiet citati minn Said in sostenn tal-istanza taghha, din il-Qorti tghid illi l-Bank Centrali ma kiser l-ebda principju ta` gustizzja naturali jew xi htiega procedurali mandatorja kif del resto ma kiser l-ebda element ta` *reasonableness* fl-insistenza tieghu. F`dak li qeghda tghid din il-Qorti hija wisq konfortata li ghalkemm dwar il-bank guarantee baqa` ma ntlahaqx qbil, dwar il-packaging, il-partijiet kienu prattikament waslu, kif del resto kkonfermaw ghatt mill-persuni li xehdu.

Ma rrizultax li kien vjolat is-subinciz (ii) anke ghaliex fil-kaz tal-lum ma kenitx akkolta offerta ta` offerent partikolari ad insaputa ta` offerent iehor fl-istess process. Anzi fil-kaz tal-lum, Said giet shortlisted. Il-Bank Centrali ttratta maghha biss. U ma wasalx ghaliex ma kienx hemm qbil mal-pretizi tal-Bank Centrali. Eppure l-Bank Centrali ma marx jittratta ma` haddiehor u ftiehem skond kondizzjonijiet differenti jew addirittura nferjuri ghal dak li nnegozja ma` Said. Il-Bank Centrali ghazel *to call off the quotation process*.

Mhux biss Said ma kienux eskluzi izda mat-tmiem tan-negozjati maghha ntemm ukoll il-process innifsu.

Din il-Qorti ghalhekk ukoll tghid li is-subinciz (ii) mhux pruvat.

Ma kienet improprija xejn r-riferenza tal-Bank Centrali ghad-dritt tieghu illi jirrifjuta anke l-aktar offerta vantaggjuza u dan fil-kuntest tas-subinciz (iii). Jekk l-offerta ta` Said kienet l-ahjar ghax taghha kien l-ahjar prezz (ara x-xiehda ta` Joseph Bonnici) dak ma jfissirx li l-Bank Centrali ma setax jirrifjutaha mhux biex jaghzel lil haddiehor, izda biex ma jaghzel lil hadd, ghaliex il-*concern* ewlenija tal-bank u cioe` principalment il-htiega ta` bank guarantee ma kenitx sodisfatta mis-*shortlisted candidate*. Ma kien hemm propju xejn irragonevoli ghall-Bank Centrali li jiddeciedi kif iddecieda.

Fir-rigward ta` dak li sar wara li kienet ritirata l-*quotation offer* din il-Qorti ma ssib xejn censurabbli fil-kuntest tad-disposizzjonijiet citati mill-kumpanija attrici in sostenn tal-istanza taghha. Dak li ried jimplika Remy Said fl-affidavit tieghu huwa kontradett u dokumentat mill-Bank Centrali. Il-bejgh propost lil Said u lil haddiehor sar skond procedura li kienet tghodd ghal kulhadd skond l-istess kriterji ghalkemm il-kwantitajiet ta` muniti (kif rajna) kienu jvarjaw. Min accetta u min le. Said irrifjutat. Il-fatt li haddiehor accetta u ghamel in-negozju tieghu (b`riferenza ghal Eurocollect) mhux prova li kull ma sar kien intiz li jkun ghad-detriment ta` Said.

In vista tal-premess, din il-Qorti qeghda tichad l-ewwel talba. Ghalhekk ma hemmx htiega li tghaddi ghall-konsiderazzjoni tat-tieni, it-tielet u r-raba` talbiet attrici.

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi, filwaqt illi tilqa` l-eccezzjonijiet tal-bank konvenut, qeghda tichad it-talbiet kollha tal-kumpanija attrici, bl-ispejjez kontra l-kumpanija attrici.

< Sentenza Finali >

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