



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 17/2012

**Carmel Vella ghan-nom ta' Vella Bros. Ready Mix
Limited**

vs

L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Carmel Vella personalment kif ukoll ghan-nom ta' Vella Bros. Ready Mix Limited tat-23 ta' Frar 2012 minn decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Frar 2012 kontra rifjut tal-applikazzjoni PA 5359/06;

Rat ir-risposta tal-Awtorita li sottomettiet illi l-appell ghandu jigi michud u d-decizjoni tat-Tribunal tigi konfermata;

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Rat l-atti kollha inkluz dawn tal-applikazzjoni quddiem l-Awtorita u semghet id-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ra l-appell ipprezentat mill-Perit Guido Vella ghan-nom tal-appellant, Carmel Vella minn rifjut ta' applikazzjoni PA 5359/06 - "to regularise variations from approved drawings" fi Vella Bros. Ready Mix Ltd., Triq it-Torri Gorgun, Xewkija, Ghawdex fejn iddikjara s-segwent:-

"Please find attached a copy of the refusal issued by the DCC on the 18th March, 09 regarding the application PA 5359/06(Dok. API). My Clients would like to appeal from this most unfair decision, on the following grounds:

This application is intended to sanction minor variations from the plans which had been approved by the Appeals Board in file PA 3788/91 (Dok. AP2). These variations do not alter the nature of the development, and were made solely in order to make the undertaking viable, safe and efficient according to EU standards.

This Batching plant is actually the main producer of Ready-mix Concrete in Gozo, and is providing Concrete for some of the major infrastructural projects underway on the island. In spite of all this the Plant as erected has a smaller footprint than that approved, 'while the end result is pleasing to the eye, and is acceptable according to Structure Plan and Local Plan Policy. As you can see from the plans and sections submitted, the buildings AS BUILT are sometimes smaller on plan and in section than the approved ones (YELLOW). The buildings have been erected in the parts of the site approved for building, while the open areas have actually been enlarged.

The Appeals Board had approved this plant by its decision dated 18th June, 1997(PAB 103/94)(Dok. AP2) since the site lies on an old and disused TORBA quarry. This shows that the site has been committed to the building/construction trade long before the Maltese Islands were declared a Planning Area in 1962. An extensive landscaping scheme was adopted on site as

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per Plan No. 20907/A. Please note that the trees shown on this scheme ACTUALLY EXIST, and are mature enough to screen the plant from view.

The LSU/PCU stated -BLUE 13- that official alignment is not required.

The MRA has not objected to this development.

The Department of Agriculture has not objected to this development.

The Approved Transporter Garage, Cement, Additives & General Stores (Block A), 'were actually developed as a Basement Garage,' additives and general stores (Plan 51006/F),' with a Ground Floor Watchman and Staff Quarters/Plans 51006/E1, 51006/E2). This building, designed to look like a rural farmhouse, is actually smaller in Volume than the one approved (plan 51006/G), and has its own landscaped garden(Plan 20907/A) since it is the most visible from the street. Together 'with the Cladding of the South Boundary wall with rusticated stone, the landscaped garden, the use of noise absorbing plants and of dust absorbing material, these mitigation measures conform 'with Policy GZ-CMRC-9. This policy does not prohibit the use of a part of the plant as a Watchman's Quarters. The presence of a watchman 24/7 on site is mandatory, in order to guard the premises from vandals, thieves, arsonists and saboteurs.

The Watchman's Quarters, which also serve as a Mess and First-Aid Station are absolutely necessary according to the policies and rules of the Health and Safety Department, and follow European Community Conditions of Employment. The 26 registered Full-Time Employees (Doc. AP3) working every day of the year on this plant are entitled to the same working conditions as any other workmen.

The approved Canopy for Trucks was developed as a Canopy for Trucks, Office Block, and Aggregate Silo(Plans 51006/A, 510061D1, 510061D2). As these

plans show, the Building envelope AS ERECTED is considerably smaller than the one approved in PA 3788/91.

Since the development is not residential in nature, it DOES NOT run counter to the GCLP, which has even designated 4 nearby areas in Xewkija for MIXED USE on Map 14-13.A, due to the large variety of USES approved in this village.

The Plans, elevations and sections that have been submitted make it possible for MEPA to review the operations of an existing construction-related plant in an area located outside the limits to development. Thus the proposal CONFORMS to and can be approved according to Policy GZ-CMRC-9. The GCLP shows clearly that the site is not scheduled in any way, and is not a rural conservation area. MAP 13-4 actually shows the area as a DEGRADED LANDSCAPE, so that the applicant's landscaping scheme shall greatly upgrade and improve this degraded area. Please note that the degradation is definitely not due to the applicant's development, which is separated from this degraded area by a rubble-faced boundary wall.

This disturbance is still going on in the area, since a brand new Waste Separation Station (even for hazardous waste) is being erected a few metres down the same road, and a GAS DEPOT was approved while this file was being processed, onfile PA 1355/06 (Dok. AP4) on a site a few metres away. Similar disturbing development is the Helipad, the Heliport, countless animal farms, an Area for Intensive Farming, A Sewage Treatment Plant (Map 14.2-E, 14-13E) and so on. The locality is also notorious for the continuous dumping of debris, scrap, heavy refuse, etc.

The buildings on the North part of the site, that is Blocks D, E & F had been approved on permit number PB 2879/72/2153/70 (Dok. AP5) as a dairy farm, where an appellants' predecessor had reared cows until he died. The Blocks D, E & F have been incorporated in the Site, and now form part of the Batching Plant.

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The levy of €186.40 is hereby attached.

In view of the foregoing you are kindly requested to waive off the refusal issued by the DCC, and to issue a permit for this proposal, under any condition that you may wish to impose. The appellants reserve the right to make further written/verbal submissions, and request that they be present at every hearing or site inspection held by the Board.";

Ra r-ragunijiet tar-rifjut li huma s-segventi:-

"The site lies outside the limits for development defined in Map14.13-A of the Local Plan for Gozo and Comino, and so it is located in an area where new residential development is restricted. The proposed development would run counter to the local Plan which strictly prohibits new dwelling units outside the limits to development unless strongly justified.

Development of this site would compromise the Malta Environment & Planning Authority's ability to review the operations of existing construction related plants in areas which are located outside the limits to development. The proposal is therefore counter to Policy GZ-CMRC-9 of the Gozo and Comino local Plan.

The site lies in a Rural Conservation Area (as designated by the Structure Plan and indicated on the Key Diagram). The proposal does not comply with Structure Plan policy RCO 2 which clearly states that no form of urban development will be permitted within Rural Conservation Areas.

The proposal does not fall within one of the categories of development, namely structures or facilities essential to agricultural, ecological or scenic interests, which may be permitted in Rural Conservation Areas where they meet the principles and criteria set out in Structure Plan policy RCO 4. The proposal is not essential to, nor does it enhance agricultural, ecological, or scenic interests.";

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Sema' lill-Perit Guido Vella u lill-Avukat Dr. Justyne Caruana ghall-appellant;

Sema' lill-Avukat Dr. Anthony De Gaetano, David Cassar u Mario Scicluna ghall-Awtorita;

Ra r-rapport tal-Awtorita prezentat fid-19 ta' Gunju 2009 minn David Cassar, partikolarment il-kummenti tad-Direttorat fejn gie dikjarat is-segwent:-

"The proposed sanctioning of the variations to the approved plant is not acceptable since the structures take up a larger area than that approved in the original permission,' a dwelling is included; the extension would compromise the objectives of the Gozo and Comino Local Plan; and the landscaping scheme is not adequate.

-- Layout of structures and extension

Permission PA3788/91 was issued "to erect garage for commercial use", which included the construction of a concrete plant with silos, ramp and stores - see copy of approved drawing 38A at red 1A and file attached. The permitted area for the structures found at the south-western side of the site cover an area of approximately 350m². The permitted stores and garage were not constructed. Instead, the structures related to the batching plant (consisting of garages/stores and offices) were constructed adjacent to, and in the vicinity of, the plant - see drawing red 39A. A dwelling unit was also constructed in this area. The total area of the proposed structures (including the dwelling unit) amounts to approximately 918m². Therefore the proposed sanctioning does not only regard the variation in the layout, and addition of dwelling, but also an extension of approximately 570m².

The proposed layout is not acceptable since there is no justification for the sanctioning of the illegal dwelling unit - which is subject to enforcement action ECF165/96 - and therefore the proposal runs counter to Structure Plan Policies SET 11 and SET 12 and Gozo and Comino Local Plan Policy GZ-LMDZ-1 and GZ-RLST-5. The additions

and variations of the structures around the plant consist of an extension to the approved batching plant. The extension cannot be accepted since it goes against the provisions of Local Plan Policy GZ-CMRC-9, which sets out a general presumption against the lateral extension of existing construction related sites.

-- Landscaping

The existing and proposed landscaping on site is not adequate to provide the necessary screening of the development. The proposed landscaping scheme submitted in PA3788/91, following the issue of permission, was never approved in view of illegal development on site, while the proposed landscaping scheme submitted with the current application is not acceptable - see black 18 from EPD. The proposal creates a negative visual impact in a rural area and therefore it goes against the objectives of Structure Plan Policy RC04 and Local Plan Policy GZ-CMRC-9. Indeed Local Plan Policies GZ-RECR-1 and GZ-RLCN-5 seek the rehabilitation of surrounding areas and their use for informal rural recreation, and the visual impact of the proposal needs even further consideration.

-- Illegal Development

Enforcement action was initiated - through ECF 165/96 - against the construction of a dwelling without the necessary permission, which falls within the site boundaries. The building (Block A) is being shown as a "Watchman and Staff Quarters, and Stores" and no mention of a dwelling is being made in the proposal description. The application, therefore, does not seek to sanction the existing dwelling on site and the provisions of Circular PA2/96, thus apply.";

Ra l-verbali tas-seduti mizmuma fil-kors ta' smigh ta' dan l-appell,

Ra l-files PA 5359/06, PA 3788/91, ECF 334/06, u ECF 165/96.

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Ra d-digriet ta' dan it-Tribunal tal-1 ta' Settembru 2011, u tas-6 ta' Jannar 2012.

Ikkunsidra ulterjorment:-

Il-proposta prezenti hi "To regularise variations from approved drawings". L-applikazzjoni hi wahda generika, u ma tirreferix biss ghal dak li gie effettivament approvat cjoe' l-batching plant. Naturalment fil-kaz li l-proposta kienet limitata ghal dak li kien digja' gie approvat; il-proposta kienet tigi kkunsidrata f'ottika differenti. Dan ma sarx propju ghaliex l-appellant bil-proposta prezenti tieghu qed jitlob li jirregolarizza l-varjazzjonijiet li kienu l-mertu ta' Enforcement Action, billi l-appellant fuq l-istess sit, fost affarijiet ohra, bena dar residenzjali bla permess.

In fatti irrizulta li dwar dan l-izvilupp hareg Avviz biex Tieqaf u ta' Twettieq ECF 165/96; Saret l-applikazzjoni PA 3427/96 biex tigi sanzjonata d-dar in kwistjoni, liema applikazzjoni giet irtirata.

Saru enforcements ohrajn ECF 1417/98 - dwar kontravenzjoni tal-kondizzjoni Numru 2 tal-Perrness PA 3788/91 - billi ma giex sottomess pjan ta' landscaping ghall-approvazzjoni mill-MEPA;

u ECF 334/06 - billi l-izvilupp ma kienx konformi mal-pjanti approvati fil-permess PA 3788/91; billi ma' dak approvat zdienu, garage, ufficini, stores fil-kantina, silo, bitha ghaz-zrar, u varjazzjoni fil-landscaping.

L-oggezzjoni principali tal-Awtorita ghal din l-applikazzjoni, hi li d-dar residenzjali mibnija barra z-zona tal-izvilupp - ma tistax tigi ssanata. Oggezzjoni ohra tal-Awtorita hi fis-sens li l-izvilupp approvat originarjament ikopri area ta' 350m²; mentri l-area ta' dak li qed jintalab biex jigi sanzjonat jkopri area ta' 918 m² u cjoe' diskrepanza ta' 570 m².

Hi l-opinjoni kkunsidrata ta' dan it-Tribunal li f'dawn ic-cirkostanzi partikolari, s-sanzjonar tal-izvilupp illegali fuq

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skala konsiderevoli f'area barra z-zona tal-izvilupp, ma jimmeritax approvazzjoni.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tat-18 ta' Marzu 2009, ghall-applikazzjoni PA 5359/06.

Ikkunsidrat

L-aggravju tal-appellant huma s-segwenti:

1. Id-decizjoni hi nulla ghax l-okkju ma jiriflettix il-partijiet involuti fl-applikazzjoni billi l-applikant kien Carmel Vella personalment kif jidher mill-atti u dokumenti fl-appell.
2. Gie lez id-dritt ghal smigh xieraq billi wiehed mill-membri tat-Tribunal kien gia ta' decizjoni fuq is-sit in kwistjoni u s-rikuza tieghu giet miochuda mill-istess Tribunal.
3. In-nullita tad-decizjoni tat-Tribunal billi injora l-aggravji kollha tal-appellant.

L-ewwel aggravju

Bla dubbju dan l-aggravju hu wiehed ta' natura legali li jekk ippruvat igib in-nullita tad-decizjoni tat-Tribunal billi d-decizjoni tkun inghatat kontra persuna li mhix il-parti interessata.

Bhala fatt pero dan l-aggravju ma fihx mertu. Hu minnu illi l-atti quddiem it-Tribunal ma jiddistingwux dejjem bejn Carmel Vella personalment jew Carmel Vella in rapprezentanza tas-socjeta Vella Bros. Ready Mix Limited. Pero bla dubbju l-aqwa prova ghandha tistrieħ biss u esklussivament fl-applikazzjoni li saret ghal hrug tal-permess.

L-atti tal-Awtorita juru bla dubbju illi l-applikazzjoni 5359/06 maghmula fl-24 ta' Awwissu 2006 saret minn Carmel Vella obo Vella Bros. Ready Mix Limited u dan hu dak li hu rilevanti ghal finijiet tad-decizjoni tat-Tribunal li nghatat fil-konfront tal-applikant dijarat fl-applikazzjoni mertu tal-vertenza prezenti.

Ghalhekk dan l-aggravju qed jigi rigettat.

It-tieni aggravju

It-tieni aggravju gie mqajjem mill-appellant bhala punt ta'dritt quddiem it-Tribunal fid-19 ta' Settembru 2011 cioe zmien wara li l-appell quddiem it-Tribunal beda jinstama' u kien gia differit ghad-decizjoni. Il-Qorti tista' tieqaf hawn billi quddiem it-Tribunal il-kwistjoni tar-rikuza qamet wara li l-process tal-appell instema', u kien differit ghas-sentenza u f'dak izzmien kollu li kien jinstema' l-appell din il-kwsitjoni ma tqajmitx meta l-fatt allegat kien gia maghruf ghall-appellant, u dan skond l-artikolu 739 tal-Kapitolu 12.

Pero oltre dan l-appellant fir-rikors tieghu jirreferi ghal presenza ta' wiehed mill-membri tat-Tribunal fuq it-Tribunal li ta decizjoni fl-applikazzjoni numru 3788/91. Din per se ma taghti ebda lok ghal rikuza skond il-ligi. Apparti li l-appellant ma indika ebda artikolu tal-ligi rilevanti biex jissostanzja t-talba tieghu, hu indikat mill-istess appellant li l-membri tat-Tribunal ta decizjoni fuq applikazzjoni differenti ghalkemm fuq l-istess sit. Hi l-fehma ta' din il-Qorti li ma jistax jinghad illi l-membri ppartecipa f'xi decizjoni fuq l-appell mertu ta'din il-vertenza. It-talba f'din l-applikazzjoni hi sanzjonar ta' varjazzjonijiet minn pjanti approvati u kwindi l-operat tal-membri tat-Tribunal f'decizjoni precedenti fuq l-istess sit bl-ebda mod ma setghet tkun raguni ta' projbizzjoni li jkun parti mit-Tribunal li kienet qed tikkonsidra talba ghal sanzjonar minn permess ezistenti u approvat. Dan l-ilment ma jaqa' taht ebda dispost tal-artikolu 734 tal-Kap. 12 li ghandu japplika bl-istess mod ghal membri tat-Tribunal quasi gudizjarji.

Ghalhekk dan l-aggravju hu bla bazi.

Il-Qorti ma tistax tifhem kif id-dritt ghal smigh xieraq jista' jigi lez fuq permess li nhareg u li dak li kien qed jintalab issa hu sanzjonar ta' varjazzjonijiet minn disinji originarjament approvati. Din ma kinitx talba ta' revizjoni minn decizjoni li ma approvatx applikazzjoni fejn l-istess membru kien parti mit-Tribunal li rrifjuta originarjament il-

permess fejn allura kien jirrizulta car li l-membri kien gia ppunzja ruhu fuq il-mertu. Il-mertu tal-applikazzjoni odjerna hi ghal kollox differenti mill-premess gia mahrug favur l-applikant u ghalhekk ma hemm ebda divjet li l-membri jiddeciedi fuqu flimkien mal-membri l-oħra tat-Tribunal kif inhu obligat li jagħmel. Ma hemm ebda lezjoni jew apparenza ta' lezjoni li jwassal ghal ksur ta' smigh xieraq u ghalhekk dan l-aggravju ukoll qed jigi rigettat.

It-tieni aggravju

L-appellant jissottometi illi t-Tribunal iddecieda mingħajr ma ta' kont għall-aggravju mressqa minnu. Dan l-aggravju jekk ben fondat jista' jwassal għall-annulament tad-decizjoni tat-Tribunal għax kif ingħad fid-decizjoni fl-ismijiet **Michael Attard Brothers Limited vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, deciza fit-30 ta' Novembru 2011 'hu obligu tal-Bord u kull gudikant, li jikkonsidra l-punti sollevati quddiemu, u jiddecidihom, billi jiddelibera dwar l-istess b'motivazzjoni adegwata'. Ma jfissirx b'daqshekk illi kull punt sollevat għandu jigi kunsidrat skrupolozament biex sentenza tkun valida pero hu importanti lil fl-assiem tagħha d-decizjoni tkun trattat il-punti kollha saljenti speċjalment dawk legali u jidher li gew kunsidrati u trattati adegwatement biex il-persuni koncernati jingħataw raguni valida u konkreta fuq il-fatti għal rifjut jew approvazzjoni. B'hekk tkun tidher li qed issir gustizzja mal-partijiet.

Il-mertu tal-applikazzjoni hu l-approvazzjoni ta' varjazzjonijiet minn dak approvat bil-permess 3788/91. It-Tribunal ikkunsidra dak li gie sottomess mill-appellant in sostenn tal-applikazzjoni u dak sottomess mill-Awtorita kontra l-hrug tal-permess. Avolja kif qal l-appellant it-Tribunal ma ddelungax fl-ispejgazzjoni u ragunijiet li wasluh jichad l-applikazzjoni pero jirrizulta li t-Tribunal ra l-files ta' dak approvat, dak mitlub fl-aggravju tal-appellant kif ukoll l-enforcement notices li hargu fuq partijiet mill-izvilupp li tagħhom qed tintalab l-varjazzjonijiet.

It-Tribunal qies bhala fundamentali ghac-cahda tal-applikazzjoni l-enforcement notices li hargu kontra l-applikant rigward certi aspetti tal-varjazzjonijiet li taghhom intalab sanzjonar cioe l-fond kunsidrat bahal residenzjali fuq is-sit in kwistjoni, pjan ta' landscaping fejn ma giex mitlub l-approvazzjoni tal-Awtorita, u binjiet ohra li saru mhux konformi mal-pjanti. Barra minn hekk gie relevat illi l-area ta' dak li qed jintalab sanzjonar hi kbira hafna meta tqis dak originarjament approvat. It-Tribunal ikkonkluda illi sanzjonar ta' zvilupp fuq din l-iskala f'area barra zona ta' zvilupp ma tistax tigi sanzjonata. Dawn huma kwistjonijiet ta' fatt illi t-Tribunal dehrlu fid-diskrezzjoni moghtija lilu fuq kwistjonijiet ta' fatt li jaghti piz ghall-provi tal-Awtorita. L-aggravji tal-appellant huma msejsa fuq il-fatt li l-alterazzjonijiet huma minimi, u t-Tribunal skarta dan l-argument ghax ma qishomx minimi, il-qies tal-varjazzjonijiet ukoll ma kienx tali li okkupaw footprint izghar kif allegat, l-uzu ta' binjiet li hemm, u li qed jigu mitluba li jigu sanzjonati ma kienux tali li jistghu jigu sanzjonati kunsidrat it-tip ta' sit, u l-qies u skop li bihom saru l-alterazzjonijiet. Il-Qorti ma tistax taqbel mal-appellant li l-aggravji tieghu ma gewx kunsidrati. L-iktar li jista' jilmenta l-appellant hu illi t-Tribunal ittratta l-applikazzjoni u l-aggravji minn ottika legali differenti minn dak li ssottometta l-applikant, pero b'daqshekk ma jfissirx li ma gewx kunsidrati, jew li t-Tribunal applika hazin il-ligi ghal fatti.

Ghalhekk il-Qorti ma tqis li l-ilment tal-appellant hu gustifikat u qed tichdu.

Decide

Ghalhekk il-Qorti taqta' u ticcediedi billi tichad l-appell ta' Carmel Vella personalment kif ukoll ghan-nom ta' Vella Bros. Ready Mix Limited u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tas-7 ta' Frar 2012. Bl-ispejjez ghall-appellant.

< Sentenza Finali >

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