



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 147/2012

Austin sive Agostino Xuereb

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Austin sive Agostino Xuereb tat-12 ta' Ottubru 2012 mic-cahda tal-applikazzjoni tieghu PA 3321/07 mit-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012;

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

Rat l-atti kollha u semghet id-difensuri tal-partijiet;

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Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:

B'applikazzjoni tas-16 ta' Mejju 2007 - Full Development Permission – PA/03321/07 fejn l-appellant, f'Site at, Wied il-Buzbiez, Rabat (Malta) talab:

"To rehabilitate existing agricultural rooms."

L-Awtorita cahdet it-talba ghall-hrug tal-permess relattiv ghar-raguni segwenti:

"1 The proposal runs counter to the adopted Policy and Design Guidance:

Agriculture, Farm Diversification, and Stables, and in particular to paragraph 2. 4A(4) since the site is not registered on the applicant.

2 The proposal runs counter to the adopted Policy and Design Guidance:

Agriculture, Farm Diversification, and Stables, and in particular to paragraph 2.4A since the applicant has not been registered as a farmer for at least two years prior to the application.

3 The proposal runs counter to the adopted Policy and Design Guidance:

Agriculture, Farm Diversification, and Stables, and in particular to paragraph 2.4A(3) which limits the size of an agricultural store to 15 square metres on an arable farm of 5 to 10 tumoli.

4 The proposed agricultural rooms run counter to the adopted Policy and Design Guidance: Agriculture, Farm Diversification, and Stables, and in particular to paragraphs 2.4A(9) which limits the external height of agricultural stores to 3.2 metres.

5 The reservoir run counter to the adopted Policy and Design Guidance: Agriculture, Farm Diversification, and Stables, and in particular to paragraph 2.6A(2) which it is permitted on arable land registered in the name of the applicant with the Department of Agriculture. The reservoir is not included in the description therefore fails to comply with the requirements of Circular MEPA 8/02.

6 The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5."

Il-perit Charles Buhagiar pprezenta l-aggravji tal-appellanti inter alia kif gej:

"My client acquired his property in September, 2006 which property consisted of an agricultural holding in which are located various dilapidated structures (copy of contract attached). These structures were used for agricultural purposes.

My client has submitted an application to rehabilitate these structures. No change of use is being requested. These structures are clearly visible in the old survey sheets.

The arguments put forward by MEPA to justify their refusal decision is that since my client is not a registered farmer he cannot rehabilitate the existing rooms.

Furthermore they claim that such rehabilitation would constitute some form of urban development.

With all due respect we cannot understand how the rehabilitation of the existing rural structures constitutes "urban development". Furthermore it is not specified in

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any planning policy that such rehabilitation can only be carried out by registered farmers."

Permezz ta' nota l-perit Buhagiar ikkummenta ulterjorment kif gej:

"My client had requested permission to rehabilitate existing rural structures.

For ease of reference please find attached a fresh drawing which includes the layout of the rooms in relation to each other as well as the section and elevation duly coloured to indicate the proposed rehabilitation works (in our original submission only the plans were coloured).

I trust that this new drawing is of assistance in the determination of our application."

Permezz ta' rapport l-Awtorita ressqet il-kummenti taghha inter alia kif gej:

"5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 While the description of the proposed development states that the proposal shall involve rehabilitation works, in actual fact, the state of the existing rooms entail that the proposal will also involve considerable reconstruction works. These shall include:

For Room A:

The complete redevelopment of three (3) of the external walls, an extended floor above what appears to be the only sound structural of the existing structure, new internal dividing walls, and new roofs.

For Room B:

The complete redevelopment of all four (4) external walls.

5.2 The extent of works that are required to be carried out for the proposed 'rehabilitation', does not constitute of eligible conversion works in accordance with Paragraph 8.1 (iii) as the existing structures are not in a sound structural condition and would require substantial rebuilding. This policy clearly states that the conversion of existing rural structures will not be permitted where this will involve the rebuilding of large section of walls, as is the case of this proposed development

The proposed development therefore does not qualify as rehabilitation works, but an almost reconstruction of the existing ruins.

5.3 As the proposed development would mainly consist of new development, the Authority has considered it as such. Furthermore, as the application indicates that the use of the rooms shall be for agricultural purposes, the proposed development has been assessed under the provisions of Policy 2.4A of the agriculture policy guidance. As reflected in the reasons for refusal, the proposed development does not comply with several of the criteria listed in this policy, as follows:

- The Department of Agriculture (consultation letter at red 16) have stated that the land on which the two rooms are proposed is not registered on the applicant's name in the Farmers Register (F.R.C.), and hence in conflict with criteria (4);
- The applicant has not been registered as a farmer with the Department of Agriculture for at least two years prior to the submission of this application, as confirmed by this same department, and hence in conflict with criterion (1);
- While the applicant is not eligible for the construction of a new agricultural room with only 0.5.0 tumoli of registered arable land, the size of the two rooms fairly exceed the maximum 15m² permitted to farmers with over 5 tumoli of registered land. Hence, the proposal is also in conflict with criterion (3);

- The height of both rooms exceeds the maximum height of 3.2 metres regulated by criterion (9).

5.4 There is no justification on sound planning grounds for the proposed development, as required by Structure Plan Policies SET 11 & 12, as the agricultural status and the design of the proposed rooms do not qualify as agricultural rooms that may be permitted under Policy 2.4A. Moreover, contrary to that claimed by the appellant, the proposed development does not consist of rehabilitation, as the state of the existing rooms is that of ruins and hardly any of the original building fabric is present on site. Hence, the development would consist of substantial new constructions rather than the rehabilitation of existing structures, which the Authority deems is not acceptable."

Il-perit Charles Buhagiar ikkummenta inter alia kif gej:

"In our opinion MEPA is misinterpreting our application since it is stated that the two rooms subject of this application are in ruins and are to be demolished and rebuilt.

As you may note from the attached drawings this certainly is not the case since a substantial part of the rooms structure is still in existence even if the roofs have collapsed.

However to enable a better understanding of our proposal we would like to respectfully request that you carry out a site inspection to confirm personally the existence of the rooms (not ruins)."

Inzamm access fuq s-sit rellativ fis-6 ta' Mejju 2011 u it-Tribunal gie muri mill-appellant, il-fdalijiet ta' tlett ikmamar antiki hafna li l-appellant qed jipproponi li jerga' jirripristina. Gie notat illi kamra minnhom kienet mibnija fuq zewg sulari, ta' hdejha baqa' biss il-pedament, u l-ohra fuq l-lemin fiha forsi gholi ta' sitt filati pero' m'hemmx soqfa u huma fi stat ta' abbandun totali.

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Illi fl-udjenza tat-22 ta' Frar 2012 gie prezentat PA 3321/07.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghar-rijabilitazzjoni ta' kmamar agrikoli ezistenti.

Skond l-Awtorita, mill-pjanti ppresentati jidher li l-proposta ma tinkludix biss restawr tal-bini ezistenti imma r-rikostruzzjoni tal-bicca l-kbira tal-kmamar.

Il-fdalijiet li baqa', li skond l-Awtorita huma biss 'ruins', huma ta zewg ti kmamar ta' footprint 35.5 u 28.2 metru kwadru rispettivament. Ir-rikostruzzjoni proposta tikkonsisti fil-bini mill-gdid ta' l-bicca l-kbira tal-hitan u tas-soqfa kollha. Kamra minnhom hija proposta li tinbena fuq zewg sulari.

Is-sit mertu ta' dan l-appell jinsab ODZ f'Wied il-Buzbiez, Rabat, Malta li hija Level 4 Area of Ecological Importance.

Din l-applikazzjoni giet rifjutata peress li

- L-izvilupp propost imur kontra s-Policy and Design Guidance: Agriculture, Farm Diversification, and Stables, stante li s-sit mhuwiex registrat fuq l-applikant bhala bidwi ghal mini mu ta' sentejn qabel l-applikazzjoni;
- L-izvilupp mhuwiex konsistenti mal-limiti mposti dwar id-daqs ta' mahzen agrikolu ta' 15 metru kwadru fuq art agrikola ta' bejn hamsa u ghaxart itmiem;
- L-limiti dwar l-gholi estem qed jinqabes fil-proposta in ezami;
- Il-gibjun mhuwiex inkluz fid-deskrizzjoni tal-izvilupp propost u peress li l-gibjun qed jigi propost li jinbena fuq art mhux registrata fuq l-appellant; u
- Il-proposta tmur kontra i-policy SET 11 u l-policy BEN 5 tal-Pjan ta' Struttura.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smigh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellant jissottometti li

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- Kien akkwista l-proprjeta mertu ta' dawn il-proceduri f'Settembru tal-2006, liema proprjeta tikkonsisti f'art agrikola b'diversi kmamar fi stat ta' dilapidazzjoni u li kienu jintuzaw ghal skopijiet agrikoli;
- L-applikant ipprezenta applikazzjoni ghar-riabilitazzjoni tal-istess strutturi;
- L-argumenti mressqa mill-Awtorita li l-izvilupp propost iwassal ghal zvilupp urbanizzanti mhuwiex minnhu; u
- Ma tezisti l-ebda policy vigenti li tillimita li ssir biss rijabilitazzjoni minn bdiewa rregistrati.

L-Awtorita tissottometti li

- Nonostante li l-applikazzjoni hija ghal rijabilitazzjoni fil-fatt hum a ntizi diversi xoghlijiet ta' kostruzzjoni;
- F'dan is-sens l-Awtorita tikkunsidra li l-izvilupp propost jikkonsisti f'zvilupp gdid u dan skond il-kriterji ta' Section 8 tal-policy Development Outside Built-up Areas (PLP 20);
- Konsegwenza ta' dan il-fatt u li l-applikant mhuwiex bidwi registrat mhux permess li jsir dan it-tip ta' zvilupp;
- Fi kwalunkwe kas iz-zewgt ikmamar jeccedu l-massimu ta' 15 metru kwadru permessi lil bdiewa b'izjed minn hamest itmiem art agrikola;
- L-gholi tal-kmamar jeccedi l-massimu permess ta' 3.2 metri; u
- L-izvilupp mhuwiex gustifikat ai termini tal-policies SET 11 u SET 12 tal-Pjan ta' Struttura.

Mill-premess jirrizulta ghalhekk li f' dan il-kas dak li jrid jigi deciz finalment minn dan it-Tribunal huwa jekk din il-proposta hix wahda ta' restawr u riabilitazzjoni jew jekk dan hux progett ta' kostruzzjoni ta' zewgt ikmamar li minnhom ma fadal qwazi xejn. Din ta' l-ahhar hija l-pozizzjoni ta' l-Awtorita li tuza il-provedimenti tal-PLP 20 bhala sostenn ghal din il-pozizzjoni. Minn-naha l-ohra l-appellant qed jibbaza l-argumenti tieghu principalment fuq it-tezi li l-fdalijiet li baqa fuq is-sit ghandhom jigu kkunsidrati bhala kmamar li ilhomjezistu ghal zmien twil u fadal bizzejjed minn dawn il-kmamar li x-xoghol fuqhom ghandujitqies bhala restawr u riabilitazzjoni.

Fil-fehma kunsidrata ta' dan it-Tribunal, jekk jirrizulta li dawn il-kmamar ghadhom fi stat tali li l-forma u l-istil

arkitettoniku tagħhom għadhom fi stat tajjeb bizzejjed li wiehed jista jkun konfidenti li dawn jstghu jigu fedelment restawrati a bazi ta' dak li jirrakkomanda l-Pjan ta' Struttura, allura dan jkun jista jsir skond il-policies vigenti tal-Awtorita indipendentement minn kemm ghandu art registrata fuqu l-appellant u jekk dan hux registrat bhalafarmer mad-dipartiment tal-agrikultura.

Jekk dan mhux il-kas u allura jkun jirrizulta li dawn il-kmamar iridu jigu prattikament mibnijin mill-gdid bi stil li essenzjalment mhux relatat mal-kmamar originali allura japplikaw il-policies relattivi kollha tal-Policy and Design Guidance: Agriculture, Farm Diversification, and Stables. F'dan il-kas, mill-premess, ikun jirrizulta li l-appellant ma jikkwalifikax bl-ebda wahda minn dawn il-policies.

Meta zamm access fuq s-sit in ezami fis-6 ta' Mejju 2011, it-Tribunal gie muri mill-appellant, il-fdalijiet ta' tlett ikmamar antiki hafna li l-appellant qed jipproponi li jerga' jirripristina. Waqt dan l-access kien gie nnotat illi karnra minnhom jidher li kienet mibnija fuq zewg sulari, fil-kamra ta' hdejha kien baqa' biss il-pedament, waqt li l-ohra li qieghda fuq l-lemin ghandha hitan li illum huma gholjin madwar sitt filati. It-Tribunal kien innota li l-kmamar ma kellhomx soqfa u li kienu fi stat ta' abbandun totali.

Minn dak li jidher fuq is-sit wiehed jiehu l-impressjoni li l-hitan ezistenti illum tal-kmamar in ezami huma mibnija minn gebel antik u li huma ta' zewg tipi; jew li huma maghmula minn hitan tas-sejjieh normali u antiki bla ebda feature specjali jew li jaghtu l-impressjoni li tqieghdu fuq il-post recentement u mhux skond is-sengha.

Fl-assenza ta' informazzjoni ulterjuri jew xi tip ta' dokumentazzjoni teknika minn-naha tal-appellant dan it-Tribunal jista jagħmel gudizzju biss fuq dak li jidher fuq is-sit in ezami u jikkonkludi għalhekk li l-Awtorita kellha rag un li tikkunsidra din l-applikazzjoni bhala zvilupp gdid li jrid jigi ggustifikat bil-policies tal-Policy and Design Guidance on Agriculture, Farm Diversification and Stables u fuq kollox tal-Pjan ta' Struttura.

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Fl-opinjoni meqjusa ta' dan it-Tribunal, apparti mill-pedamenti u xi features zghar u, f'dan il-kuntest insinifikanti, ma baqa xejn mill-kmamar li huwa verament awtentiku jew li huwa ta' minn jigi ppreservat.

Fi kwalunkwe kas dan it-Tribunal ma jharisx lejn din is-sitwazzjoni mill-punto di vista ta' jekk jidhluz kwistjonijiet ta' drittijiet kwiziti jew le imma mill-ottika strettament ta' ippanar u partikolarment x'ghandu jsir biex il-principji ta' l-iStructure Plan jigu rrispettati.

Johrog ukoll mill-premess li l-appellant ma jikkwalifikax taht il-Policy and Design Guidance on Agriculture, Farm Diversification and Stables u jista' jkun li ghalhekk huwa ra li l-unika possibilita li ghandu hi li l-kmamar jigu accettati bhala kmamar antiki u ghalhekk jkun jistghu jigu accettati bhala bini legittimu fl-ODZ.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smigh ta' dan l-appell, billi jirrizulta li l-proposta tal-izvillupp, kif maghmula, tikser numru ta' policies tal-Awtorita dan l-appell ma jistax jigi milqugh.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA 3321/107, « To rehabilitate existing agricultural rooms.», tal-15 ta' Mejju, 2009.

Ikkunsidrat

L-aggravju tal-appellant hu li t-Tribunal ghamel zball ta' ligi ghax injora d-dritt tal-appellant li kellu zvilupp antik fuq is-sit u ghalhekk kellu dritt kwezit ta' proprjeta fuq l-art u strutturi in kwistjoni li t-Tribunal injora u hares biss lejn il-kwistjoni mill-ottika ta' ppanar.

Il-Qorti ma taqbilx illi t-Tribunal injora d-drittijiet tal-appellant qua sid tal-istrutturi li hu talab jirriabilita. It-Tribunal ma kienx qed jinjora d-drittijiet tal-appellant. Id-

dritt tieghu ta' sid tal-art u tal-istrutturi ma gewx mittiefa mit-Tribunal fid-decizjoni tieghu. Dak li kien il-kompitu tat-Tribunal kien li jara fit-termini tat-talba tal-appellant, liema kienu l-policies rilevanti u japplikahom.

Fil-fatt il-kwistjoni kollha kienet dwar jekk it-talba tal-appellant kinitx tirrigwarda wahda ta' riabilitazzjoni u restawr tal-istrutturi ezistenti li ghalha kienet tapplika policy jew kinitx fil-fatt talba li taqa' taht zvilupp ta' kmamar li minnhom ma kien fadal kwazi xejn. Il-kwistjoni dwar jekk kinitx wahda jew ohra kienet purament ta' fatt u interpretazzjoni ta' policies rilevanti illi din il-Qorti ma ghandhiex dritt tissindaka. A bazi tal-fatti u l-access li ghamel it-Tribunal wasal ghal konkluzjoni illi l-fatti attwali tal-istrutturi ezistenti ma setghux jitqiesu tali taht il-pjan ta' struttura vigenti li jistghu jigu restawrati billi ma kienux ghadhom tali li l-forma u l-istat arkitettoniku taghhom jista' jaghti lok ghal restawr fidil tal-original u fejn l-appellant lanqas gab prova ta' kif kienu originarjament. In oltre kif gustament qal it-Tribunal dan ma kienx jiddependi mill-fatt jekk l-appellant kienx registrat bhala farmer mad-dipartiment tal-agrikoltura.

Tenut kont illi l-pjan ta' struttura li jaghti lok ghal restawr kif mitlub ma setghax isir, kellkom jigu applikati l-policies ghal bini ta' strutturi meqjusa bhala godda u fuq tali bazi, l-applikazzjoni tal-appellant tippekka u ma setghetx tigi favuravolment kunsidrata. Kwindi l-argument tal-appellant li gie mittiefes xi dritt kwezit tal-appellant hu bla bazi billi dak li hu tal-appellant baqa' tieghu pero kull tibdil kellu jsir skond il-pjanijiet u policies vigenti li ghalhom kull applikant irid jikkonforma. Il-kwistjoni dwar x'tip ta' zvilupp kien fir-realta cioe hux riabilitazzjoni skond il-kriterju tal-artikolu 8.1(iii) tal-policy ta' zvilupp barra zoni ta' zvilupp jew ghandux jitqies zvilupp gdid a bazi tal-Policy and Design Guidance: Agriculture, Farm Diversification and Stable (December 2007) hi wahda ta' fatt li kif inghad taqa' fil mansjonijiet u diskrezzjoni tat-Tribunal li din il-Qorti ma ghandhiex dritt tissindika jekk mhux ghal zball fattwali grossolan li kien il-punt determinanti ghad-decizjoni li mhux il-kaz.

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Decide

Ghalhekk il-Qorti tichad l-appell ta' Austin sive Agostino Xuereb u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tas-27 ta' Settembru 2012. Bl-ispejjez ghall-appellant.

< Sentenza Finali >

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