



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-19 ta' Frar, 2014

Appell Civili Numru. 6/2013

Clement Cauchi

VS

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Clement Cauchi tal-20 ta' Frar 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 fejn cahad applikazzjoni PA 5132/05 biex jigi korregut is-sit minn kif kien approvat fil-permess 921/05 u 6805/94;

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

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

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

Ir-raguni li ghalha l-Awtorita irrifjutat l-applikazzjoni PA 5132/10, "Biex jigi kkoregut is-sit li minn kif approvat fil-permess PA 0921/05 u PA 6805/94 ", fis-6 ta' Lulju, 2011, kienet is-segwenti:

"1. The proposal runs counter to the provisions of paragraph 2.2 of Circular MEPA 3/05 in that the site of the current application does not have the same designation as that of the original permission."

Fl-appell tieghu, l-appellant, permezz tal-Perit Borg, jaghti is-segwenti ragunijiet ghaliex fl-opinjoni tieghu dan l-appell ghandu jigi milqugh:

"1. Is-sit gie mmarkat hazing minhabba l-inezzattezzi fis-siteplan pprovduta mill-Awtorita' ta' l-Ippjanar. Tant hu hekk li anke fl-applikazzjoni bin-numru PA 6805/94 is-sit gie indikat kawza ta' dan.

2. Minkejja li fil-kazijiet PA 921/05 u PA 6805/94, il-periti inkarigati kellhom ghad-dispozizzjonijiet taghhom siteplans skorretti u li ma jirriflettux x'kien hemm attwali fuq is-sit, l-Awtorita' ta' l-Ippjanar approvat iz-zewg applikazzjonijiet imsemmija minkejja li kellha ghad-dispozizzjoni taghha l-facilitajiet kollha mehtiega. Tant hu hekk li anke l-Initial Setting Out of Scheme Alignment gie moghti (ara dok 1). Dan ikompli jigi kkonfermat mill-ewwel paragrafu tad-DPA report kif ippreparat mid-Direttorat li kopja tieghu hi hawn annessa.

3. Fl-ahhar izda mhux l-inqas, ix-xoghol approvat fil-Permess PA 921/05 seta jigi approvat anke barra miz-zona ta' l-izvilupp."

Fir-risposta tieghu, Jonathan Borg, ghall-Awtorita' jaghti r-ragunijiet ghaliex fl-opinjoni ta' l-Awtorita dan l-appell ghandu jigi michud. Is-segwenti huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

"5.2.1 Designation of Site

The plotting of site in permits PA 6805/94 and PA 921/05 clearly indicates that the original permissions fall within the limit to development on the border of the boundary, while the proposed site indicated on site plan (Doc 1I in PA File) falls outside the limits to development. Therefore in accordance with the provisions of para. 2.2 in PA Circular 3/05, "the site can be corrected only if there is no difference whatsoever in the designation of the original site and the new application, i.e. there is no change in zoning".

5.2.2 Franka Stone Wall

The boundary wall present on site is constructed in franka stone, in accordance with permit PA 6805/94. Notwithstanding this, the development was permitted since the site plan in that application had indicated that the proposal was to be constructed within the development zone. Since this application is attempting to relocate the site of the development to an area ODZ the materials used in the boundary wall are not acceptable since they run counter to the provisions of L.N. 160/97 (and as amended in L.N. 169/04).

5.2.3 Other Comments

The appellant is arguing that the development approved in PA 921/05 would also be favourably considered outside the development zone. Notwithstanding this, the development proposal does not include the development approved in PA 921/05 but is rather aiming at the correction of site from the original permit.

Should the appellant wish that the development approved in PA 921/05 be considered for the site in concern, a separate full development application would be required."

Fin-nota taghhom tal-15 ta' Marzu, 2012, il-Perit Borg u l-Avukat Dr Jean Paul Grech ghan-nom tal-appellant, jissottomettu li gej:

"(1) The first issue which needs to be pointed out is that even though the sites of PA 921/05 and PA 6805/94 were incorrectly indicated (and this as a result of incorrect

MEPA site-plans) the site in question still fell outside the limits of development and MEPA was fully aware of this. This emerges from the relative DPA reports to these applications. Nonetheless the relative permits were still issued. The Directorate was therefore not correct in stating in his October 2011 report to this appeal that the sites as indicated fell within the development zone. Appellant therefore fails to understand how come now MEPA is advocating the refusal of these applications because they fall outside the development zone. This outside development zone factor was already dealt with and refuted by the then Planning Appeals Board in its decision dated 31st May 2000 in the names Clement Cauchi vs. il-Kummissjoni għall-Kontroll tal-Izvilupp (PA 6805/94; PAB 293/95). It would be opportune to quote the relative excerpts from the said decision, a copy of which is annexed and marked as Document JPG1:

“Il-Bord huwa ampjament sodisfatt li t-talba tal-appellant għall-izvilupp tas-sit in kwistjoni ma tmurx kontra l-ispiritu tal-Pjan ta' Struttura, a tenut kont ta' cirkostanzi partikolari tal-kaz, fosthom li s-sit tmiss mal-linja tal-bini ga ezistenti, b'faccata fuq it-triq, l-applikazzjoni għall-permess ta' zvilupp għandha tigi milqugħa...

Il-Bord huwa propens li jaccetta l-appell. Si tratta ta':

- Sit li jinsab imiss ma scheme ezistenti (imiss fil-veru sens tal-kelma)
- Sit li kien diga' munit bil-permess.
- Zvilupp li certament m'jikkrea ebda impatt negattiv – tenut kont li huwa adjacent ma' bini ezistenti kif ga' ingħad.”

(2) Reference is also to be made to the DPA report dated 16th April 2005 relative to application PA 921/05 concerning the application for the construction of an underwater reservoir. Notwithstanding that the site lied outside the development zone and this fact was noted in the same DPA report, the reservoir was also approved. A copy of this report is attached as Document JPG 2. The DCC Board considered as per minutes attached as

Document JPG 3 that “the proposal lies underground and does not constitute overdevelopment.” Moreover, various water reservoirs have been approved outside development zones as these are intended to provide an underground water storage to ensure a continuous water supply all year round for cultivated fields.”

Fit-tieni risposta tieghu, Jonathan Borg, għall-Awtorita' jirrispondi bis-segwenti:

"2. The Authority has the following comments to make in relation to the appellant's latest submission.

Contrary to what the appellant has stated the site plans provided by the Authority were correct. Area surveys (from where site plans are taken) are continuously being updated; however one cannot expect to have all the existing development marked on the site plan if any development took place after an update. That is why the Authority always advise applicants to provide measurements from the nearest corners when indicating the proposal location on the site plan. The site plans in PA 6805/94 and PA 921/05 do not show such measurements.

Furthermore the applicant himself (now the appellant) indicated in the site plan in PA 921/05 that the proposal is within the scheme (see copy of site plan). In fact when the Authority plotted the site locations as indicated by the applicant in PA 6805/94 and PA 921/05, the proposal location fell squarely within the limits of development as is evident from the attached site plans showing the official plotting.

In accordance with the provisions of para. 2.2 in PA Circular 3/05, “the site can be corrected only if there is no difference whatsoever in the designation of the original site and the new application, i.e. there is no change in zoning”. It is undisputed that the designation of the site as originally marked on the site plan (within scheme) is different than that indicated in the new application (ODZ) and therefore the Authority was correct to refuse the application."

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 588/11 u PA 5132/10, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-Appell jirrigwarda talba ghall-korrezzjoni tas-site plan minn dik li kienet giet approvata fil-permessi PA 921/05 u PA 6805/94. Il-perit dahhal dikjarazzjoni li l-permess originali mas-sarraffx fuq is-sit approvat u li m'hemm ebda intenzjoni li dan isir. Mhux qed jigu proposti modifiki ohra f' din it-talba.

Is-sit in ezami jinsab ODZ fit-triq li taghti minn San Lawrenz ghan-Nadur.

Skond l-Awtorita', il-pjan lokali jindika dan is-sit li qiegħed gewwa 'Area of Agricultural Value' waqt li policy GZ-LMDZ-1 tghid li zvilupp urban mhux permess barra il-linja tal-izvilupp.

L-applikazzjoni giet rifjutata peress li l-proposta tikser para 2.2 tas-Circular 3/05 u dan għaliex s-sit in ezami ma jaqax that l-istess regime ta' ippjanar tas-sit fil-permess originali.

Ir-ragunijiet li gab l-appellant għal dan l-appell huma:

- Is-sit kien gie mmarkat hazin fl-applikazzjoni originali għaliex kien hemm diskrepanzi fis-site plan ufficjali tal-Awtorita';
- Is-site plan kien gie mmarkat hazin fiz-zewg applikazzjonijiet u cioe PA 921/05 u PA 6805/94 u għalhekk l-Awtorita' kienet approvat dawn iz-zewg applikazzjonijiet minkejja li s-site plan kienet immarkata hazin u fejn id-Direttorat kien qal li s-sit huwa l-bicca l-kbira barra z-zona tal-izvilupp; u
- L-izvilupp mertu tal-applikazzjoni PA 921/05 jista jigi approvat anki barra il-linja tal-izvilupp.

Fir-risposta tagħha l-Awtorita' tirrileva li meta sar il-plotting tas-sit kif indikat fil-permessi PA 6805/94 u PA 921/05 irrizulta li is-sit jaqa gewwa l-linja taz-zona tal-izvilupp

waqt li s-sit li qed jigi propost f' din l-applikazzjoni; jaqa' barra z-zona tal-izvilupp. Dan ifisser li r-regime ta' policies li japplikaw ghaz-zewg siti huwa differenti.

L-Awtorita' nnotat wkoll li l-boundary wall li gie approvat fil permess PA 6805/94 huwa tal-franka. Peress li issa jirrizulta li s-sit li fuqu nbena' dan il-hajt huwa ODZ dan il-hajt jigi jikser il-provedimenti tal-avviz legali LN 160/97.

L-Awtorita' tghid ukoll li peress li t-talba f' din l-applikazzjoni hija semplicement biex jigi korrett is-sit tal-permess PA 921/05 din l-applikazzjoni ma' tistax tintuza wkoll bhala talba ghas-sanzjonar tal-izvilupp kopert originarjament fl-applikazzjoni PA 921/05.

Fis-sottomissjoni sussegwenti l-appellant jinsisti li meta kienet giet ikkunsidrata l-applikazzjoni PA 6805/94 mill-PAB is-sit kien gie kkunsidrat li jinsab ODZ. Dwar l-applikazzjoni PA 921/05, fid-DPA report relativ id-Direttorat kien ikkunsidra li s-sit jinsab ODZ.

Fir-risposta taghha dwar dan l-Awtorita' issottomettiet site plans u aerial photo li juru li skond is-site plan sottomessa fl-applikazzjonijiet PA 6805/94 u PA 921/05 is-sit kien jidher li jinsab gewwa z-zona tal-izvilupp waqt li skond is-site plan ikkoregguta is-sit qieghed ODZ.

Iz-zewg punti li jridu jigu decizi minn dan it-Tribunal huma:

- Ghandhiex tigi approvata din it-talba peress li jidher li meta gew approvati l-applikazzjonijiet PA 6805/94 u PA 921/05 is-sit kien ikkunsidrat bhala li kien jinsab parzjalment jew kompletament ODZ; u
- Ghandhiex tigi approvata din it-talba peress li normalment reservoir ODZ jista jigi approvat.

Dwar l-ewwel punt jirrizulta car mis-site plans li gew sottomessi mill-Awtorita' fis-second statement taghha li s-sit kif indikat fis-site plans originali kien jidher li jaqa' gewwa z-zona tal-izvilupp waqt li issa qed jirrizulta li dan is-sit fil-verita' jaqa' kompletament ODZ u li m' ghandu ebda konfini li tmiss mal-linja tal-izvilupp. Fuq dan l-

appellant ma' ghamel ebda risposta u ghalhekk jidher li dan il-punt mhux kontestat.

Peress li fid-decizjoni tal-PAB dwar PA 6805/94 l-argument principali li intuza biex jigi milquh l-appell kien li skond is-site plan li kellu quddiemu l-bord is-sit kien imiss maz-zona tal-izvilupp jidher car li issa bis-sit f' post differenti imbiddlu c-cirkostanzi u ghalhekk il-parametri li ntuzaw fid-decizjoni originali inbiddlu.

L-intiza cara tal-applikazzjoni in ezami kienet biex jinbidel is-site plan u xejn izjed. It-talba originali ma' hix biex jigi sanzjonat l-izvilupp u ghalhekk ma' jaghmilx sens li tigi milquha talba li fil-fatt ma' saritx. Dan huwa principju importanti ghaliex l-applikazzjoni originali ma' gietx pprocessata f' dan is-sens u ghalhekk jista' jkun hemm issues ohrajn , bhal ma' jidher li hemm f' dan il-kas, li hemm bzonn jigu kkonsidrati bhal per ezempju illegalities on site.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smieh ta' dan l-appell, billi jirrizulta li il-proposta in ezami ma tistax tintlaqa peress li c-cirkostanzi tas-sit f'termini ta' ppjanar inbidlu u anki peress li l-processar kollu tal-applikazzjoni kkunsidra biss it-talba biex jigi kkoreggut il-pozizzjoni tas-sit u mhux l-issanzjonar tal-izvilupp, dan l-appell ma jirrizultax fondat u ghalhekk ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita' ta' l-applikazzjoni PA 5132/10, "Biex jigi kkoregut is-sit li minn kif approvat fil-permess PA 0921/05 u PA 6805/94 ", tas-6 ta' Lulju, 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jiddeciedi l-prova li nonostante li s-sit gie markat hazin, ma jbidilx ir-rizultat li kien jinhareg permess ghal gibjun taht l-art f'ODZ; u li zewg applikazzjonijiet gew approvati bis-site plan odjern li hi

wahda ufficjali tal-MEPA fuq alignments li nghataw mill-Awtorita; il-fattur tal-ODZ kien gia gie deciz mill-Bord fid-decizjoni tal-31 ta' Meju 2000;

2. It-Tribunal ghamel apprezzament hazin tal-ligi dwar 'end of development' u ma ppronunzjax ruhu dwar is-sottomissjonijiet maghmula mill-appellant a rigward u decizjoni tat-Tribunal tal-22 ta' Gunju 2011 f'vertenza ohra. Dan igib il-konsegwenza ta' trattament simili bazat fuq l-istess principju u jikkostitwixxi commitment. Il-principju stabbilit ta' 'end of development' ma hux marbut ma' zona wahda izda japplika f'kull kaz u indipendenti mill-pjan lokali kif jistabilixxu decizjonijiet tal-Qorti. Policies tal-Awtorita ghandhom ikollhom effett simili u ugwali f'kull kaz altrimenti l-agir tat-Tribunal isir irregolari u diskriminatorju;

3. L-accettazzjoni tal-izvilupp ma kinitx ser tbiddel il-qaghda taz-zona jew tas-sit u t-Tribunal naqas li jikkonsidra dan il-punt;

4. It-Tribunal ma dahalx fil-punti ta' aggravji kollha mressqa mill-appellant senjatament il-Local Plans Interpretation Document u naqas li jezercita d-diskrezzjoni a tenur tal-artikolu 69 tal-Kap. 504.

L-ewwel aggravju

Dan l-aggravju ma hu xejn aktar milli talba ghal revizjoni tal-punti in kontroversja decizi mit-Tribunal. L-appellant qed jistieden lil din il-Qorti sabiex hi, bl-istess fatti kunsidrati mit-Tribunal, jasal ghal konkluzjoni differenti mit-Tribunal. L-appellant mhux qed jibbaza dan l-aggravju fuq kwistjoni ta' ligi deciza mit-Tribunal izda l-apprezzament tal-fatti kif applikati skond il-policies u ligijiet rilevanti. Dan kollu jaqa' barra l-mansjoni tal-Qorti u mhux sindakabbli. It-Tribunal ikkonsidra li l-plotting ta' sit fuq il-permessi originali kien hazin u ghalhekk gustament ikkunsidra kif dan kien ser jeffettwa t-talba cara permezz ta' din l-applikazzjoni sabiex jigi kkoregut is-sit minn kif kien jidher fil-permessi originali. It-Tribunal fuq punt prettament legali li l-appellant lanqas jaccenna ghalih, ikkunsidra li circular 3/05 paragrafu 2.2 ighid li tibdil jigi ammess meta s-sit jaqa' taht l-istess regim ta' ippjanar tas-sit fil-permess originali. It-Tribunal ikkunsidra fuq kwistjoni fattwali u teknika illi s-sit kif dikjarat kien indikat

fiz-zona ta' zvilupp mentri minn ezami ta' dan it-Tribunal irrizulta li jaqa' kompletament ODZ b'ebda konfini li tmiss ma linja ta' zvilupp kuntrarjament ghal dik li kien iddecieda l-Bord tal-Appelli fil-permess originali.

L-appellant ma jaghamel ebda osservazzjoni dwar din il-konkluzjoni tat-Tribunal u billi din hi kwistjoni purament teknika u fattwali din il-Qorti mhix ser tissindakaha. Lanqas ma hi ser tikkonsidra c-cirkulari 3/05 li dwarha ma ghamel ebda aggravju l-appellant.

Hu rrelevanti x'kien isib approvazzjoni anki f'zona ODZ kif jissottometti l-appellant billi l-kwistjoni mhix din kif gustament ikkunsidra l-appell it-Tribunal. Il-kwistjoni kienet biss dwar jekk hux permess tibdil ta' site plan u f'dan il-kaz, fuq bazi fattwali irrizulta li ma setghax isir billi f'dan il-kaz inbidlet id-desinjazzjoni taz-zona u ghalhekk ir-regim legali applikabbli kellu jkun wiehed differenti li seta' jgib konsegwenzi ohra mhux parti mill-mertu ta' din l-applikazzjoni.

It-Tribunal kien preciz fl-argumentazzjoni u qies l-aggravju tal-appellant mill-punto di vista tieghu kif maghmul u skartah a bazi ta' principji legali applikabbli ghal kaz, principji li ma gewx mittiefsa mill-appellant f'dan l-appell. Dan kollu in linea mal-mertu strett tal-applikazzjoni.

Ghalhekk dan l-aggravju ma jisthoqqlux jigi milqugh.

It-tieni aggravju

Dan l-aggravju lanqas jimmeritah jigi kunsidrat billi qatt ma kien aggravju tal-appell quddiem it-Tribunal kwindi kull osservazzjoni dwar 'end of development' site, trattament simili u commitment ma ghandhom ebda relevanza billi qatt ma tqajmu quddiem it-Tribunal fl-appell interpost, liema appell kien dirett biss lejn s-site plan kif prezentata u approvata mill-Awtorita u li skond l-appellant l-istess Direttorat tal-Awtorita kien konsapevoli tad-diskrepanzi, u illi subordinatament anki bid-diskrepanzi, l-izvilupp tal-giebja xorta kien jigi approvat.

Il-Qorti ma tikkonsidrax dak mhux mitlub jigi kunsidrat mill-istess Tribunal u kwindi dan l-aggravju wkoll qed jigi michud.

It-tielet u r-raba aggravji

Dawn l-aggravji wkoll huma bla ebda siwi. L-appellant qed jistieden lil Qorti tinvestiga hi jekk f'zona ODZ l-izvilupp tal-giebjja kienx permissibbli nonostante l-izball fis-site plan u n-nuqqas tat-Tribunal li jaghti kaz il-Local Plans Interpretation Documents u juza d-diskrezzjoni afdara lillu skond l-artikolu 69 tal-Kap. 504. Jerga' jigi ribadit illi l-applikazzjoni kienet cara u t-Tribunal ma kellu ebda poter jinvestiga jew jikkonsidra dak li c-cirkulari 3/05 kienet tivvjetat li jaghmel. Ghalkemm ic-cirkulari mhix policy izda hi linja ta' gwida li t-Tribunal kellu d-dover li jaddotta. In oltre l-istess Tribunal ibbaza d-decizjoni tieghu fuq il-fatt inkontestat illi stante r-regim differenti ta' policies applikabbli ghal kaz minhabba fejn irrizulta li kien stiwat is-sit, semplici applikazzjoni ghal bdil ta' site plan kienet qed taghti lok ghal approvazzjoni ta' zvilupp li seta' skond l-applikazzjoni tal-policies rilevanti ghas-sit irrizulta illegali. Billi t-Tribunal ma giex mitlub fl-applikazzjoni jaghti permess ex novo ghall-zvilupp tenut kont taz-zona fejn jinsab is-sit jew talba ghal sanzjoni jekk irrizulta xi illegalita mill-post ezatt fejn kien sitwat is-sit, it-Tribunal kellu jdejh marbuta, u ma oltrepasax dak mitlub. L-argument tal-appellant li t-Tribunal kellu xi diskrezzjoni ma jreggix ghaliex it-Tribunal hu marbut bil-parametri tal-applikazzjoni biss u ma jistax jiddeciedi kwistjonijiet mhux mitluba.

Ghalhekk dawn l-aggravji qed jigu michuda.

Decide

Ghalhekk il-Qorti tiddeciedi billi tichad l-appell ta' Clement Cauchi u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013. Bl-ispejjez kontra l-appellant.

Kopja Informali ta' Sentenza

< Sentenza Finali >

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