



MALTA

**QORTI TA' L-APPELL  
ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta tad-9 ta' April, 2014  
Appell Civili Numru. 51/2013

**Wayne Pisani**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Wayne Pisani tad-9 ta' Awwissu 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013 li rrifjutat l-applikazzjoni PA 76/12 'construction of a swimming pool';

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:

A. Il-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fis-17 ta' Meju 2012, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 76/12 – Torri ta' Cincli, Ta' Cincli, Bidnija, Mosta: Construction of swimming pool.

Ir-ragunijiet ghar-rifjut kienu s-segweni:

"1. The proposed layout is not in accordance with the provisions of the Development Control Policy - Swimming Pools Outside Development Zone (January 2000), which aims to contain the spatial spread of development, minimise the take-up of land, and limit the extent of visual intrusion. Also, the proposal does not satisfy criterion (1) which requires that the development does not affect sites of ecological importance and criterion (2) which requires that the landscaping to screen the development must not have an adverse impact on the landscape. Hence, the proposed development also runs counter to Structure Plan policy R O 4 which does not permit the development of any structures which would adversely affect the natural scenic value of rural areas."

B. In-nota tal-Perit Edgar Caruana Montaldo għall-Appellant, ipprezentata fit-3 ta' Gunju 2012, inter alia t-tlett punti segwenti:

"1. Spatial spread

a. The Development Control Policy – Swimming Pools Outside Development Zone (January 2000) allows an 'extension to the curtilage of existing building' (opening statement to policy 5.1) but does not specify that the 'existing building' has to be the applicant's own residence. In fact consideration 4.3 of the same document states 'The swimming pool should be sited as close as possible to the existing building and should be limited in size'.

b. The distance from the existing third building (third party property) does not exceed 6.5 meters.

c. The proposed pool is actually located as close as possible to our own approved residence.

d. The location of the pool is on the part of the site that has the least topographical change in level.

e. The location of the pool is in the area of the site which is best screened by existing structures and landscaping (see sections AA and BB in latest drawings)

f. The location of the pool is in the lowest area of the site....

2. Sites of ecological importance

a. The area in question where the pool is being proposed has never been a garigue area as it clearly shown in attached aerial photographs of 1957, 1967, 1978, 2004 and 2008 (enlarged).

b. In fact, contrary to the mistaken reference to garigue in the DPAR report, the site of ecological importance in the Central Malta Local Plan which includes a specific map dealing with Bidnija, specifically map "MOM8 – Bidnija Environmental Constraints Map" (attached including an enlarged detail), wherein the site in question (including the proposed area) is clear of any markings, evident of the fact that the site proposed for the development of the pool does not have any environmental constraints.

3. Landscaping to screen the development

a. This matter was addressed in line with the EPC's recommendations and in fact amended drawings were submitted with olive tree clusters (not linear) screening the proposed pool on the North Western side whilst the existing

two storey party wall (Southern side) and the existing third party carob tree (Eastern side) completely screen the proposed pool which would be located in the lowest part of the site.

b. Certainly, there might have been an oversight by the Planning Directorate when updating the Notes to Committee following the submission of the latest fresh drawings since the planting of clusters of olive trees to further screen the proposed pool does not have an adverse effect on the natural scenic value of the rural areas running counter to Structure Plan policy RCO 4."

C. In-nota risponsiva ta' Jonathan Borg ghall-Awtorita', ipprezentata fit-18 ta' Lulju 2012, inter alia l-punti segwenti:

"5.2 The Authority has the following comments to make:

Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone) allows the construction of swimming pools within the curtilage or as an extension to existing buildings. It is evident, and indeed it has always been construed so, that the 'building' cited in this policy refers to the residential unit within the site which the proposed pool forms part of. Should this policy be understood in any other way it would lead to a serious precedent in the assessment of ODZ applications and would distort the scope of this policy – that of limiting the urban sprawl in the ODZ, as is happening in this case by having the proposed swimming pool about 20m away from its associated residence on justification it is near a third party building.

Once it is established that the building is eligible (that is, it is a legally established building) for a swimming pool, Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone) seeks to ensure that the proposed swimming pool does not adversely impact on the site and its surroundings by aiming to contain the spatial spread of development ODZ, minimise the take-up of land and limit the extent of visual intrusion. In this regard, the following is noted:

1. The proposed swimming pool is located at an approximate distance of 20m from the applicant's residence. The appellant is stating that that is the best location for the proposed development in view of topography. Nevertheless, the Authority would like to state that if the site cannot accommodate a swimming pool that meets the objectives of Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone) against urban sprawl, then the site does not qualify for such a development in terms of same policy.

2. The appellant is arguing that the surroundings have never been garigue and submitted a set of aerial photographs to indicate this. However the Authority notes that these photographs which are rather blurred and not clear, actually show garigue with a few pockets of soil (typical of such landscape) and confirm what the Authority has been stating all along. The Authority wishes the Tribunal to take notice of the set of proper aerial photos for the years between 1967 and 2008 in the PA file (documents Red 44A)

which portray the surroundings more clearly. It is also pertinent to note that the garigue nature of the area has been confirmed by the Environment Protection Directorate (Document 33 in file PA76/12). To this end, the proposed pool will result in the obliteration of an ecologically important habitat which runs counter to criterion (1) of Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone).

3. The proposal includes also the linear plantation of olive trees at the northern part of site which is characterised by garigue (Drawing 15B & Document 37 in file PA76/12). Linear planting is not typical of the rural context, let alone within a garigue area, and is itself a visual impact. The Environment Protection Directorate in fact stated that the proposal lacks adequate context-sensitive landscaping (Document 33 in file PA76/12). Hence, the proposal also conflicts with criterion (2) of Circular PA 1/00 which requires that the development is adequately screened and does not have any adverse impact on the landscape and policy RCO 4 of the Structure Plan which aims at safeguarding the scenic value of rural areas."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex jinbnew swimming pool u zewg gwiebi, u biex jinzerghu sigar taz-zebbug f' font konsistenti minn residenza li tinsab f'category 2 rural settlement barra z-zona tal-izvilupp (ODZ) tal-Bidnija, limiti tal-Mosta.

L-arja tal-madwar tikkonsisti in parti minn ghelieqi b' uzu agrikolu u l-font in ezami llum jikkonsisti minn xaghri (garigue).

Precedentement kienu gja' gew intavolati xi applikazzjonijiet: PA 939/96 sabiex jinbena swimming pool u cint li pero' kienet giet irtirata; PA 4331/04 sabiex isiru xi zidiet mar-residenza prezenti, u PA 2804/10 sabiex jigu ssanati divergenzi mill-permess PA 4331/04 bhalma huma xatba u bdil fil-kunfigurazzjoni tar-recint.

Ir-raguni ghar-rifjut huma bbazati fuq il-premessa li peress li hawn si tratta minn zona ta' valuri xenografici u ekologici, il-proposta hi oggezzjonabbli minhabba l-fatt li ghandha firxa eccessiva u terga tghid ma giex indikat l-ebda tip ta' landscape screening bl-iskop li jimmitiga l-izvilupp fl-ambjent tal-madwar. Ghalhekk il-proposta hi f'kunflitt mal-kriterji tad-Development Control Policy – Swimming Pools Outside Development Zone u l-policy RCO 4 tal-Pjan ta' Struttura.

L-aggravji ta'-Appellant jistghu jigu riassunti kif gej:

- Firxa tal-izvilupp:

Il-policies li jirrigwardaw swimming pools citati fir-raguni tar-rifjut, jispecificaw li dawn ghandhom ikun vicin bini ezistenti - pero' mhumiex tassattivi jekk il-bini ezistenti ghandux ikun tal-istess propjetarju tal-iswimming pool jew le. Fil-fatt il-pixxina ser tinbena madwar 6.5 metri l-boghod minn bini gja' ezistenti ta' terzi, f' art baxxa u wieta' li facilment tista' tigi screened.

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- Art skedata:

Skond il-mappa MOM 8 tal-Pjan Lokjali, ma jirrizultax li l-bicca art in ezami hi skedata jew vinkolata bl-ebda mod. Minn dan ghandu jirrizulta li tali dikjarazzjoni tal-Awtorita' hi skorretta ghal-ahhar.

- Screening:

Il-pjanti kienu gew emendati fil-fazi tal-iprocessar tal-applikazzjoni sabiex isir it-tip ta' screening li talbet l-istess Awtorita' – cjo'e' clumps minflok linji ta' sigar taz-zebbug fuq in-nahha tal-Majjistral, li jikkumplementaw hajt gholi ezistenti f' Nofsinhar u s-sigar tal-harrub ta' terzi fil-Lvant.

L-Awtorita' zammet ferm l-oggezzjoni taghha ghal-proposta in ezami u rilevat li meta' l-policy li tirtigwarda l-bini ta' swimming pools (kif citata fir-raguni ghar-rifjut), tipecifika distanza limitu mill-bini, qeda tirreferi ghar-residenza li titla' fuq l-istess font fejn hem mil-pixxina, u mhux dik fuq font adjacenti.

Ghalhekk id-dikjarazzjoni tal-Appellant hi monka u frivola ghal-ahhar. Zgur jekk kemm il-darba l-intiza tal-policy hi li titrazzan il-fresh take-up of land, allura ghandu jsegwi li l-pixxina trid tinbena vicin ir-residenza li minnha ser johorgu dawk li juzawha – u dan sabiex per ezempju il-hard landscaping tal-passagg bejn ir-residenza u l-iswimming pool ikun kemm jista jkun minimu; mhux li l-pixxina tinbena fit-tarf l-iehor tal-font bil-konsegwenza li l-passagg ikun ikopri s-sit kollu. Ghal din ir-raguni biss dan l-appell ma jimmeritax li jigi milqugh.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghal-PA 76/12 kif mahrug mill-Kummissjoni ghal-Kontroll ta' l-lzvilupp tal-Ambjent u l-ippjanar, fis-17 ta' Mejju 2012.

## Ikkunsidrat

L-aggravju tal-appellant huwa s-segwenti:

1. It-Tribunal ikkunsidra biss l-ewwel aggravju minn tlieta proposti tal-appellant cioe dwar il-post fejn kellu jsir is-swimming pool u illi tali post maghzul kien hemm jista' jkun vicin tar-residenza tal-applikant u fejn hu l-aktar milqugh u bl-anqas tibdil ghat-topografija tas-sit. It-Tribunal applika hazin il-policy in kwistjoni meta jidher li ddecieda li s-swimming pool kellha tirtirrispetta xi distanza mir-residenza meta l-policy cioe Development Control Policy - Swimming Pools Outside Development Zone (circular 1/00) ma tindika ebda rekwizit ta' distanza mir-residenza hlief ghal ancillary facilities. It-Tribunal inkorra zball iehor fil-ligi billi ggustifika r-rifjut minhabba li d-

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distanza ta' 20 metri mir-residenza kien ser ikollha a priori impatt negattiv b'aktar landscaping mentri l-policy kull ma tghid hu li jrid jigi verifikat li l-landscaping ikun approprjat u ma jkollux impatt avvers fuq il-landscape. In oltre t-Tribunal minhabba dan ir-ragunament ma kkunsidrax il-landscaping propost mill-punto di vista li trid il-ligi biex jigi verifikat hux idoneju jew le mas-sit u zona.

Il-Qorti tqis illi t-Tribunal seta' gie indott ghall-argumenti li ressaq biex jiggustifika r-rifjut minn argument imressaq mill-appellant fl-appell fejn iggustifika s-sit tas-swimming pool billi sostna illi residenza ta' terzi tinsab 6.5 metri boghod minnha u illi l-policy ma ssemmiex liema residenza izda biss existing building. Pero zied ukoll illi l-pool hi proposta fis-sit proprjeta tal-appellant fejn ghandu residenza. Iggustifika t-tul bejn il-pool u r-residenza ta' circa 20 metri billi ssottometta ragunijiet ta' topografija, screening u planning.

Sfortunatament it-Tribunal qabad biss mal-ewwel punti tal-argument minghajr ma qies xi tghid il-policy. It-Tribunal fi-fatt ighid hekk:

L-Awtorita' zammet ferm l-oggezzjoni taghha ghal-proposta in ezami u rilevat li meta' l-policy li tirrigwarda l-bini ta' swimming pools (kif citata fir-raguni ghar-rifjut), tipecifika distanza limitu mill-bini, qeda tirreferi ghar-residenza li titla' fuq l-istess font fejn hem mil-pixxina, u mhux dik fuq font adjacenti.

Ghalhekk id-dikjarazzjoni tal-Appellant hi monka u frivola ghall-ahhar. Zgur jekk kemm il-darba l-intiza tal-policy hi li titrazzan il-fresh take-up of land, allura ghandu jsegwi li l-pixxina trid tinbena vicin ir-residenza li minnha ser johorgu dawk li juzawha – u dan sabiex per ezempju il-hard landscaping tal-passagg bejn ir-residenza u l-iswimming pool ikun kemm jista jkun minimu; mhux li l-pixxina tinbena fit-tarf l-iehor tal-font bil-konsegwenza li l-passagg ikun ikopri s-sit kollu. Ghal din ir-raguni biss dan l-appell ma jimmeritax li jigi milqugh.

Il-Qorti b'riluttanza tindahal fi kwistjonijiet ta' planning jew ta' fatt pero meta dawn il-konsiderazzjonijiet ikunu bazati fuq kwistjoni ta' natura legali, trid bilfors tara jekk it-Tribunal interpretax il-policy koncernata fid-diskrezzjoni moghtija lilu bil-ligi jew invece applika hazin il-policy fejn allura l-Qorti trid bilfors tintervjeni.

F'dan il-kaz il-policy tghid hekk:

5.1 The construction of new swimming pools, or the enlargement of existing pools, and the construction of ancillary facilities, within the curtilage of

existing buildings or as an extension to the curtilage of existing buildings, in areas ODZ may be permitted, subject to the following criteria

- 1) the development would not lead to the loss of fertile good quality agricultural land or adversely affect valleys, cliff sides, scheduled property or other sites of ecological, geological, archaeological, cultural or historical importance;
- 2) the development is either adequately screened from views from outside the site by an existing boundary wall and/or by other existing structures or planting; or is proposed in the application to be adequately screened. The hard and soft landscaping proposed, including boundary walls, should be appropriate, in terms of siting; height; form; materials; type of plants; etc., to its setting and not have an adverse impact on the landscape;
- 3) the construction of the pool would not require the removal of any existing indigenous or archaeophytic trees or the disturbance of other existing valuable landscaping. The extent of paving or hard surfacing around the swimming pool should normally be limited to not more than 50% of the pool area and an appropriate mix of hard and soft landscaping within the garden area/open space is encouraged;
- 4) the area of the swimming pool does not exceed 50m<sup>2</sup> for a single residential unit and 70m<sup>2</sup> for multiple residential units. The area of swimming pools for hotels and other commercial uses should be related to the number of people it is intended to serve, although, in general, it should not exceed 70m<sup>2</sup>;
- 5) ancillary facilities which should not exceed more than one floor, should be well designed and appropriate to their setting. The shortest distance between facilities ancillary to the pool (such as changing rooms) and the residential unit does not exceed 4 metres. Structures such as pump rooms should be located completely underground;
- 6) the swimming pool meets the conditions for the type of pool as approved by the Water Services Corporation.

Harsa lejn il-policy, imkien ma jigi notat jew jista' jigi interpretat illi l-policy tgħid li l-pixxina trid tinbena 'vicin ir-residenza li minnha ser johorgu dawk li juzaha (pool)'. Il-policy tirrikjedi biss u dan b'mod car u inewkivoku illi l-pool trid issir 'within the curtilage of existing building' mingħajr limitazzjoni ulterjuri. 'Curtilage' ifisser 'the open space situated within the common enclosure belonging to a dwelling house'. It-Tribunal ma jistax jinterpreta dik li ma jirrizultax li għalih hemm lok għal interpretazzjoni. It-tul mir-residenza jista' jkun soggett ta' argumenti u diskussjoni pero dan meta t-Tribunal jigi biex jikkunsidra, kemm-il darba jirrizulta li l-pool hi 'within the curtilage of the building' kif inhu dan il-kaz, jekk hemmx adeguate

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screening, impatt fuq il-landscape, tgharriq ta' speci protetti jew siti ta' importanza skond ma ttiprovdi l-policy fost affarijiet ohra. Hu l-obbligu tal-applikant li jipprovdi l-prova li ma hemm ebda projbizzjoni jew impatt negattiv ghal swimming pool fejn qed tigi proposta u sta ghat-Tribunal li jevalwa fid-diskrezzjoni tieghu jekk tali proposta taqax fil-parametri tal-policy. Pero t-Tribunal ma jstax, kif ghamel f'dan il-kaz, li juza d-distanza wahedha bhala raguni ghaliex ma ghandhomx jigu kunsidrati l-proposti tal-appellant dwar il-landscaping, screening, eccetra iktar u iktar meta l-istess Tribunal invece jiehu in konsiderazzjoni fatturi generici fuq il-landscaping minghajr referenza partikolari ghal proposta tal-applikant, kif ghamel fil-paragrafu tat-Tribunal citat mill-Qorti aktar il-fuq.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Wayne Pisani u tirrevoka u thassar id-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013, u tirrinvoja l-atti lura quddiem it-Tribunal sabiex in linea ma' dak deciz, jerga jisma' l-appell mill-gdid. Spejjez ghall-Awtorita.

### **< Sentenza Finali >**

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