



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-26 ta' Gunju, 2014

Appell Civili Numru. 67/2013

Jimmy Muscat

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Jimmy Muscat tal-4 ta' Novembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013 fil-PA 427/10 li jikkonsisti f'rilokazzjoni ta' farm tan-naghag f-sit iehor;

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra :-

B'applikazzjoni prezentata fit-2 ta' Frar 2012, Full Development Permission, PA 0427/10, l-appellant f'sit off Triq San Anard, Xaghra, Ghawdex ippropona:-

“proposed relocation of farm”

L-applikazzjoni giet michuda b'rifjut tat-2 ta' Lulju 2012 ghar-ragunijiet segwenti :-

“The applicant is in the possession of a nearby underutilised livestock farm, and there is no apparent justification, from a planning point of view, as to why this farm cannot be used for the rearing of sheep. The proposed construction of a new farm therefore runs counter to criterion (5) of policy 2.3C of Policy & Design Guidance on Agriculture, Farm Diversification and Stables, which specifies that new farms should preferably be located either within an Intensive Agricultural Zone or within abandoned farm buildings”

Fl-appell tieghu, il-Perit Emanuel Vella ghall-appellant ssottometta kif gej :-

“We have been instructed by Mr. Jimmy Muscat of plot 99, Triq Frangisk Camilleri Xaghra, to refer to the above captioned application, PA 427/10 and to formally submit an appeal in terms of the Environment & Development Planning Act from the decision by the Environment & Planning Commission

(EPC) dated 2 July 2012 for the following reasons and for such other other reasons as may be submitted verbally during appeal stage:

The reason given for the refusal is that:

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“The applicant is in the possession of a nearby underutilized livestock farm, and there is no apparent justification, from a planning point of view, as to why this farm cannot be used for the rearing of sheep. The proposed construction of a new farm therefore runs counter to criterion (5) of policy 2.3C of Policy & Design Guidance on Agriculture, Farm Diversification and Stables, which specifies that new farms should preferably be located either within an Intensive Agricultural Zone or within abandoned farm buildings”

Applicant humbly submits that he has been rearing broiler chickens for several years. Then the death of his son triggered psychological reactions in his family which rendered it imperative that he suspend broiler operations for a couple of years. His wife travelled to Australia, spent time with her mother and she asked her other son to go with her. That left Mr. Muscat on his own having to manage a butcher's shop and a flock of sheep. He could not handle batches or broilers as well. That is why he decided to suspend broiler operations until things got back to normal.

In the meantime he was advised no to rear sheep in close proximity to broiler chickens. Good Agricultural Practice required the sheep to be housed, fed and milked in premises designed and built specifically for them that would cater for the well being of the sheep themselves, of the personnel involved in caring for them and for the correct and healthy collection, storage and process of the milk they produce with an aim at providing consumers with safe and healthy cheeselets for their table.

He has therefore decided that he will not resume broiler production until he has constructed alternative and adequate premises for his sheep.

Turning to policy 2.3 C this stipulates that “new farms should preferably be located either within an intensive Agricultural Zone or within an abandoned farm building”. It clearly does not prohibit new farms being built on new land. “Preferably” means that were it is possible, then it would be better if new farms are built “within an intensive Agricultural Zone or within an abandoned farm building. In this case this is not possible. If Mr. Muscat had an abandoned farm building, he would have transferred his sheep to that building ages ago.

Every criterion that has resulted to be favorable to Mr. Muscat obtaining approval for his application. The land is designated to be suitable for agricultural activity and that is what Mr. Muscat is applying for. Every single objection or concern that was raised to challenge this application has been examined and found to be null.

The only objection that the case officer has managed to find is that Mr. Muscat already has a broiler farm which is currently vacant. Mr. Muscat does not intend to leave such an asset vacant for long, but he needs to provide adequate premises for his sheep first. Then he can concentrate on resuming production on his broiler farm according to good agricultural practices.

For the above reasons and for such additional reasons as may be raised during the ensuing procedures our client respectfully requests the EPRT to uphold the application in question and order the issuing of the relative permit.

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L-Awtorita' fir-rapport taghha kkumentat kif gej :-

“1.0 THE APPEAL

1.1 This is an appeal from a decision of the Malta Environment and Planning Authority (MEPA) to refuse a Full Development application the construct a sheep farm.

1.2 The new sheep farm is to accommodate the appellant's herd which is currently being reared on another farm, located nearby, belonging to the appellant as well which is currently a dormant broiler farm. The proposed farm consists of two separate buildings; once containing a sheep barn, a covered yard, a milking parlour and a quarantine section, and the other includes a dairy room, cheeselets room, office and restroom, fodder store, and a manure clamp with an underlying cesspit.

1.3 The proposed farm buildings have a footprint of approx. 400sq.m, with an external height of 4.2m. A concrete passageway around the buildings is also being proposed. A landscaping scheme is being proposed consisting of a mixture of olive trees and fig trees along the west and north periphery to screen the farm from external views. The east and south periphery are screened by the higher third party fields and therefore no landscaping is being proposed along this side.

2.0 SITE LOCATION, DESCRIPTION & CONSTRAINTS

2.1 The site lies outside the limits of development and has direct access onto an existing rural road.

2.2 The site lies approximately 190m away from the Xewkija development zone boundary as designated in the Gozo and Comino Local Plan. The site is also designated as Land of Agricultural Value in the GCLP, whilst map 13.1-B indicated that the access road to the proposed farm is designated as a Panoramic Route.

3.0 SITE HISTORY

3.1 No development applications have been traced on the site.

4.0 POLICY CONTEXT

4.1 Policy & Design Guidance on Agriculture, Farm Diversification and Stables (January 2008)

Policy 2.3C: New or Relocated Livestock Farms

Permission may be granted for the construction of a new livestock farm unit or for a relocated livestock farm unit, subject to specified criteria.

(5) The proposed new and/or relocated livestock farm unit is located within an Intensive Agriculture Area, as designated in the Local Plan for the area. Where no Intensive Agricultural Area has been designated in the Local Plan, the Authority will give preference to the re-use or conversion of disused or abandoned livestock farm buildings or other suitable agricultural buildings for such purpose. Applicants proposing the construction of new buildings for a new or relocated livestock farm unit shall demonstrate, to the satisfaction of the Authority, that:

The proposed development cannot be located within an Intensive Agriculture Area as designated in the Local Plan; and

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There are no disused or abandoned agricultural buildings, particularly livestock farm buildings, suitable for re-use or conversion.

5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 The appellant is mainly justifying this appeal on the grounds that:

The appellant decided to suspend broiler operations temporarily due to a difficult family situation;

The appellant was advised not to rear sheep in close proximity to broiler chickens. The sheep required to be housed, fed and milked in specifically designed premises. The appellant therefore decided not to resume broiler production until he has constructed alternative and adequate premises for his sheep;

The word preferably in policy 2.3C means that it is not prohibited to construct new farms are built "within an Intensive Agriculture Area or abandoned farm building" but where possible;

The land is suitable for the proposed agricultural activity and the Authority did not raise any other reason to refuse the application.

5.2 The Authority has the following comments to make:

5.2.1 The appellant's herd is currently being reared within a farm covered by a permit and license as a broiler farm.

5.2.2 The Department of Veterinary Services stated that this broiler farm is currently dormant and thus under-utilized. Therefore the Authority maintains that there is no apparent justification as to why the construction of a new farm is required since, obviously, the existing farm can be used for this purpose (as is the situation in reality). Hence, the proposal to relocate the sheep farm runs counter to criterion (5) of policy 2.3C of Policy & Design Guidance on Agriculture, Farm Diversification and Stables, which specifies that new farms are to be located either within an Intensive Agricultural Zone or within an abandoned farm building.

5.2.3 Policy 2.3C of the Policy & Design Guidance on Agriculture, Farm Diversification and Stables states that "the Authority will give preference to the re-use or conversion of disused or abandoned livestock farm buildings or other suitable agricultural buildings for such purpose". It is true that this policy does not constitute a blanket prohibition for new farms in the ODZ, but it makes it abundantly

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clear that in case that a disused farm is available, than it should be re-used rather than construct a new farm.”

Ghall-proposta oggezzjonaw diversi residenti, fosthom Josephine Calleja, Angela Sultana u Sonia Scerri ghar-raguni principali li l-farm propost ikun ta' inkonvenjent ghalihom partikolarment minhabba l-irwejjeh li tali attivita' tiggera.

In oltre is-sit propost jiffirma parti minn vallata' maghrufa bhala 'Ta Zejta' fejn jinstabu diversi gherien u hitan tas-sejjegh li jiggarrfu kemm-il darba jigi approvat il-progett.

Fl-affidavit tieghu, il-konsulent Saviour Vella emfasizza l-fatt li t-trobbija tat-tigieg ma tistax issir fl-istess post fejn jinzammu n-naghag.

Ikkunsidra ulterjorament :-

L-appellant qed jipproponi li jibni razzett ta' circa 400 sq.m. b'gholi ta' 4.2 m; mdawwar b'passagg tal-concrete. Is-sit jinsab barra z-zona tal-izvilupp b'access dirett fuq triq rurali u hu circa 190m 'l boghod mill-konfini tal-izvilupp tax-Xewkija. Skond il-Gozo and Comino Local Plan, is-sit hu disinjat bhala Land of Agricultural Value u skond il-Mappa 13.1.B it-triq li taghti access ghar-razzett propost hi indikata bhala Panoramic Route. L-izvilupp propost hu ta' zewg binjiet separati, wiehed fejn jinzammu nghag u l-iehor ufficini, store, manure clamp u fossa.

L-appellant diga ghandu razzett fejn xi snin ilu kien irabbi t-tigieg. Din l-attivita' pero' giet sospiza snin ilu, meta l-appellant kellu luttu fil-familja. Fil-prezent ghalhekk l-appellant qed izomm n-nghag fl-istess razzett fejn qabel kien irabbi t-tigieg.

Gie prezentat affidavit ta' konsulent agrikolu li rrileva li z-zewg attivitajiet huma irrikonciljabbli; billi n-nghag ma jistghux jinzammu f'razzett fejn jitrabbew it-tigieg.

L-appellant jipprova jiggustifika t-talba tieghu ghal razzett ieher li jkun specifikament ddisinjat ghat-trobbija tan-nghag billi jikkontendi li dak prezenti, fejn qabel kien irabbi t-tigieg, mhux adattat.

Dan ifisser li jekk t-talba tieghu tigi milqugha, ikollu razzett gdid ghat-trobbija tan-nghag u dak ezistenti jigi abbandunat; sakemm ma jkunx f'posizzjoni li jerga' jibda

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jrabbi t-tigieg ukoll. Cirkostanza li tista' tavvera ruhha xi darba fil-futur; jew tista' ma tavvera ruhha qatt u r-razzett originali jibqa' abbandunata.

Din is-sitwazzjoni m'hijiex permessibbli skond il-Policies tal-Ippjanar rilevanti; billi ghandu dejjem jsir l-aqwa u l-ahjar uzu tal-art.

Fil-prezent ma jistax jinghad li l-appellant jirrikjedi zewg rzizet ghat-trobbija wiehed tat-tiegieg u l-iehor ghan-nghag; billi hu minnu ammess li qed irabbi nghag biss u t-trobbija tat-tiegieg ilu s-snin li abbandunaha.

Kif gie korrettement irrilevat mill-Awtorita', f'dawn ic-cirkostanzi partikolari, skond il-Policies, l-appellant ghandu juza' r-razzett li diga ghandu u jekk hemm bżonn jaghmel xi modifiki marginali biex l-istess razzett ikun adattat ghat-trobbija tan-nghag.

In fatti skond il-Policy 2.3C tal-Policy and Design Guidance on Agriculture, Farm Diversification and Stables (January 2008) tali proposta ghall-izvilupp gdid ma tigix approvata jekk diga jezisti razzett li jista' jintuza' ghall-uzu propost.

Dan apparti l-fatt li l-izvilupp propost hu f'sit vicin il-konfini tal-izvilupp, tant li diversi residenti ta' dik il-lokalita' oggezzjonaw ghall-progett billi din l-attivita' tkun ta' inkonvenjent ghalihom.

Ezaminata fid-dettal l-proposta tal-appellant, il-motivazzjonijiet tar-rifjut u l-aggravji tal-appell, fil-kuntest tal-polciies tal-ippjanar rilevanti, l-appell ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut tat-2 ta' Lulju 2012 ghall-applikazzjoni tal-appellant, PA 0427/10.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

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1. It-Tribunal kien diskriminatorju mal-appellant ghal fatt li ghandu sit wiehor ghat-trobbija tt-tigieg li kien qed jintuza temporanjament ghal uzu ta' naghag u minhabba f'hekk mhux jinghata permess juza sit iehor ghat-trobbija tan-naghag biex jkun jista' jerga' juza s-sit mhux mertu tal-applikazzjoni ghat-trobbija tat-tigieg. In oltre ebda ligi ma tista' tiddiskrimina skond il-Kostituzzjoni. Il-fatt li hu bidwi ma jistax jintuza b'mod diskriminatorju ghaliex il-permessi u regoli ghal farm tat-tigieg hu differenti minn farm tan-naghag;

2. Il-policy 2.3C regolament 5 tal-Policy and Design Guidance on Agriculture, Farm Diversification and Stables ighid li tinghata preferenza ghal reuse jew conversion of disused or abandoned livestock farm building or other suitable agricultural buildings for such purpose. Din il-policy ma tghid li l-irziezet iridu jkunu tal-istess persuna izda biss fl-istess inhawi. It-Tribunal interpreta hazin il-policy billi interpreta l-kriterju bhala mandatarju u fit-tieni lok farm ghal livestock ma setghax jitqabbel ma' wiehed tat-tigieg. In oltre t-Tribunal injora li jekk ir-razzett bil-permess ta' broiler tat-tigieg ma jintuzax skond il-kundizzjonijiet ghal certu zmien, jaqa' l-permess u l-applikant jispicca bla razzett fejn jopera.

L-ewwel aggravju

Fl-ewwel lok jinghad illi allegazzjonijiet ta' diskriminazzjoni a bazi tal-Kostituzzjoni mhux sindakabbli quddiem din il-Qorti izda jridu jsiru fil-forum idoneju. Del resto ma saret ebda talba ad hoc ai termini tal-Kostituzzjoni ta' Malta jew il-Konvenzjoni Europea dwar id-drittijiet tal-Bniedem trasportata fil-ligijiet taghna. Dan il-principju dejjem gie applikat b'dan il-mod billi l-parametri ta' azzjoni ta' din il-Qorti huma limitati ghal decizjoni fuq punti ta' ligi decizi mhux kwistjonijiet ta' natura soggettiva li jistghu jaghtu lok ghal tiftix ta' rimedju adegwat pero mhux f'dan il-forum u permezz ta' appell taht il-Kap. 504.

Maghdud dan pero, din il-Qorti ma jirrizultalhiex illi t-Tribunal ibbaza d-decizjoni tieghu semplicement ghaliex l-appellant ghandu zewg rziezet izda ghaliex a bazi tal-fatti quddiemu dehrlu fid-diskrezzjoni afdana lilu fuq apprezzament ta' fatt li l-appellant gia kien qed juzufrixxi ruhu minn razzett ghat-trobbija tan-naghag. Dan wahdu ma jaghti ebda lok ghal xi forma ta' diskriminazzjoni izda biss interpretazzjoni u applikazzjoni tal-policy rilevanti ghal fatti. Fil-fatt hu dan il-pern tal-kwistjoni kollha kif rilevata fit-tieni aggravju u cioe jekk il-policy kinitx tippermetti lit-Tribunal japplika l-policy kif fil-fatt giet applikata jew jekk din kinitx biss

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mod ta' interpretazzjoni tal-istess policy fejn l-istess policy thalli element diskrezzjonali kif promulgata.

Ghalhekk dan l-aggravju tad-diskriminazzjoni qed jigi michud.

It-tieni aggravju

L-appellant qed jallega illi l-policy mertu ta' din l-applikazzjoni taghti preferenza ghal reuse jew conversion of disused farm buildings pero din il-policy ma timplikax li jekk sid ghandu zewg farms, allura mhix applikabbli. Din il-Qorti tqis illi l-appellant mhux qed jallacja l-argument tieghu ma applikazzjoni hazina tal-ligi izda aktar ma' interpretazzjoni ristretta li ghamel it-Tribunal tal-istess policy. Din il-policy tighid hekk fil-paragrafu 5:

(5) The proposed new and/or relocated livestock farm unit is located within an Intensive Agriculture Area, as designated in the Local Plan for the area. Where no Intensive Agricultural Area has been designated in the Local Plan, the Authority will give preference to the re-use or conversion of disused or abandoned livestock farm buildings or other suitable agricultural buildings for such purpose. Applicants proposing the construction of new buildings for a new or relocated livestock farm unit shall demonstrate, to the satisfaction of the Authority, that:

The proposed development cannot be located within an Intensive Agriculture Area as designated in the Local Plan; and

There are no disused or abandoned agricultural buildings, particularly livestock farm buildings, suitable for re-use or conversion.

It-Tribunal, fil-parti rilevanti ghal dan l-argument jikkonsidra preferenza ghal aqwa u ahjar uzu tal-art. Ikkunsidra li l-farm fejn illum qed isir it-trobbija tan-naghag jista' jaghmel modifika marginali biex jigi addattat ghall-istess trobbija kif fil-fatt kien qed jintuza ghal dawn l-ahhar snin peress illi l-uzu precedenti tal-istess farm ghat-trobbija tat-tigieg kien ilu wieqaf ghal snin u ghalhekk bhala farm building ghat-trobbija tat-tigieg kien disused. Kwindi hi l-fehma tal-Qorti illi t-Tribunal interpreta l-ispirtu tal-policy fil-forma ristretta tieghu speċjalment tenut kont tal-ahhar parti tar-regolament 5 u billi tali interpretazzjoni la hi kontra l-kliem express tal-policy jew hi talment assurda li tista' tippregudika applikazzjonijiet futuri, din il-Qorti ma

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ghandhiex tissindakaha ghax mhux parti mill-mansjoni taghha. Kwistjonijiet teknici u ta' ppjanar huma fdati appozitament f'idejn l-Awtorita u mbaghad f'idejn it-Tribunal sabiex isir revizjoni tad-decizjonijiet tal-Awtorita.

L-appellant ukoll jissottometti illi farm ghal livestock ma jstax jigi komparat ma' wiehed tat-tigieg. Din is-sottomissjoni hi errata billi d-definizzjoni ta' livestock tinkludi mhux biss 'sheep' izda wkoll 'poultry' fost animali ohra.

It-Tribunal pero ma waqafx hemm izda fuq bazi ta' konsiderazzjoni ta' planning, ikkonsidra li r-razzett li qed jigi propost li jinbena b'din l-applikazzjoni flok l-uzu tar-razzett gia utilizzat ghall-iskop propost, jikkreja impatt negattiv fuq iz-zona billi jinsab b'access dirett fuq triq rurali circa 190 metru l-bogħod mill-konfini ta' zvilupp fix-Xewkija u skond il-Gozo and Comino Local Plan is-sit hu desinjat bhala land of agricultural value u t-triq li taghti access ghal razzett hi panoramic route. L-izvilupp invece jipproponi razzett ta' 400 metru kwadru, gholi 4.2 metri, mdawwar b'passagg tal-concrete.

Dawn il-kostatazzjonijiet waslu lit-Tribunal li japplika strettament il-policy 2.3C regolament 5 billi fl-ewwel lok ir-razzett ezistenti hu gia kompatibbli mat-trobbija tan-naghag u bdil tas-sit kien ser jipprejudika n-natura taz-zona fejn qed jigi propost.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Jimmy Muscat u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013.

Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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