



MALTA

QORTI CIVILI

PRIM' AWLA

(GURISDIZZJONI KOSTITUZZJONALI)

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tal-31 ta' Lulju, 2014

Citazzjoni Numru. 19/2013

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24. Reginald Joseph Fitzpatrick
Maltese I.D. 0033588A
25. George Thomas Goodall
Maltese I.D. 0028358A

vs

1. The Attorney General ;
2. The Minister of Finance, the Economy and Investment (as responsible for Enemalta Corporation and the Water Services Corporation) ;
3. The Minister for Resources and Rural Affairs ;
4. The Malta Resources Authority ;
5. Enemalta Corporation ;
6. Water Services Corporation

The Court :

I. Introduction

On the 26 February 2013, applicants filed the application in the Maltese language – together with a translation in English.

By decree of the 28 February 2013, this Court ordered service of the application on respondents, who were granted a period of twenty (20) days to enter a reply, and set the first hearing of the suit for the 26 March 2013.

Following service, respondents filed each their reply in the Maltese language. The acts in question were all served on applicants` legal counsel.

At the hearing of the 26 March 2013, applicants requested the Court that proceedings be conducted in English as none were familiar with the Maltese language. There was no opposition to this request. The Court acceded. From that moment onwards, proceedings were conducted in English.

II. The application

The English version of the application states as follows –

*That the scope of these proceedings is to declare null acts of parliament (precisely regulations that, according to **Art 2(1) of Chapter 249** of the Laws of Malta, are deemed as such) on the basis of their being ultra vires of the legislative powers conferred upon Parliament by the Maltese People : **Article 65(1) of the Constitution of Malta** reads thus :*

“Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta’s international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.” ;

*Therefore this application is being filed before this Honorable Court in terms of **Art. 46(3) of the Constitution of Malta** and according to disposition 5 of **Subsidiary Legislation 12.09 of the Laws of Malta** ;*

*As in exercise of the powers conferred by articles 20 and 39 of the Enemalta Act, Enemalta, with the approval of the Minister responsible for Enemalta, and with the approval of the Malta Resources Authority and the Minister for Resources and Rural Affairs, or any of the same, a series of regulations were laid on the table of the House of Representatives and, in due course, were published by means of Legal Notices and today form part of the **Electricity Supply Regulations (1940) (S.L.423.01)** ;*

As the said regulations introduced in Malta, as of the 1st October of 2008, a dual-tariff system for the non-commercial use of electricity - denominated as residential and domestic tariffs (see Regulation 36(1) and 36(3) of L.S.423.01). For the purposes of this action, the following is highlighted :

i) Domestic Tariffs, unit per unit, are roughly 30% higher than Residential Tariffs. This results from the First Schedule (Residential Tariffs) and the Third Schedule (Domestic Tariffs) of S.L. 423.01 ;

ii) Primary and Secondary Residences benefit from an Eco Reduction Scheme on the amount due for the consumption of electricity for the period covered in the bill, calculated on a pro rata basis, of 25% on the first 2000 kwh in the case of a single resident, and in the case of multiple residents 25% on the first 1000 kwh and 15% on the subsequent 750 kwh of the relative cumulative annual consumption (First Schedule of S.L. 423.01) whereas a domestic resident does not benefit at all from the said Eco Reduction Scheme ;

As in the European Union the electricity sector is regulated by the same through a series of directives which Member States of the Union are bound to implement ;

*As amongst these directives, there is in force **Directive 2009/72/EC (Concerning Common Rules for the Internal Market in Electricity)**. The scope of this Directive is to establish common rules for the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements (See Chap.I, Art.1).*

As Directive 2009/72/EC distinguishes between a 'household customer' which means a customer purchasing electricity for his own household consumption, excluding commercial or professional activities and a 'non-household customer' which means a natural or legal persons purchasing electricity which is not for their own household use and includes producers and wholesale customers (see Chap. I, Art. 2, 10 and 11) ;

As Directive 2009/72 obliges Member States to impose on undertakings operating in the electricity sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for electricity undertakings of the Community to national consumers. (see Chap. II. Art. 2, 3) ;

As Directive 2009/72 obliges Member States to ensure that all household customers, enjoy universal service, that is the right to be supplied with electricity of a specified quality within their territory at reasonable, easily and clearly comparable, transparent and non- discriminatory prices. (see Chap. II. Art. 3, 3) ;

*As in exercise of the powers conferred on the Minister responsible for the Water Services Corporation, the same Corporation with the approval of the Malta Resources Authority, or any of the same, a series of regulations were laid on the table of the House of Representatives and, in due course, were published by means of Legal Notices and today form part of the **Water Supply Regulations (1940)** (L.S.423.03) ;*

As the said amendments introduced in Malta, as of the 1st of January 2010, a dual-system of tariffs for the non-commercial use of water designated as

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residential and domestic tariffs (see Regulation 12(1) u 12(3) respectively of S.L. 423.03). The residential tariff for the consumption of water for each quantity not in excess of 33 m³ is set at €1.47 per m³ whereas the domestic tariff for the consumption of water for each quantity not in excess of 33m³ is set at €2.30 per m³ (see Schedule 1 (residential) and Schedule 3 (domestic) of S.L. 423.03) ;

As Directive 2006/123/EC (On Services in the Internal Market) delineates :

(95) The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or restricted by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence. It does not follow that it will be unlawful discrimination if provision were made in such general conditions for different tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are justified for objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment.

As Directive 2006/123/EC (On Services in the Internal Market) provides in Section 2, Article 14 :

Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following :

1. discriminatory requirements based directly or indirectly on nationality ...

and in **Article 20** :

1. *Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.*

2. *Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.*

As the ultimate effect of this dual-system of water and electricity tariffs for non-commercial use based on the criterion of residency or otherwise of a E.U. national in Malta (created-as aforementioned-by means of S.L.423.01 and L.S. 423.03 respectively) undermines the applicant`s exertion of their rights under Articles 43 and 49 of the TEU and is in violation of the scope of the Directives above-mentioned ;

Let therefore the defendants submit their reasons as to why this Court should not :

Declare null and without effect the dual-tariff system for electricity and water for non-commercial use based on the criterion of residency of a E.U. National in Malta created by means of S.L.423.01 and L.S. 423.03 respectively by tenure of Article 65(1) of the Constitution of Malta and Chapter 460 of the Laws of Malta and in violation of Directives 2009/72, and 2006/123 and Articles 43 u 49 of the TEU, or any thereof ;

The applicants reserve every right at law for reimbursement of payment effected, including legal interest, for their water and electricity bills when the said payments effected were not legally due.

The applicants subpoena the defendants, and request the reimbursement of all expenses and damages incurred in connection with the subject of these proceedings, including legal interest, and including the expenses of the judicial protests filed against any of the defendants to date.

With the application, claimants filed a list of witnesses and a list of documents. The Court has seen the documents that were filed.

III. The replies

1) The Attorney General, the Minister of Finance, the Economy and Investment and the Minister for Resources and Rural Affairs

These three respondents filed one reply, common for the three, on the 22 March 2013. They stated the following in Maltese –

1. *Illi fl-ewwel lok u in linea preliminari :*

(i) Illi l-azzjoni tar-rikorrenti in kwantu bazata fuq l-Artikolu 46(3) tal-Kostituzzjoni ta` Malta u l-Artikolu 5 tal-Legislazzjoni Sussidjarja 12.09 tal-Ligijiet ta` Malta hija irrita u nulla stante li dawn l-Artikoli japplikaw biss ghall-poter ta` Qorti (li ma tkunx Prim Awla jew Kostituzzjonali) sabiex tibghat riferenza kostituzzjonali lill-Prim Awla tal-Qorti Civili u ma jikkoncedu ebda

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dritt lil xi parti li taghmel “riferenza kostituzzjonali” hi kif qed jaghmlu r-rikorrenzi odjerni ;

(ii) Illi kull wiehed mir-rikorrenzi ghandu jipprova x`inhu l-interess guridiku tieghu biex jippromwovi l-proceduri odjerni ;

(iii) Illi ghalkemm fl-introduzzjoni tar-rikors promotur ir-rikorrenzi jindikaw li l-iskop ta` dawn il-proceduri huwa sabiex jigu attackati Atti tal-Parlament, effettivament mis-sustanza u mit-talbiet taghhom jidher b`mod car li l-ghan tal-proceduri odjerni huwa li jattakkaw legislazzjoni sussidjarja mahruqa bil-poter tal-Ministru koncernat, liema Ministru huwa debitament parti minn din il-kawza – konsegwentement l-esponent Avukat Generali m`huwiex il-legittimu kontraddittur ghat-talbiet tar-rikorrenzi u ghandu jigi liberat mill-osservanza tal-gudizzju ;

(iv) Illi inoltre, subordinament u bla pregudizzju ghas-suespost, din l-Onorabbli Qorti ghandha tiddeklina milli tezercita l-gurisdizzjoni kostituzzjonali taghha a tenur tal-proviso tal-Artikolu 46(2) tal-Kostituzzjoni stante d-disponibilita` ta` mezzi ohra xierqa ta` rimedju ordinarju li r-rikorrenzi ghandhom sabiex jivvantaw il-pretensjonijiet taghhom fosthom dik ta` azzjoni ta` stharrig gudizzjarju quddiem il-Qrati ordinarji, kif ukoll rimedji ohra opportuni kontemplati mill-Kap 387 u l-Kap 423 tal-Ligijiet ta` Malta ;

(v) Illi fi kwalunkwe kaz u bla pregudizzju ghas-suespost minkejja li dawn huma proceduri kostituzzjonali ma hemm ebda ndikazzjoni ta` liema mill-Artikoli 33 sa 45 tal-Kostituzzjoni gew allegatament lezi fil-konfront tar-rikorrenzi u ghalhekk l-esponenti qeghdin minn issa jirrizervaw id-dritt li jirrispondu ulterjorment wara li r-rikorrenzi jiccaraw il-lanjanzi taghhom ;

(vi) Illi wkoll bla pregudizzju ghas-suespost ir-rikorrenzi ma specifikawx liema partijiet mil-legislazzjoni sussidjarja 423.01 u 423.03 huma allegatament lezivi tad-drittijiet fundamentali taghhom u f`dan il-kuntest l-esponent qeghdin ukoll minn issa jirrizervaw id-dritt li jirrispondu ulterjorment wara li r-rikorrenzi jaghmlu din il-kjarifika.

2. *Illi fit-tieni lok, **fil-mertu**, l-allegazzjonijiet u l-pretensjonijiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt.*

3. *Illi kemm ir-Regolamenti fuq il-Provvista tal-Elettriku (L.S. 423.01) kif ukoll ir-Regolamenti dwar il-Fornitura ta' l-Ilma (L.S. 423.03) huma pjenament konformi mal-provvedimenti tal-Artikolu 65(1) tal-Kostituzzjoni, mal-Kap 460 tal-Ligijiet ta' Malta, mad-Direttivi 2006/123 u 2009/72 u mal-Artikoli 43 u 49 tat-Trattat tal-Unjoni Ewropea.*

4. *Illi l-ligi tal-Unjoni Ewropea mkien ma tipprojbixxi r-regolamentazzjoni ta' tariffi. Ghal finijiet tal-kaz odjern jigi fil-fatt rilevati li din ir-regolamentazzjoni saret, u saret b`mod proporzjonali minghajr ebda distinzjoni bejn cittadini tal-Unjoni Ewropea inkluzi dawk Maltin.*

5. *Illi finalment id-Direttivi citati mir-rikorrenti mkien ma jipprekludu l-uzu ta' tariffi li mhumiex specifikati fid-Direttivi stess.*

Ghalhekk u fid-dawl tas-suespost l-allegazzjonijiet u t-talbiet tar-rikorrenti ghandhom jigu michuda bl-ispejjez kontra taghhom.

Salvi eccezzjonijiet ulterjuri.

2) **Enemalta Corporation**

In its reply filed on the 22 March 2013, respondent Enemalta Corporation stated as follows in Maltese –

1. *Illi preliminarjament l-azzjoni odjerna hija rrita u nulla stante illi hija msejsa fuq artikoli, senjatament l-artikolu 46(3) tal-Kostituzzjoni u l-artikolu 5 tal-Legislazzjoni sussidjarja 12.09 tal-Ligijiet ta` Malta, li jaghtu poter lill-Qrati hemm definiti sabiex jaghmlu referenza kostituzzjonali u mhux sabiex ir-referenza kostituzzjonali ssir mir-rikorrenti ;*

2. *Illi wkoll preliminarjament kull rikorrent ghandu jgib prova tal-locus standi tieghu sabiex jinterponi din l-azzjoni ;*

3. *Illi wkoll preliminarjament din l-Onorabbli Qorti ghandha tirrifjuta li tezercita s-setghat kostituzzjonali taghha ai termini tal-artikolu 46(2) tal-Kostituzzjoni stante illi r-rikorrenti ghogobhom jinterponu din l-azzjoni minghajr ma ezawrew ir-rimedji ordinarji li tipprowdihom il-ligi, fost l-ohrajn, taht il-Kap 423 u l-Kap 387 tal-Ligijiet ta` Malta ;*

4. *Illi fi kwalunkwe kaz u minghajr pregudizzju ghas-suespost il-Korporazzjoni tirriserva li tipprezenta risposta ulterjuri jekk ikun mehtieg u dan minhabba l-fatt illi r-rikorrenti ma ghamlu l-ebda referenza ghal dak li skont huma huwa d-dritt fundamentali taghhom stabbilit mill-artikoli 33 sa 45 tal-Kostituzzjoni li gie lez, liema artikoli tal-ligijiet sussidjarji, skont huma, ghandhom jigu dikjarati nulli u bla effett u in generali ma ssostanzjawx il-premessi taghhom f`mod car u ezawrient i;*

5. *Illi fil-mertu u minghajr pregudizzju ghas-suespost, it-talbiet tar-rikorrenti huma nfondati stante illi ma gie lez ebda dritt taghhom u regolamenti ghall-provvista tal-elettriku (SL423.01) huma pjenament konformi mal-Kostituzzjoni ta` Malta, mal-Kap 460 tal-Ligijiet ta` Malta u mad-Direttivi 2009/72, 2006/123 u l-Artikoli 43 u 49 tat-TEU (sic) ;*

6. *Illi fil-fatt is-sistema tat-tariffi in kwistjoni hija perfettament kompatibbli mar-rekwiziti tal-ligi u fl-ebda mod ma ccahhad lill-ebda cittadin tal-Unjoni Ewropeja, inkluzi dawk Maltin, minn kwalsiasi dritt li jista` jkollhom;*

7. *Salv eccezzjonijiet ulterjuri.*

Ghaldaqstant, in vista tas-suespost, il-Korporazzjoni Enemalta titlob bir-rispett li din l-Onorabbli Qorti joghghobha tichad it-talbiet tar-rikorrent bhala nfondati kemm fil-fatt kif ukoll fid-dritt ;

Bl-ispejjez.

3) Water Services Corporation

In its reply filed on the 22 March 2013, respondent Water Services Corporation stated as follows in Maltese –

Illi preliminarjament, l-intempestivita` tal-azzjoni odjerna, stante li fil-konfront tal-Korporazzjoni ghas-Servizzi tal-Ilma, qatt ma kien hemm xi nterpellazzjoni ufficjali da parti tar-rikorrenti, jew min minnhom, sabiex l-esponenti tirregola l-pozizzjoni taghha ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, il-Korporazzjoni esponenti ma hijiex il-legittimu kontradittur, stante li hija m`ghandha l-ebda awtorita` li taghmel jew tibdel il-ligi, u ghaldaqstant ghandha tigi liberata mill-osservanza tal-gudizzju ;

Illi intant, u minghajr pregudizzju ghas-suespost, il-process tat-twaqqif ta` tariffa mill-Korporazzjoni esponenti, huwa soggett ghal ex ante awtorizzazzjoni mill-Awtorita` ta` Malta dwar ir-Rizorzi u dan ai termini tal-Artikolu 27 tal-Kap. 255 tal-Ligijiet ta` Malta ;

Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom, qabel xejn, jindikaw b`mod ezatt daww l-emendi, ossija Avvizi Legali, illi huma qeghdin jittantaw jimpunjaw permezz tal-proceduri odjerni ;

Illi di piu, il-Korporazzjoni esponenti tikkontendi li l-Avviz/i Legali mertu ta` din il-vertenza jikkostitwixxu mizuri tal-Istat ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, l-azzjoni odjerna, in kwantu hija bbazata fuq l-Artikolu 46(3) tal-Kostituzzjoni ta`

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Malta u l-Artikolu 5 tal-Legislazzjoni Sussidjarja 12.09 tal-Ligijiet ta` Malta hija rrita u nulla stante illi l-poter hemm imnissel huwa mholli biss lill-Qrati hemm definiti sabiex jaghmlu riferenza kostituzzjonali u mhux lir-rikorrenti kif donnhom qed jikkontendu ;

Illi minghajr pregudizzju ghas-suespost, u in linea preliminari wkoll, din l-Onorabbli Qorti ghandha tirrifjuta li tezercita s-setghat kostituzzjonali taghha a tenur tal-artikolu 46(2) tal-Kostituzzjoni stante li r-rikorrenti ma ezawrewx ir-rimedji ordinarji li tipprovdilhom il-ligi, partikolarment, imma mhux limitatament, dawk kontemplati taht il-Kapijiet 387 u 423 tal-Ligijiet ta` Malta ;

Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom jispecificaw liema dritt fundamentali taghhom suncit fl-artikoli 33 sa 45 tal-Kostituzzjoni, allegatament gie lez. Ghaldaqstant il-Korporazzjoni esponenti qeghda minn issa tirriserva illi tipprezenta risposta ulterjuri ;

Illi minghajr pregudizzju ghas-suespost, u inoltre, ir-rikorrenti jehtiegilhom ilkoll jippruvaw l-interess u r-relazzjoni guridika rispettiva taghhom u li b`xi mod gew diskriminati skont il-pretensjonijiet rispettivi taghhom ;

Illi fil-mertu, u minghajr pregudizzju ghas-suespost, id-distinzjoni bejn tariffi residenzjali u tariffi domestici fil-legislazzjoni lokali fiha nnifisha ma hijiex projbita mid-dritt Malti jew dak Ewropej, senjatament mal-Artikolu 65(1) tal-Kostituzzjoni, mal-Kap 460 tal-Ligijiet ta` Malta, mad-Direttivi 2006/123 u 2009/72 u mal-Artikoli 43 u 49 tat-Trattat tal-Unjoni Ewropea; u ma hijiex applikata b`mod diskriminatorju bejn cittadini Maltin u dawk tal-Unjoni Ewropea ;

Illi ghaldaqstant, it-talbiet tar-rikorrenti, fil-konfront tal-Korporazzjoni intimata ghandhom jigu michuda bl-ispejjez kontra l-istess rikorrenti ;

B`riserva ghall-eccezzjonijiet ulterjuri.

Bl-ispejjez.

4) **Malta Resources Authority**

On the 22 March 2013, respondent Malta Resources Authority filed a reply in Maltese, together with a translation in English. The latter states as follows –

The exponent is contesting the allegations and claims made by the applicant as unfounded in fact and in law for the following reasons :

1. *Whereas, preliminarily the Malta Resources Authority is not the correct respondent at law in terms of Article 181B of the Code of Organisation and Civil Procedure (Cap. 12 of the Laws of Malta) and is hence humbly requesting to be non suited with costs.*

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2. *Whereas, also preliminarily the action of the applicants is null and void as it is based on Article 46(3) of the Constitution of Malta and regulation 5 of S.L. 12.09 of the Laws of Malta, as those provisions apply only to the power of a Court which is not the First Hall of the Constitutional Court to make a constitutional reference to the First Hall of the Civil Court and that the same does not confer any right to any party to make “a constitutional reference” itself such as in the case of the applicants.*

3. *Whereas, also preliminarily, the applicants should prove their juridical interest proof of which is totally absent in their first application.*

4. *Whereas, preliminarily the applicants should correctly specify their claims for the reason that they are vague and that there does not result any nexus between the facts as exposed and the claims made in their first application.*

5. *Whereas, preliminarily the applicants should specify which of the provisions of articles 33 to 45 (inclusive) of the Constitution of Malta (Cap. 1 of the Laws of Malta) which allegedly they are entitled of their protection thereof.*

6. *Whereas, preliminarily the application and the claims made therein lack any legal basis under the Constitutional procedure for the reason that Article 65(1) of the Constitution and Chapter 460 of the Laws of Malta and Directives 2009/72/EC and 2006/123 and articles 43 and 49 of the TFEU, do not in any manner substantiate the applicants` claims under the Constitutional procedure.*

7. *Whereas, preliminarily the applicants are making abuse of the Constitutional procedure in that they are making use of an extraordinary procedure as the current procedure is when they instead may avail themselves of*

ordinary remedies to safeguard any rights asserted by themselves. In this instance the exponent refers to Article 46(2) of the Constitution and to the proviso to Article 4(2) of Chapter 319 of the Laws of Malta. Whereas also the same applicants may have filed a complaint with the exponent Authority to investigate the alleged breach of the relevant laws or of a regulatory requirement by means of a formal and substantive complaint. Whereas the same applicants were informed of this by means of the Authority`s counter-protest of the 4th January 2013 (see doc. MRA attached with this reply), instead of which the applicants chose to proceed by filing an action by means of this extraordinary procedure.

8. *In that on the merits, subordinately and without prejudice to what has been premised, even if for the sake of argument it has to be conceded that the applicants have any right which is protected under the current procedure, the subsidiary legislation 423.01 does not contravene any of the rights protected under the Constitution. In that inasmuch even the same applicants are not specifying in their application which fundamental human right protected under the Constitution is being contravened by the exponent.*

9. *In that subordinately and without prejudice to what has been premised, the claim made by the applicants that this Honourable Court should “declare null and without effect the dual-tariff system for the electricity and water” simply on the basis of their allegations runs counter to the Constitution and this because it is based as it is, on mere allegations that it is not compliant with Constitutional obligations, and must hence be denied. Whereas in any case such tariffs are wholly compatible in fact and in law with Maltese and European law.*

10. *In that subordinately and without prejudice to what has been premised, in view of the nebulous and abstract manner the alleged breaches have been expressed by the applicants, the exponent Authority is hereby as from now reserving its right to respond further as the case may be.*

Saving any other pleas.

Therefore the applicant, respectfully requests this Honourable Court to deny all the claims of the applicants with expenses against them.

Note has been taken of this respondent's list of witnesses and list of documents.

IV. The preliminary pleas

The Court **directed** the parties to present evidence and make submissions regarding the preliminary pleas as it was the intention of the Court to give judgement on the preliminary pleas before considering the merits.

V. The note verbal of the 26 March 2013

During the hearing of the 26 March 2013, the following *note verbal* was inserted in the records of the proceedings :-

Dr Galea for the applicants refers to the third paragraph of the application which reads from "Therefore this application is being filed" till "Laws of Malta", and declares that this premise is not an integral

part of the claims but is merely a supporting argument. Therefore, for clarity's sake, applicants declare that their action is based exclusively on Art. 65(1) of the Constitution, for reasons laid down in the application and which still hold to date. Furthermore, for clarity's sake, applicants declare that they are not relying on any alleged violation of the human rights' provisions of the Constitution as a basis for their claim. (emphasis of the Court).

Dr Galea re-affirms the position that the lawsuit was filed in the proper Court, in the sense that according to the premises and claims being made by applicants, this remains a case with Constitutional application, for reasons already explained.

Dr Sciberras, Dr Degiorgio, Dr Young and Dr Pace, having heard the explanation submitted by applicants' lawyer, submit as follows :

That contrary to what Dr Galea is stating, the reference to Art 46(3) of the Constitution is not merely a supporting argument, but it is the article on which the whole action is based, as emerges from the wording of the application. Therefore they insist that for these reasons the application is null and void as indicated in the preliminary pleas.

The Court, having heard the submissions of parties lawyers', orders that submissions be made for eventual judgement by this Court, on all pleas which are of a preliminary nature, and which do not enter into the merits of the dispute between the parties.

VI. The decree of the 6 June 2013

Following the hearing of the 26 March 2013, applicants filed an application on the 17 April 2013 with a request to correct their original application in the light of the *note verbal* of the 26 March 2013. Respondents opposed claimants' request.

At the hearing of the 6 June 2013, claimants entered another *note verbal* where, in addition to what they had stated in their application of the 17 April 2013, made the following declaration :-

At the Court`s request, Dr Galea submits that taking into account the nature of the application and the alleged breaches to the rights of her clients by means of the legislation in question, the appropriate reference to the Constitution was always intended to be a reference to Art 46(1) and not Art 46(3), because that in question is a freestanding procedure, i.e. it is not related to any other lawsuit. Furthermore it also relates to merits that fall under the jurisdiction of the same Court.

By decree delivered in open court on the 6 June 2013, the Court **acceded** to claimants` request for the deletion of the third paragraph of their original application **and** its substitution with the following –

Therefore this application is being filed before this Honourable Court in terms of Art 46(1) of the Constitution of Malta and according to disposition 4 of Subsidiary Legislation 12.09 of the Laws of Malta.

In view of this decree, the Court gave respondents ten (10) days to reply in writing to the original application as amended.

VII. The hearing of the 30 September 2013

Kopja Informali ta' Sentenza

At the hearing of the 30 September 2013, applicants entered the following *note verbal* -

Plaintiffs make reference to fol. 195 of the proceedings. This is an annex indicating a list of plaintiffs together with their official identification document references and a corresponding ARMS account number. The defendants have raised in their note of submissions on the preliminary pleas that this information is not sufficient as is. The plaintiffs in view of the Constitutional nature of this procedure are humbly requesting this Court to witness one of the plaintiffs who will verify on oath her passport or ID Number together with an electricity bill for the purpose approving the locus standi of at least one of the plaintiffs. The plaintiffs however leave the matter regarding the sufficiency of the evidence regarding the locus standi to the better Judgement of this Honourable Court.

The respondents opposed this request for reasons that result from the *note verbal* of the hearing.

The Court gave the following decree in open court –

Having heard the request made by Applicants. Having noted the objections of respondents.

Considers that the nature of these procedures render it imperative onto Court to look thoroughly into the aspects of the proper administration of justice in a manner that respects the rights of each party.

Considers that the request made is not in consistent with any rule of substantive justice and more than that is not in any matter prejudicial to the position taken by respondents in these proceedings taking it into account that the preliminary pleas are various in nature.

Therefore the Court authorises each respondent to confirm the statement at folio. 195 of the Court file by way of evidence for the purposes of the matter under scrutiny, and if need be should the Court enter into the merits of the dispute.

Following that decree, the Court heard the testimony of those applicants who were present. With regard to the others who were absent, their lawyer Dr Juliette Galea gave an account on oath. In essence, the applicants – each in his or her regard – confirmed their nationality, testified that they were resident in Malta, gave details of their Maltese identity card and of their ARMS account.

VIII. The judgement of the 16 January 2014 on the preliminary pleas

On the 16 January 2014, the Court gave judgement on respondents' preliminary pleas. The terms of the Court's decision were as follows –

The Court abstains from taking further notice of plea marked 1(i) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs ; of the plea marked 1 of respondent Enemalta Corporation ; of the sixth plea of respondent Water Services Corporation ; and the second plea of respondent Malta Resources Authority.

The Court orders applicants to bear the costs of judgement on this matter.

The Court rejects the plea marked 1(ii) of respondents the Attorney General, the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs ; plea marked 2 of respondent Enemalta Corporation ; the ninth plea of respondent Water Services Corporation ; and the third plea of respondent Malta Resources Authority.

The Court orders that each party bears its own costs with regard to judgement on this matter.

The Court accepts the plea marked 1(iii) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs, declares respondent the Attorney General as an improper defendant in this cause and declares the Attorney General as non-suited.

The Court orders applicants to bear the costs of judgement on this matter.

The Court rejects the plea marked 1(iv) of respondents the Attorney General, the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs, the plea marked 2 of respondent Enemalta Corporation ; the seventh plea of respondent Water Services Corporation ; and the seventh plea of respondent Malta Resources Authority.

The Court orders respondents to bear the costs of judgement on this matter.

The Court rejects the pleas marked 1(v) and (vi) of respondents the Attorney General ; the Minister of Finance, the Economy and Investment ; and the Minister for Resources and Rural Affairs, the plea marked 4 of respondent Enemalta Corporation ; the fourth and eight pleas of respondent Water Services Corporation ; and the fifth and eight pleas of respondent Malta Resources Authority.

The Court orders that each party bears its own costs with regard to judgement on this matter.

The Court accepts the plea marked 1 of respondent Malta Resources Authority, declares said respondent as an improper defendant in this cause and declares the Malta Resources Authority as non-suited.

The Court orders applicants to bear the costs of judgement on this matter.

The Court accepts the plea marked 2 of respondent Water Services Corporation, declares said respondent as an improper defendant in this cause and declares the Water Services Corporation as non-suited.

The Court orders applicants to bear the costs of judgement on this matter.

IX. The two decrees of the 11 March 2014

Following this judgement, two applications were filed by respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, on the one hand, and Enemalta Corporation, on the other, for leave to enter an appeal.

By means of two separate decrees given in open court at the hearing of the 11 March 2014, the Court rejected the above respondents' requests for leave to appeal.

X. The note verbal of the 11 March 2014

At the hearing of the 11 March 2014, the following *note verbal* was entered into the records of the proceedings :-

Dr Susan Sciberras is raising a point in the sense that applicants are to specify and identify which provisions of the Constitution and/or the Convention are in issue in this cause.

Dr Juliette Galea declares that the rights invoked are the right to the peaceful enjoyment of property (Art 1 Protocol 1 of the Convention) together with Art 14 of the Convention relating to discrimination.
(emphasis of the Court).

Following that *note verbal*, the Court acceded to respondents' request to file an additional reply.

XI. The additional reply

On the 20 March 2014, respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, and Enemalta Corporation filed a joint additional reply which *inter alia* states the following :-

*i. On a preliminary basis, since as resulted from the acts of this case this Court is vested with a Constitutional Jurisdiction emanating from the provisions of Article 46 of the Constitution and Article 4 of the European Convention on Human Rights and Fundamental Freedoms, then its competence is to decide issues falling within the parameters of the said Articles. It thus follows that this Honourable Court in Constitutional Jurisdiction does not have the competence *ratione materiae* to take cognizance of and decide the issues and claims raised ...*

*ii. That without prejudice to the above, **in merit**, applicants' application that the subsidiary legislations in question violate their human rights are unfounded in fact and at law.*

iii. That there is no breach of Article 1 Protocol 1 of the Convention since S.L. 423.01 and S.L. 423.03 are not depriving applicants of the peaceful enjoyment of their possessions as will be proven during the course of the proceedings.

iv. That subordinately and without prejudice to the above, should this Court nonetheless determine that applicants are subject to any deprivation of such possessions, respondents reiterate that this is justifiable because it is being done in the public interest and in conformity with the conditions provided for by national and international law.

v. That moreover and also without prejudice to the above, if this Court finds that there is any interference with the rights of applicants under this Article of the Convention, such interference is legitimate and falls within the State's margin of appreciation to legislate in accordance with the general interest as will be proven during the course of the proceedings.

vi. That there is also no breach of Article 14 of the Convention. Respondents point out that not every difference in treatment amounts to discrimination in the context of the Convention. Moreover for an action under Article 14 to be successful, comparison for the purpose of establishing whether there has been discrimination or not has to be done with respect to analogous situations, that is on a 'like with like' basis.

viii. That in the present case applicants are not receiving any discriminatory treatment by virtue of S.L. 423.01 and S.L. 423.03 when compared to an analogous category of people in their same situation.

XII. The hearing of the 10 April 2014

At the hearing of the 10 April 2014, parties' lawyers made verbal submissions regarding the additional reply. They agreed that *due to the nature of the issues raised by that additional reply, it would be opportune that this Court, before even entering into the merits, gives judgement on the points raised in that additional reply.*

The Court endorsed the parties' approach and adjourned the suit for judgement on the joint additional reply of respondents the Attorney General, the Minister of Finance, Economy and Investment, the Minister for Resources and Rural Affairs, and Enemalta Corporation.

The Court has seen the records of the case to date in their entirety, has taken note of the parties' submissions and in a position to decide on the additional reply as follows :-

XIII. The preliminary plea raised in the additional reply

Following the judgement of the 16 January 2014, the respondents that are still parties in this suit are :- a) the Attorney General ; b) the Minister of Finance, the Economy and Investment ; c) the Minister for Resources and Rural Affairs and (d) Enemalta Corporation.

In their joint additional reply, the respondents raised a **preliminary** plea claiming that this Court does not have jurisdiction *rationae materiae* to take notice and decide on applicants' claims. In their plea, respondents refer to Art 46 of the Constitution of Malta ("Constitution"). They also refer to Art 4 of the European Convention on Human Rights and Fundamental Freedoms ('Convention'). Regarding the latter, the Court points out that the correct reference should have been to Art 4 of the European Convention Act (Chapter 319 of the Laws of Malta) rather than the Convention itself.

Art 46 of the Constitution states as follows :-

(1) *Subject to the provisions of sub-articles (6) and (7) of this article, any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.*

(2) *The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) of this article, and may make such orders, issue such writs and give such*

directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said articles 33 to 45 (inclusive) to the protection of which the person concerned is entitled : Provided that the Court may, if it considers it desirable so to do, decline to exercise its powers under this sub-article in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If in any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the provisions of the said articles 33 to 45 (inclusive), that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious ; and that court shall give its decision on any question referred to it under this sub-article and, subject to the provisions of sub-article (4) of this article, the court in which the question arose shall dispose of the question in accordance with that decision.

(4) Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court.

(5) No appeal shall lie from any determination under this article that any application or the raising of any question is merely frivolous or vexatious.

(6) Provision may be made by or under an Act of Parliament for conferring upon the Civil Court, First Hall, such powers in addition to those conferred by this article as are necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by this article.

(7) Rules of Court making provision with respect to the practice and procedure of the Courts of Malta for the purposes of this article may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of those Courts, and shall be designed to secure that the procedure shall be by application and that the hearing shall be as expeditious as possible.

Art 4 of Chapter 319 states as follows :-

(1) *Any person who alleges that any of the Human Rights and Fundamental Freedoms, has been, is being or is likely to be contravened in relation to him, or such other person as the Civil Court, First Hall, in Malta may appoint at the instance of any person who so alleges, may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the Civil Court, First Hall, for redress.*

(2) *The Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of subarticle (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, of the Human Rights and Fundamental Freedoms to the enjoyment of which the person concerned is entitled : Provided that the court may, if it considers it desirable so to do, decline to exercise its powers under this subarticle in any case where it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other ordinary law.*

(3) *If any proceedings in any court other than the Civil Court, First Hall, or the Constitutional Court any question arises as to the contravention of any of the Human Rights and Fundamental Freedoms, that court shall refer the question to the Civil Court, First Hall, unless in its opinion the raising of the question is merely frivolous or vexatious ; and that court shall give its decision on any question referred to it under this subarticle and, subject to the provisions of subarticle (4), the court in which the question arose shall dispose of the question in accordance with that decision.*

(4) *Any party to proceedings brought in the Civil Court, First Hall, in pursuance of this article shall have a right of appeal to the Constitutional Court.*

(5) *No appeal shall lie from any determination under this article that any application or the raising of any question is merely frivolous or vexatious.*

(6) *The Rules of Court made in accordance with article 46(7) of the Constitution as in force from time to time shall apply mutatis mutandis to the practice and procedure of the courts for the purpose of this article as if the proceedings made under this article were proceedings made under article 46 of the Constitution.*

(7) *Where it is alleged that any of the Human Rights and Fundamental Freedoms and any of the provisions of articles 33 to 45 (inclusive) of the Constitution has been, is being or is likely to be contravened, the demand for redress or the reference to the Civil Court, First Hall, in accordance with article 46 of the Constitution and this article may be made in the same application or reference.*

(8) *Where an application for redress or any reference to the Civil Court, First Hall, made after the 30th April, 1987 is made exclusively either under article 46 of the Constitution or under this article and is still pending before the Civil Court, First Hall, or the Constitutional Court, the court may examine whether or not the facts complained of are in violation of the corresponding Human Rights and Fundamental Freedoms, in the first case, or of the corresponding Fundamental Rights and Freedoms of the Individual enforceable under the Constitution, in the second case ; and if the court so finds it may order accordingly the redress it may deem appropriate under any of the aforesaid laws.*

For this Court, the relevant issue at this point is whether such a plea which respondents themselves qualify as a *preliminary* plea can be raised at this stage of the suit.

Without in any manner entering into the merits of the dispute between the parties, it was evident from inception that applicants filed their application

before this Court in its constitutional jurisdiction. In the premises that preceded their demands, applicants, besides referring to specific dispositions in subsidiary legislation, which they allege is null and void, referred also to specific provisions of the Constitution. Nonetheless respondents the Attorney General, the Minister of Finance, the Economy and Investment, and the Minister for Resources and Rural Affairs, on the one hand, and Enemalta Corporation on the other did not plead lack of jurisdiction of this Court *in limine litis*. What they did in their respective fourth plea was **only** to reserve their right to enter additional pleas, once applicants did not indicate in their application which of Art 33 to Art 45 they allege to have been violated. However respondents` position is definitely not tantamount to a plea against the jurisdiction of the Court.

The Court points out that **after** hearing the parties, it gave judgement on the 16 January 2014 on **all** preliminary pleas raised by **all** respondents – including the present respondents. These preliminary pleas **did not** include a plea as to the jurisdiction of the Court. The Court underlines the fact that none of the parties registered an adverse view to the direction by the Court in the sense that the Court intended to decide on the preliminary pleas before considering the merits. The Court is of the considered opinion that once **none** of the respondents raised the plea of lack of jurisdiction *in limine litis* and once all the respondents made their submissions with regard to the preliminary pleas prior to its decision of the 16 January 2014, then respondents **submitted** to the jurisdiction of the Court, and are therefore now precluded at law to raise the plea of lack of jurisdiction of the Court in their additional reply.

In a judgement of the 16 October 2003 in re “**Angelo Cutajar & Sons Company Limited vs Dott. Anthony Cremona et noe**”, this Court (PA/AJM) stated that *l-eccezzjoni dwar il-kompetenza ta` Qorti ... b`rieda tal-ligi hija wahda mill-eccezzjonijiet li l-Qorti tista` tqanqal minn rajha, imbasta dan isir f`waqt bikri tal-kawza in limine.*

In another judgement of the 3 October 2003 in re “**George Said noe vs Joseph Ellul Sullivan et**”, this Court (**PA/PS**) remarked that the plea of lack of jurisdiction of the Court *htiegilha titqajjem in limine litis*. *Dan ghaliex “il-patt li bih tigi prorogata l-gurisdizzjoni jista’ jigi rinunzjat minn dak li a favur tieghu l-patt ikun gie stipulat u jekk dik il-persuna konvenuta ma topponix l-eccezzjoni relativa in limine litis “si ha da ritenere che egli vi abbia rinunziato, ed in caso di tale rinunzia rivive la giurisdizione ordinaria e propria (Vol. XXIV P I p 1067)” – “Charles Debono proprio et nomine –vs- John Caruana nomine”, Appell Kummercjali, 14 ta’ Mejju 1971.*

One final point : the Court has already referred to the *note verbal* that was registered at the hearing of the 11 March 2014. In particular where applicants indicated that the fundamental rights which they claim to have been breached by the subsidiary legislation in question are Art 1 Protocol 1 of the Convention and Art 14 of the Convention. This declaration was made **after** respondents demanded that applicants should specify which human rights provisions in the Constitution and/or the Convention they allege to have been violated. Yet again this approach by respondents contradicts their *belated* stance with regard to the jurisdiction of the Court. It is considered opinion of the Court that once applicants have pinpointed *specific* **human rights** provisions embodied in the Convention (not in the Constitution) as their basis for a judicial remedy against the subsidiary legislation in question, the Court can proceed to consider the merits taking into account all issues raised by the parties.

Decision

For these reasons, the Court dismisses the preliminary plea marked (i) raised by respondents the Attorney General, the Minister of Finance, the Economy and Investment, the Minister for Resources and Rural Affairs and Enemalta Corporation in their joint additional reply. Relative costs are to be borne by respondents.

Consequently the Court directs the parties to forward their evidence on the merits.

The Court adjourns the cause for applicants to forward their evidence on the merits at the hearing of Thursday 23 October 2014 at 1.00 p.m.

The Hon. Mr Justice

Joseph Zammit McKeon

< Sentenza In Parte >

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