



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta ta' l-20 ta' Mejju, 2015

Appell Civili Numru. 6/2015

**Jason Axiak**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Jason Axiak tas-16 ta' Frar 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Jannar 2015 fl-applikazzjoni PA 1674/13 'to park vehicle of licensed fixed hawker from morning to evening';

## Kopja Informali ta' Sentenza

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:

L-applikazzjoni giet rifjutata mill-Kummissjoni ta' l-Ambjent u l-Ippjanar ghas-segwenti ragunijiet :-

1. "The proposed development conflicts with Policy GZ-Xghr-3 of the Local Plan for Gozo and Comino which does not permit development at Ramla Bay until a Management Plan for the area is approved by MEPA.

2. The site is located within a Special Area of Conservation of International Importance. The proposed development is not necessary to the management of the Special Area of Conservation, nor does it seek to improve the Special Area of Conservation. The proposal is therefore unacceptable as it conflicts with Article 13.1 of Legal Notice 257 of 2003.

3. The site is located in an Area of Ecological Value as indicated on the Structure Plan Key Diagram, where further human intervention, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan.

4. The site lies in a Rural Conservation Area (as designated by the Structure Plan and indicated on the Key Diagram). The proposal does not comply with Structure Plan Policy RCO 2 which clearly states that no form of urban development will be permitted within Rural Conservation Areas.";

Ra r-ragunijiet tal-appell hekk kif gej :-

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"I refer to the above application which was refused by the EPC. I kindly request that this Tribunal revoke this decision for the following reasons:

Management Plan could have been prepared years ago

The Management Plan mentioned by policy GZ-Xghr-3 could have been prepared years ago. This possibility of preparing a management plan was mentioned in the Gozo Local Plan of 2006. More than 7 years later, there is no sign that this management plan is in the pipeline. The applicant cannot therefore be penalised simply because the Managing Authority of Ramla Bay has not taken the initiative to prepare this plan. It is interesting to note that in the DPAR of PA46/11 it was stated that the management plan for Ramla was to be finalised in 2013. 2013 has nearly passed now and there is no sign that this management plan is anywhere near preparation or finalisation. Furthermore, in order not to prejudice in any way any future management plans for Ramla, the permit may be easily issued for a temporary period. This was done when PA 1211/07 and PA46/11 were approved for identical development in the same street. Reason 1 of refusal therefore does not hold.

Development is within a fully developed street

The second and third reasons of refusal are quite ridiculous. This is not unacceptable development in a Special Area of Conservation or an Area of Ecological Value. It is simply an application to park a vehicle from morning to evening, like the other hundreds of vehicles flocking to Ramla in summer.

This is not an urban development

The proposed development is not an "urban" development. My client would be allowed to park his vehicle in the site to provide the hawker service without even a development permit. He only applied for this permit to be able to park in the same space consecutively on various days. Therefore, stating that the proposal cannot be accepted since it is an urban development within a rural conservation area is truly not applicable and reason 4 does not hold.

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The proposal is justified in view that a quality service is being offered to visitors who flock to Ramla Bay in summer. My client is not seeking a beach concession. He is simply seeking permission to render the service similar to that approved in PA1211/07 and PA46/11 - which service is given exclusively within the surfaced street through a mobile motorised vehicle.

We therefore kindly ask that the refusal decision be revoked. We kindly ask to be notified beforehand for all sittings concerning this application.”;

Ra r-risposta tal-Awtorita' prezentata lil dan it-Tribunal fit-13 ta' Marzu 2014 li jaqraw hekk kif gej :-

### “5.0 COMMENTS ON APPELLANT’S ARGUMENTS

5.1 The Authority has noted the arguments as brought forward in appellant’s request for appeal and shall address these issues hereunder:

5.2 In this request for appeal, appellant is stating that this request for development is justified in view that the proposed development satisfies all the requisites of the relevant policies.

5.2.1 However, after noting all of appellant’s arguments as presented in this request for appeal the Authority disagrees with these justifications and states that the development as proposed breach the relevant policies as will be discussed below.

5.2.2 As regards to the arguments of the appeal itself, the Authority disagrees with appellant’s statement on various accounts and will be explained below.

5.2.3 The proposal consists of the parking of a vehicle within an existing parking bay to sell ice-cream. The parking bay is at the end of the road leading to the beach of Ramla. Although the applicant possesses a trading license of a street hawker, the commercial activity within this particular location would create a precedent for more applications for similar vehicles. In addition, the proposal would compromise the Local Plan Policy GZ-Xghr-3 which specially states that no new planning permissions will be awarded in this area pending the approval by MEPA of a Management Plan.

5.2.4 The site is located within a sensitive area and an ecologically important area. It is also designated as a Natura 2000 site. Structure Plan Policy RCO2 and Local Plan Policies GZ-RLCN-1 and GZ-RLCN-2 do not allow development on scheduled areas and indicate that there should be strong presumption against the development of structures. The proposed parking of a vehicle for the selling of ice-cream does not meet the requirements of the SP and LP Policies. The proposed activity is not acceptable in a scheduled area. Furthermore, the proposal is approved might compromise the proposed Management Plan for the area as requested in LP Policy GZ-Xgh-3.

5.2.5 The two Planning Permits mentioned by appellant refer to the same site (but different from the site under appeal), with the latter application being a renewal application of the former permission. This quoted site is located closer to the Ramla Bay than the site under appeal. The renewal application was recommended for refusal and eventually an appeals application was submitted. The EPRT upheld the proposal on the grounds that in this particular case, only renting of sun-beds can be carried out in this area. Unlike the proposed use of the parking of a vehicle for selling ice-cream, the permitted use is of a totally different nature which can be considered as being ancillary to swimming. The selling of ice-creams can be considered as a frivolous use in a Scheduled Site. Furthermore, the Authority notes that there is a clear difference between the selling of ice-creams and the renting of sun-beds. The latter does not require the use of electricity, water and drainage facilities, whereas the selling of ice-creams would certainly need electrical power to keep the refrigerators and freezers switched on. This would certainly create a nuisance since a generator would probably be used to generate power. Condition 2c of PA 46/11 reads as follows:

This permission does not entitle the applicant to the provision of water, electricity and sewage services.

The two uses cannot be compared with each other, since the use under appeal is dependant on electrical power whilst the permitted use as per quoted permit does not. Furthermore, the selling of ice-creams entails the use of signs. Condition 2f in PA 46/11 states, that the approved permit does not grant the display of any sign or advertisement and that a separate application for such needs to be submitted. Condition 2f reads as follows:

No approval is hereby granted for the display of any sign or advertisement. These must form the subject of a separate application for advertisement consent.

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Therefore, by granting this appeal, one would only be granting the use of the parking space to be used for hawking purposes, since the use would not be entitled for the provision of water, electricity and sewage services and that a separate application for the display of any sign and/or advertisement need to be submitted.

5.3 Conclusively, the Authority states that whilst taking note of appellant's arguments in this request for appeal, the Authority notes that there are no sound planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the EPC's decision which dismissed this request for development since the EPC Board had based their decision on the valid relevant policies applicable to this area. Reference is also made to the detailed reports as included in the file and to the submissions (verbal and written) which will be presented during the appeals sittings.

5.4 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions and thus, respectfully requests that the Environment & Planning Review Tribunal to confirm the decision as issued with the refusal notice and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary.”;

Ra r-risposta tal-Avukat Dottor Joshua Grech ghan-nom ta' terzi persuni nterressati li giet prezentata fl-24 ta' Gunju 2014 u r-replika tal-Avukat Dottor Jean Paul Grech ghall-appellant li giet prezentata fit-28 ta' Lulju 2014;

Ra l-policy GZ-Xghr-3 tal-Gozo and Comino Local Plan;

Ra l-PA files numru 1674/13 46/11 u 1211/07;

Ra l-atti kollha ta' dan l-appell.

Ikkunsidra ulterjorment;

Illi l-mertu ta' dan l-appell jirrigwarda bdil ta' uzu ta' art li prezentament taghmel parti mit-triq fid-dahla tal-bajja tar-Ramla, Ghawdex, sabiex jkun jista jitpogga vettura ta'

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licensed hawker mill-hinijiet ta' filghodu sa filghaxija fejn isir bejgh ta' ikel – partikolarment gelati - u xorb.

Illi r-ragunijiet ta' rifjut ghalkemm huma erba', jistghu jingabru f'zewg ragunijiet ewlenin – dik l-ewwel raguni tar-rifjut ibbazata fuq il-Policy GZ-Xghr-3 tal-pjan lokali (Gozo and Comino Local Plan) fejn tesigi l-bzon ta' management plan qabel ma jigi kunsidrat zvilupp gdid; u l-kumplement tar-ragunijiet ta' rifjut li huma bbazati fuq l-importanza tas-sit hekk kif inhu protett ghal valur rurali, u ekologiku, kif ukoll ghal fatt li sit jaghmel parti minn Special Area of Conservation (Natura 2000);

Illi l-appellant irrileva li huwa ghandu licenzja li jista jopera bhala hawker minn fuq is-sit, u l-permess ghal-izvilupp qiegħed jigi mitlub sabiex ikun jista jopera f'dan l-istess sit għal hin u perjodu itwal. L-appellant insista li bhala zvilupp mhu ser jaffettwa ebda skedar jew art protetta meta dak li qiegħed jigi propost huwa parkegg ta' vettura fi triq ezistenti, filwaqt li f'dan il-kaz huwa ghandu jigi trattat b'mod simili għal kazijiet ohra fejn gie permess tpoggija ta' vettura simili licenzjata bhal fil-kaz ta' PA 1211/07 u PA 46/11. Huwa lest li joqghod għal kundizzjonijiet li huma necessarji, inkluz permess temporanju, sakemm jigi fis-sehh il-management plan skont kif indikat fil-pjan lokali.

Illi il-policy GZ-Xghr-3 fil-pjan lokali hija cara fejn din tesigi illi “No new planning permission will be awarded in this area pending the approval by the MEPA of the said management plan.” Illi dan it-Tribunal jidhirlu li l-access li jagħti għal-bajja tar-ramla fejn jinsab is-sit inezami għandha tkun parti essenzjali fit-tfassil tal-management plan mitlub fil-policy, u għaldaqstant f'dan l-istadju l-izvilupp propost għandu jigi kunsidrat bhala wieħed prematur. Jekk kemm-il darba dan it-Tribunal jew l-Awtorita' tinjora d-dispost tal-policy bl-iskuza li l-permess ser ikun wieħed temporanju sew iwwassal sabiex l-istess policy fil-pjan lokali tkun wahda inutli u ineffettiva.

F'dan il-kaz dan it-Tribunal ma jistax jaqbel mal-appellant li din l-applikazzjoni għandha titqies b'mod simili bhal fil-kaz ta' PA 1211/07 u PA 46/11 (l-istess zvilupp fejn tal-ahhar huwa renewal għal-ewwel permess). L-applikazzjoni ta' renova, ossia PA 46/11 gie mahrug mit-Tribunal diversament kompost fid-decizjoni tas-27 ta' Settembru 2012, fejn gie kunsidrat il-fatt li s-sit jinsab f'tarf tat-triq fl-istess linja ma kiosks ohra li hemm ezistenti fid-dahla tal-bajja, filwaqt li n-natura ta' l-uzu tal-kiosk gie meqjus ukoll bhala servizz għall-pubbliku fejn jista jkri jew jixtri umbrellel ezatt qabel ma jidhol fil-bajja.

F'dan il-kaz, il-parkegg ta' vettura jinsab fit-triq li tagħti għad-dahla tar-Ramla fejn l-istess triq li hija l-unika access għal-bajja li tintuza bhala kemm għal-vetturi

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minhabba parkegg li hemm ghad-disposizzjoni fl-istess parti tat-triq, kif ukoll minn numru kbir ta' pedestrians, partikolarment fl-istagun tas-Sajf. F'dan ir-rigward, dan it-Tribunal jidhirli li ma jistax jigi injorat l-impatt fuq it-triq u l-immanigjar tal-istess triq bhala access ewlieni ghal-bajja.

Illi f'dan ir-rigward dan it-Tribunal qieghed jikkonferma l-ewwel raguni ta' rifjut.

F'dan l-istadju, dan it-Tribunal ma jarax il-bzonn li jidhol iktar fid-dettal fl-aggravji rigward it-tlett ragunijiet ta' rifjut l-oħra. Ta minn isemmi li bhala zvilupp, il-proposta hija limitata biss ghal parkegg ta' vettura fuq perjodu twil matul is-sena, partikolarment fl-istagun tas-sajf, u certament dan mhux iwassal ghal xi mpatt sinifikanti fuq is-sit tenut kont tal-fatt li dan l-izvilupp ser ikun fi triq ezistenti.

Madankollu, a bazi tal-mottivi spjegati iktar il-fuq f'din id-decizjoni, dan it-Tribunal mhux konvint li zvilupp fuq is-sit jista jigi permess b'mod sporadiku minghajr ebda bazi ta' ipplanar; u f'dan il-kaz ikun l-impatt kumulattiv ta' diversi permessi ghal zvilupp, jista jkun zghir u inokwu, imma li effittivament, minghajr il-bazi ta' ipplanar xieraq, dan iwassal ghall-impatt negattiv fuq l-ambjent tal-madwar li huwa wiehed ta' valur gholi u ta' importanza nazzjonali.

Ghal dawn il-mottivi u wara li gew kunsidrati l-fattispeci ta' dan il-kaz, dan it-Tribunal qieghed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut tal-permess.

### Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. L-Awtorita ghandha tkun uniformi fid-decizjonijiet taghha ara artikolu 36(2) tal-Kap. 504. Dan l-obbligu jestendi anki ghat-Tribunal fid-dawl tal-principju ta' ekwita. F'dan il-kaz hemm permess cioe PA 1211/07 ghal skop identiku, cioe servizz ghal pubbliku qrib xtajta liema permess inghata b'mod temporanju sakemm isir il-management plan GZ-Xghr-3 liema permess gie imgedded fl-2012 pendent li jsir dan il-pjan li ilu pendent mill-2006. Fil-kaz in kwistjoni t-Tribunal mar kontra l-prassi addotata u irrifjuta permess anki temporanju ghal vettura li ser tintuza ghal bejgh ta' gelati, pendent l-management plan u ghalhekk ivvojobla obbligu legali;



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2. Il-MEPA ma hi taht ebda obbligu li taghmel management plan izda l-policy in kwistjoni tinkoragixxi li dan isir minghajr impozizzjoni ta' obbligu. It-Tribunal bid-decizjoni impona obbligu tassattiv fuq l-Awtorita ghal formulazzjoni ta' management plan meta dan ma jirrizultax. Ghalkemm il-policy tghid li ebda permess ma jinhareg pendent l-approvazzjoni tal-pjan, dan l-obbligu jiskatta biss meta jkun inbeda l-process tal-formulazzjoni tal-abbozz tal-management plan. Jidher mill-atti li ghadu ma inbeda ebda process mill-MEPA.

### **L-ewwel aggravju**

It-Tribunal ghandu l-obbligu primarju li japplika l-ligijiet, pjanijiet u policies u ghalkemm hu ghandu jqis kwistjonijiet ta' sustanza, fost ohrajn allegazzjonijiet ta' similitudni ma' permessi ohra, dan bl-ebda mod ma jezonera u jintitola lit-Tribunal milli japplika l-ligijiet, pjanijiet jew policies kif inhuma. F'dan il-kaz l-appellant qed ighid li t-Tribunal ghandu obbligu li jkun uniformi fid-decizjonijiet tieghu. Din il-Qorti taqbel li uniformita ta' decizjoni jaghti certezza lil applikanti basta din l-uniformita tkun qed issehh f'kazijiet identici bl-istess fattispecie u planning considerations u fejn ma hemm ebda fatt jew fatturi li fil-fehma teknika u/jew legali tat-Tribunal jimmerita decizjoni bazata b'mod differenti minn ohrajn. F'dan il-kaz it-Tribunal ikkunsidra l-lanzanza fattwali maghmula mill-appellant dwar is-similitudni mal-permess kwotat mill-appellant u wasal ghal konkluzjoni purament fattwali u ibbazata fuq fatturi teknici illi fil-fatt hemm distinzjoni bejn iz-zewg talbiet. It-Tribunal sostna illi fil-kaz tal-permess citat s-sit fejn kien ser jigi parkeggjat il-mobile kiosk kien fid-dahla tal-bajja u kien servizz ghal pubbliku biex jikri jew jixtri umbrellel ezatt qabel jidhol fil-bajja mentri fil-kaz prezenti l-parkegg tal-vettura kien qed jintalab fit-triq li taghti ghall dahla tar-ramla u fejn l-istess triq hi l-uniku access ghal bajja fejn jipparkeggjaw il-vetturi u jghaddu numru kbir ta' pedestrians. Minhabba l-impatt fuq it-triq u l-immaniggar tat-traffiku l-applikazzjoni ma setghetx titqies simili. Kwindi la darba t-Tribunal ikkunsidra l-aggravju mill-aspett tekniku u wasal ghal konkluzjonijiet tieghu, liema konkluzjonijiet teknici, ma ghandhomx ikunu sindikati mill-Qorti, u wasal ghal konkluzjoni li z-zewg talbiet ma kienux simili, ma hemmx lok li jigi kunsidrat in-nuqqas ta' uniformita allegata billi din fil-fehma tat-Tribunal ma kinitx tissusisti.

### **It-tieni aggravju**

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Dan l-aggravju hu marbut mal-interpretazzjoni moghtija tal-policy GZ-Xghr-3 mit-Tribunal. L-appellant isostni li t-Tribunal impona obbligu fuq l-Awtorita li ma jirrizultax mill-policy u b'hekk applika l-policy hazin fil-konfront tal-applikant meta cahad l-applikazzjoni minhabba din il-policy jew ahjar in-nuqqas ta' ezistenza ta' management plan.

Din il-policy tghid zewg affarijiet, l-ewwel li l-izvilupp irid isir in konformita ma' management plan mill-Awtorita u illi l-Awtorita hi inkoraggita li dan isir. In oltre li sakemm isir il-pjan ebda permess ta' zvilupp ma jinhareg. It-Tribunal kellu fil-fehma tal-Qorti latitudni wiesa kif jinterpreta l-policy u l-interpretazzjoni li hu taha hi fis-sens illi l-ispirtu tal-policy hu regolamentazzjoni cara tal-izvilupp permissibli u sakemm dan ma jsirx ebda zvilupp ma ghandu jigi inkoraggit. Din l-interpretazzjoni hi wahda lecita mir-redazzjoni tal-istess policy. Meta t-Tribunal jinterpreta policy, din ma ghandhiex tigi sindakata mill-Qorti sakemm it-Tribunal ma jkunx mar kontra l-kliem espress tal-policy, ligi jew pjan jew l-interpretazzjoni hi tant assurda li tista tippregudika applikazzjonijiet futuri jekk segwita. Jista' jkun li wiehed ma jaqbilx mal-interpretazzjoni moghtija imma dan ma jwassalx ghal applikazzjoni hazina izda biss ta' divergenza ta' opinjoni fuq interpretazzjoni fejn ma ghandux ikun hemm sindakar mill-Qorti. Ir-raba paragrafu ta' pagna 6 tad-decisjoni tat-Tribunal tinkapsula l-interpretazzjoni li ghandha tinghata lil kliem tal-policy li t-Tribunal dehrlu hu l-ispirtu regolatur warajha. Din il-Qorti ma tistax u ma ghandhiex tiddisturba interpretazzjoni li hi accettabbli u plawsibbli fl-isfond tal-policy kif maghmula.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Jason Axiak u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Jannar 2015, bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

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