FIL-QORTI TAL-MAGISTRATI TA' MALTA

MAGISTRAT DR FRANCESCO DEPASQUALE

Seduta ta' nhar it-Tnejn disgha u ghoxrin (29) ta' Frar 2016

Rikors Numru 138/12 FDP

Dolores Cristina
(ID 77649M)

vs

Dr Joseph Muscat

Il-Qorti:-

Rat ir-rikors promotur ippresentat fl-24 ta' April 2012 fejn ir-rikorrenti ghamlet referenza ghal diskors maghmul mill-intimat, bhala Kap tal-Opposizzjoni, gewwa l-Imsida il-Hadd, 22 ta' April 2012, kif ukoll stqarrija mahruga mill-Partit Laburista li tikkonferma tali diskors u sahqet illi tali diskors kien jikkontjeni allegazzjonijiet u insinwazzjonijiet foloz u malafamanti fil-konfront taghha, li kellhom, bhala skop, li joffendu l-unur w il-fama taghha, senjatament fejn giet implikata f'allegat agir ta' nepotizmu fil-process tal-ghazla ta' Dr Robert Cuschieri kif ukoll impressjoni zbaljata ta' favoreggjament.

Talbet ghalhekk illi dina l-Qorti tikkundanna lir-rikorrent ihallasha danni ghal malafama lilha maghmulha.

Rat id-dokumentazzjoni esebita mir-rikorrenti.

Rat l-eccezzjonijiet ta' l-intimat ippresentati fis 27 ta' Gunju 2012 fejn sahaq illi d-diskors ma kienx libelluz u ma ntqal xejn malafamanti fil-konfront taghha filwaqt illi insista illi dak li huwa qal kien espressjoni ta' opinjoni u apprezzament, jigifieri value judgment, u ghandu jitqies bhala fair comment fuq materja ta' interess pubbliku.

Rat l-affidavit tar-rikorrenti **Dolores Cristina** ippresentat fit 12 ta' Lulju 2012.

Semghet ix-xhieda ta' **Dr Lydia Abela**, Segretarja tal-Ezekuttiv Nazzjonali tal-Partit Laburista, moghtija fl-10 ta' Dicembru 2012.

Semghet ix-xhieda ta' **Nigel Vella**, Communications Co-ordinator tal-Partit Laburista, moghtija fil 5 ta' Lulju 2015 u l-istqarrija mahruga mill-Partit Laburista fit 22 ta' April 2012.

Rat illi fil 5 ta' Lulju 2013 ir-rikorrenti iddikjarat illi ma kellhiex aktar provi x'tippresenta.

Semghet il-kontro ezami ta' Dolores Cristina moghtija fil 25 ta' Ottubru 2013, fis 7 ta' April 2014.

Semghet ix-xhieda ta' **Kurt Farrugia** moghtija fit-2 ta' Gunju 2014.

Ra in-nota ppresentata mill-intimat fis 6 ta' Novembru 2014 fejn ippresenta xhieda ta' **Christine Schembri**, Segretarja tal-Kummissjoni dwar is-Servizz Pubbliku, moghtija fil-kawza 286/12 FDP kif ukoll dokumentazzjoni ohra.

Semghet ix-xhieda in ezami u kontro ezami ta' **Dr Joseph Muscat**, Prim Ministru ta' Malta, moghtija fl-14 ta' Mejju 2015.

Rat illi fit 13 ta' Lulju 2015 il-Qorti ddikjarat l-istadju tal-gbir tal-provi bhala maghluqa.

Semghet it-trattazzjoni orali ta' l-abbli difensuri tal-partijiet moghtija fis 26 ta' Ottubru 2015, wara liema data il-kawza giet differita ghas-sentenza.

Ikkunsidrat

Jirrizulta, mill-provi prodotti, illi r-rikorrenti, fiz-zmien illi giet intavolata il-kawza odjerna, kienet il-Ministru tal-Edukazzjoni u x-Xoghol tal-Gvern tal-gurnata filwaqt illi l-intimat, illum Prim Ministru ta' Malta, kien il-Kap tal-Opposizzjoni ta' dak iz-zmien.

Jirrizulta illi fit 22 ta' April 2012, illi kien il-Hadd, waqt laqgha politika pubblika illi kienet tinzamm regolarment dak iz-zmienijiet ma' Malta u Ghawdex, u li dakinhar kienet inzammet gewwa l-Msida, l-intimat indirizza lill-pubbliku presenti u tkellem dwar diversi kwistjonijiet politici illi kienu vigenti dak iz-zmien, illi kien ftit qabel l-Elezzjoni Generali li inzammet f'Marzu 2013.

Jirrizulta illi, ghalkemm dak illi ntqal waqt tali laqgha ma giex riprodott quddiem dina l-Qorti, il-kontentut tad-diskors tieghu gie eventwalment redatt fi Stqarrija ghall-Istampa illi hareg dakinhar stess il-Partit Laburista, li gie ukoll rappurtat in intjiet fil-gazzetta l-Orizzont fit 23 ta' April 2012.

Jirrizulta illi kopja ta' tali Stqarrija ghall-Istampa mahruga fit 22 ta' April 2012 u il-gazzetta l-Orizzont tat 23 ta' April 2013 gew ippresentati mir-rikorrenti.

Jirrizulta illi r-rikorrenti hassitha malafamata bil-kliem illi ntaqlu mill-intimat in konnessjoni ma' allegazzjonijet ta' nepotizmu, liema kliem, kif rappurtat mill-iStqarrija tal-Partit Laburista, kienu s-segwenti:

> ***Sistema ta' nepotiżmu li dejjqet lil dawk ta' rieda tajba***
>
> *Xokkanti wkoll kif il-Ministru tal-Edukazzjoni ma tkellmet xejn wara l-aħbar inkwetanti li nstab mill-qrati li kien hemm tobba maqbuża fil-kariga ta' konsulent, biex din ingħatat lil persuna li ma kellhiex ir-rekwiżiti kollha. U din il-persuna inzertat ir-raġel*

tat-tifla tal-Ministru Cristina. L-istess Ministru li t-tifel tagħha kien involut fil-froġa li swiet miljuni ta' fondi Ewropej sospiżi minħabba mmaniġjar ħażin.

Dan kollu jixhed is-sistema ta' nepotiżmu li issa dejqet lil kull min huwa ta' rieda tajba. Mhix qed iddejjaq biss lil-Laburisti, imma wkoll lil Nazzjonalisti ġenwini li mhumiex jgħarfu lill-partit li vvotaw għalih, għaliex il-klikka ta' GonziPN ħatfet partit, ħatfet gvern u qed tipprova taħtaf il-pajjiż.

Illum il-meritokrazija m'għadhiex parti mid-dizzjunarju tal-Gvern. Fejn l-importanti huwa mhux kemm taf imma lil min taf. Iżda n-nies ta' rieda tajba jemmnu li għandu jkollna l-meritokrazija f'pajjiżna.

Ikkunsidrat

Jirrizulta, mix-xhieda tar-rikorrenti (fol 19), illi hija tinsisti li tichad "kategorikament li jiena kont b'xi mod involuta, jew tkellima favur ta' jew ghaddejt kwalsiasi forma ta' komunikazzjoni lil xi hadd, hu min hu, dwar is-sjha ghall-mili tal-kariga li ghaliha applika r-ragel ta' binti".

Jirrizulta, mix-xhieda ta' l-intimat, illi l-kumment tieghu, li kellu jitqies bhala kumment politiku li kellu obbligu jaghmel, kien indirizzat principalment dwar il-fatt illi r-rikorrenti, meta kienet mitluba tkkummenta dwar il-kaz ta' l-ghazla tar-ragel ta' bintha u d-decizjoni sussegwenti tal-Public Service Commission, huwa rrifjutat illi tikkumenta dwarha, u dana huwa qiesu bhala 'xokkanti'. L-istess intimat jishaq illi huwa qatt ma ried jimplika ebda azzjoni illecita' fuq ir-rikorrenti u ma kien qed jimplika ebda kaz ta' nepotizmu fil-konfront taghha personalment, izda kien qieghed juza l-kelma nepotizmu fil-konfront tal-process kollua ta' l-ghazla illi kienet saret u li eventwalment thassret.

Ikkunsidrat

Ikun opportun, f'dana l-istadju, illi jinghata sfond fil-qasir dwar il-fatt li dwaru kien qieghed jilmenta l-intimat, ossija il-process ta' l-ghazla.

Jirrizulta illi fil-Gazzetta tal-Gvern tal-20 ta' Lulju 2010 haregt sejha ghal "*Position of Designate Consultant Surgeon leading to the post of Consultant Surgeon with special interest in Hepato Pacreato Biliary Surgery in the Ministru for Health, the Elderly and Community Care*".

Jirrizulta illi ghal tali kariga applika ir-ragel ta' bint ir-rikorrenti, ossija Dr Robert Cuschieri, flimkien ma' tobba ohra.

Jirrizulta illi, bhalma kienet il-prassi adoperata dak iz-zmien, il-Public Service Commssion (Kumissjoni) illi kienet harget is-sejha (fol 26) qabbdet Bord tal-Ghazla sabiex jivverifika l-applikazzjonijet illi jkunu dahhlu ghas-sejha, liema Bord ikollu, bhala 'Chairman', il-Kap tad-dipartiment fl-Isptar fejn tali kariga ser tigi assenjata, f'dan il-kaz, kien il-Professur Godfrey Laferla, flimkien ma' professur estern, li kien il-Professur David Galaway, u zewgt membri ohra, Mr Kevin Cassar u Andrew Xuereb, illi kien id-Direttur tal-Human Resources tal-Mater Dei.

Jirrizulta illi dana il-Bord tal-Ghazla kien ghamel l-interviews tal-applikanti kollha u fl-20 ta' Jannar 2011, wara illi l-Bord ikkunsidra l-applikazzjonijet kollha, l-istess Bord ghadda biex jikkomunika l-konkluzjonijet tieghu lill-Public Service Commission, liema rizultati gew

ippubblikati mill-istess Kummissjoni fl-20 ta' Jannar 2011, fejn Dr Robert Cuschieri gie indikat illi gie maghzul ghall-applikazzjoni fuq imsemmija.

Jirizulta illi fl-24 ta' Jannar 2011, il-Medical Association of Malta (MAM), kitbet lill-Kummissjoni fejn talbet lill-Kummissjoni tinvestiga dwar l-elegibilita' ta' Dr Robert Cuschieri stante illi sahqet illi l-istess Dr Cuschieri ma kellux is-sentejn "*full time experience as a specialist in General Surgery*" rikjest fil-kundizzjonijiet tal-applikazzjoni.

Jirrizulta illi t-tlett applikanti l-ohra, fis 27 ta' Jannar 2011, ghamlu petizzjoni tal-appell, ghal liema petizzjoni, kif ukoll ghar-rikjesta tal-MAM, il-Kummissjoni irrispondiet fuq bazi preliminari fit 2 ta' Meju 2011 wara illi ezaminat il-kaz.

Jirrizulta illi sussegwentement, l-appellanti lkoll qajjmu kwistjoni legali dwar l-elegibilita' ta' Dr Robert Cuschieri.

Jirrizulta illi, eventwalment, fit 8 ta' Gunju 2011, il-Kummissjoni gharrfet lill Dr Robert Cuschieri illi huwa ma setax jitqies bhala elegibbli ghall-post illi ghalih huwa kien applika u li intghazel, peress illi ma kellux is-sentejn esperjenza rikjesti fl-applikazzjoni.

Jirrizulta illi, nelfrattemp, fis-16 ta' Gunju 2011, ic-Chairman tal-Bord tal-Ghazla gharraf lill-Kummissjoni illi apparentement, l-applikazzjoni ghal kariga fuq imsemmija, flimkien ma' tnejn ohra illi kienu qed jigu kkunsidrati kontemporanjament, gew mghoddija lill-MAM qabel ma inhargu ufficjalment, u dana, huwa allega, sar sabiex l-applikazzjonijiet ikunu jistghu jigu mfassla biex jibbenefikaw persuni partikolari. Huwa gharraf ukoll lill-Kummissjoni illi l-Bord ma kienx inghata linji gwida sufficjenti dwar kif kellhom jigu interpretati l-kundizzjonijiet ta' elegibilita' tal-applikanti. Kien ghalhekk, illi c-Chairman gharraf lill-Kummissjoni illi huwa, flimkien ma' membri tal-Bord, kienu qed jirtiraw il-firem taghhom mir-rapport illi huma kienu ghaddew lill-Kummissjoni fl-20 ta' Jannar 2011.

Jirrizulta illi wara li l-Kummissjoni d-diskuta l-kaz mas-Segretarju Permanenti fi hdan il-Ministeru tas-Sahha kif ukoll mal-Avukat Generali u mal-MAM, fl-10 ta' Novembru 2011, kull min kien applika kien gie mgharraf illi l-ghazla kkomunikata fl-20 ta' Jannar 2011 kienet giet imhassra u kien ser jerggha jigi ffurmat Bord tal-Ghazla gdid sabiex jikkunsidra mill-gdid l-applikazzjonjiet.

Jirrizulta illi, eventwalment, fil-15 ta' Dicembru 2011 Dr Robert Cuschieri kien ippresenta Mandat ta' Inibizzjoni sabiex il-Kummissjoni titwaqqaf milli tappunta Bord tal-Ghazla gdid, liema mandat gie milqugh provizzorjament fil-15 ta' Dicembru 2011 u definittivament fit-8 ta' Novembru 2013, liema decizjoni giet appellata fis-26 ta' Novembru 2013.

Ikkunsidrat

Jirrizulta illi d-difiza principali li qieghed iqajjem l-intimat fil-proceduri odjerni hija illi l-kliem u l-kummenti li ghamel, filwaqt illi kienu parti minn kritika politika illi huwa kien qieghed jaghmel u li kellu obbligu jaghmel lejn ic-cittadini li kienu elegguh bhala rappresentant taghhom fil- Parlament, kien jikkonsistu fi 'fair comment' u ghalhekk kellhom jitqiesu bhala tali.

Din il-Qorti gia kellha l-opportnita' illi tezamina fir-reqqa il-principju tal-"fair comment" u dwar kif dana zviluppa maz-zminijiet kemm fil-gurisprudenza Ingliza u dik tal- Qorti Ewropeja ghad-Drittijiet tal-Bniedem fil-kawza '**Dr Joseph Mifsud vs Robert Arrigo**' deciza fl 24 ta' Frar 2014. Madankollu, ikun opportun illi jigu indikat certi principji bazilari li taghhom ghandha tiehu konsiderazzjoni kull Qorti hekk kif tkun qed tikkunsidra tali difiza.

Kif intqal fil-Qorti Ewropea ghad-Drittijiet tal-Bniedem fil-kawza **Chauvy and Others vs France** deciza fid 29 ta' Gunju 2004,

> *Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.*

Dwar il-livel ta' kritika li politiku tista ssirlu, bhalma ma gara fil-kaz odjern, il-Qorti Ewropeja ghad-Drittijiet tal-Bniedem fis-sentenza **Ligens vs Austria** deciza fit 8 ta' Lulju 1986, u abbracjata mill-Qorti Maltin, stabbiliet principji ferm aktar liberali fil-konfront tal- politici mill indivdwu kwalsiasi u di fatti qalet:-

> *..... freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.*
>
> *The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.*

Kif qalet dina l-Qorti fil-kawza '**Jesmond Mugliette vs Dr Alfred Sant**' Avviz 39/08 deciza fl-10 ta' Marzu 2014 u mhux appellata,

> *Din il-Qorti thoss illi wasal il-mument illi tali regola* (ta' kritika politika) *titwessa aktar fis-sens illi meta jkun hemm dibattitu politiku ghaddej bejn politici, tali livell ta' kritika ghadha interpretata f'livell aktar wiesgha minn dak ipprovdut hawn fuq, peress illi d-dibattitu politiku huwa l-pern ta' socjeta demokratika u, ghalhekk ghandha tigi protetta u stimulata minn dina l-Qorti u mhux imxekkla fl-operat taghha.*

Il-Qorti Ewropeja ghad-Drittijiet tal-Bniedem, fil-kawza **Petrenko vs Moldova** deciza fit-30 ta' Marzu 2010, qalet is-segwenti:

> *it is clear from the Court's case-law that <u>the right to freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"</u> (see, inter alia, Handyside v. the United Kingdom, 7 December 1976, § 49, Series A no. 24; and Nilsen and Johnsen v. Norway [GC], no. 23118/93, § 43, ECHR 1999-VIII). This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be construed*

strictly. The need for any restrictions must be established convincingly (see, for example, Lingens v. Austria, 8 July 1986, § 41, Series A no. 103; Nilsen and Johnsen, cited above, § 43; and Tammer v. Estonia, no. 41205/98, § 59, ECHR 2001-I)."

Dwar in-natura ta' "value judgment", kontrastata mal-kuncett ta' "statement of fact" u jekk din ghandhiex ikollha applikabbli r-regoli tal-"fair comment" jew le, il-Qorti Ewropeja ghad- Drittijiet tal-Bniedem fis-sentenza taghha **Sizma vs Hungary** deciza f'Ottubru 2012, starret is-segwenti:

.... in order to assess the justification of the statements in question, a distinction needs to be made between statements of fact and value judgments, in that, while the existence of facts can be demonstrated, the truth of value judgements is not susceptible of proof. The requirement to prove the truth of a value judgment is generally impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (see, for example, Lingens v. Austria, 8 July 1986, § 46, Series A no. 103; Oberschlick v. Austria (no. 1), cited above, § 63). The classification of a statement as a fact or a value judgment is a matter which, in the first place, falls within the margin of appreciation of the national authorities, in particular the domestic courts (see Pedersen and Baadsgaard v. Denmark [GC], no. 49017/99, § 76, ECHR 2004-XI). However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it may be excessive (see Jerusalem v. Austria, no. 26958/95, § 43, ECHR 2001–II)."

Dwar in-natura ta' 'fair comment', kif jinghad f'Gatley on Libel and Slander, huwa stabbilit illi biex tali difiza tirnexxi :

..... the defendant must show that the words are comment, and not a statement of fact. He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of. Finally, he must show that the comment is on a matter of public interest, one which has expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern. If, however, the plaintiff can show that the comment was not made honestly or was actuated by malice, he will defeat the plea.

Dina l-posizzjoni tidher anke riflessia fil-kawza **Spiller vs Joseph** deciza mill-Qorti tal- Appell Ingliza fl-1 ta' Dicembru 2010, fejn Lord Phillips ghamel is-segwenti konsiderazzjonijiet meta wiehed iqis id-difiza ta' 'fair comment':

A subsidiary but important issue was what it was that a defendant had to prove in order to establish the defence of fair comment. Counsel for the plaintiff submitted that the defendant had to establish that: (i) the words complained of were comment; (ii) the comment was on facts; (iii) the facts commented on constituted a matter of public interest; (iv) the comment was objectively "fair"; that is the comment was one that was capable of being honestly founded on the facts to which it related, albeit by someone who was prejudiced and obstinate; (v) the comment represented the defendant's honest opinion. If he discharged all these burdens, the defence could none the less be defeated by proof of malice on the part of the defendant, but the onus of proving malice lay on the plaintiff. Both the Court of Appeal and the House of Lords held that there was no burden on the defendant to establish the fifth element. The defendant's honesty was assumed unless the plaintiff could disprove it by establishing malice.

Ikkunsidrat

Mill-assjem tal-provi kif prodotti, il-Qorti taghmel is-segwenti osservazzjonjiet:

- L-intimat, fid-diskors tieghu illi ghamel fit 22 ta' April 2012 u rrappurtat kemm mill-Partit Laburista kif ukoll mill-gurnal l-Orizzont, qal illi kienet 'xokkanti' illi r-rikorrenti, bhala Ministru tal-Edukazzjoni, ma tkellmet xejn wara l-ahbar li kienet harget li r-ragel tat-tifla taghha, Dr Robert Cuschieri, kien maghzul bhala konsulent minkejja li kien gie dikjarat illi ma kellux r-rekwiziti kollha u ghalhekk tobba ohra kienu inqabbzu;

- Mill-provi presentati, jirrizulta illi fit-8 ta' Gunju 2011, Dr Robert Cuschieri kien gie mgharraf illi huwa ma kienx inelegibbli biex japplika ghall-post illi huwa kien gie maghzul ghalih, peress illi ma kellux ir-rekwiziti kollha rikjesti fl-applikazzjoni.

- Jirrizulta illi Dr Cuschieri ghamel Mandat ta' Inibizzjoni biex iwaqqaf lill-Kummissjoni milli jahtar Bord tal-Ghazla gdida fil 15 ta' Dicembru 2011, liema Mandat kien gie milqugh provizzorjament, kif titlob il-Ligi, fil 15 ta' Dicembru 2011 stess, u gie milqugh definittivament fit 8 ta' Novembru 2013, jigifieri ferm wara illi sar id-diskors illi minnu qieghda tilmenta r-rikorrenti.

- Ma ghandu jkun hemm ebda dubju illi l-ghazla ta' persuna ghal posizzjoni ta' konsulent f'kwalsiasi dipartiment tal-Gvern ghandu jitqies bhala kwistjoni ta' interess pubbliku.

- Jirrizulta wkoll, mid-diskors kif rappurtat mill-Partit Laburista u l-Orrizzont, illi l-intimat kien qieghed jikkummenta dwar "*is-sistema ta' nepotizmu li issa dejqet lil kull min huwa ta' rieda tajba*" – imkien ma kien qieghed jallega nepotizmu fil-konfront dirett tar-rikorrenti, izda kien qieghed jallega sistema ta' nepotizmu fil-Gvern kollu fejn sahaq ukoll illi "*illum il-meritokrazija m'ghadhiex parti mid-dizzjunarju tal-Gvern*"

Kif kellha l-opportunita tosserva dina l-Qorti fil-kawza '**Jeffrey Pullicino Orland vs Dr Alfred Sant**' deciza fl-14 ta' April 2014 (Avviz 115/08) u mhux appellata.

> *" Il-Qorti tinnota wkoll illi, kien id-dover ta' l-intimat, bhala Kap ta' l-Opposizzjoni, illi jsemmi d-disapprovazzjoni tieghu ghal dak li kien qieghed jinghad, liema espressjoni ta' disapprovazzjoni hija parti mid-dibattitu politiku li huwa l-pern ta' socjeta demokratika u li, ghalhekk, ghandha tigi protetta u stimulata minn dina l-Qorti u mhux imxekkla fl-operat taghha."*

Konkluzjoni

Wara illi semghet it-trattazzjoni ta' l-abbli difensuri tal-partijiet

Tghaddi biex taqta u tiddeciedi l-kaz billi

Tilqa l-eccezzjonijiet kollha tal-intimat,

Tichad it-talbiet attrici.

Spejjez tal-kawza ikunu a kariku tar-rikorrenti

Magistrat Francesco Depasquale

Marisa Bugeja
Deputat Registratur