

QORTI TAL-APPELL

IMHALLFIN

**S.T.O. PRIM IMHALLEF SILVIO CAMILLERI
ONOR. IMHALLEF GIANNINO CARUANA DEMAJO
ONOR. IMHALLEF NOEL CUSCHIERI**

Seduta ta' nhar il-Gimgha 29 ta' April 2016

Numru 3

Rikors Numru 17/16

(1) Bugeja Bros (Gozo) Ltd (C-6105)

v.

**(1) Id-Direttur, Fergha tax-Xoghlijiet, Dipartiment tal-Progetti
u Zvilupp fi Hdan il-Ministeru ghal Ghawdex,**

u

(2) Joseph Attard

Preliminari

1. Dan hu appell maghmul mis-socjeta` Bugeja Bros [Gozo] Ltd [is-socjeta` appellanti] minn decizjoni [id-decizjoni appellata] moghtija fis-7 ta' Jannar 2016 mill-Bord ta' Revizjoni dwar il-Kuntratti [il-Bord], li permezz taghha dak il-Bord cahad l-appell tas-socjeta` appellanti minn

decizjoni tad-Dipartiment tal-Kuntratti illi l-offerta taghhom ghall-provvista ta' *Franka Stone* tigi mwarrba.

Il-Fatti

2. Il-fatti relatati mal-ewwel appell u ma' dan it-tieni appell maghmul mis-socjeta` appellanti huma dawn:

3. Fit-28 ta' Jannar 2014 kienet saret sejha mid-Dipartiment tal-Kuntratti ghas-*"Supply and Delivery of Franka Stone as directed by the Directorate of Projects and Development Ministry for Gozo [“Period Contract”]*. Fost il-kundizzjonijiet stipulati fil-*quotation document* hemm dik indikata fil-klawsola 6.1.2 li tghid li *“Bidder must produce evidence that the quarry from which the franka stone is supplied is operating with all the necessary permits/licences”*.

4. Ghal din is-sejha kien hemm zewg offerenti: is-socjeta` appellanti u l-appellat Joseph Attard. Peress li l-Bord tal-Aggudikazzjoni sab li z-zewg offerenti kienu jissodisfaw ir-rekwizit indikat fil-klawsola precitata, allura kienet giet maghzula l-offerta ta' Joseph Attard peress li din kienet l-orhos wahda.

5. B'ittra datata 4 ta' Marzu 2014 is-socjeta` appellanti wara li ipprezentat *“Reasoned Letter of Objection”*, ressqet appell quddiem il-Bord ta' Revizjoni. Skont l-imsemmija ittra tas-socjeta` appellanti l-ilment li fuqhom ibbazat l-appell taghha huma tnejn: [1] li l-barriera tal-

offerent rakkomandat ma kenitx koperta bil-permessi tal-MEPA, tant li kien hemm avviz ta' infurzar fuqha; u [2] *“moreover, Recommended Bidder is not in a position to execute the contract in terms of the law”*.

6. Mill-provi mismugha mill-Bord irrizulta li l-appellat Joseph Attard, l-offerent rakkomandat, ghandu izjed minn barriera wahda. Ghandu l-barriera SG-4 imsejha “il-barriera l-antika” u li hi munita mil-licenzja necessarja mahruqa mill-awtorita` kompetenti, il-Malta Resources Authority [MRA], liema licenzja hi rikonoxxuta mill-MEPA, kif ukoll ghandu estensjoni tal-istess barriera, u barriera ohra, li huwa jopera bla permess, u li fuqhom hemm avvizi ta' infurzar mahruqa mill-MEPA.

7. B'decizjoni tat-22 ta' Lulju 2014 il-Bord kien cahad l-appell tas-socjeta` appellanti wara li osserva, inter alia, li:

“3. With regards to the Appellant’s claim that the ‘licensed quarry’ is exhausted, this Board considers this contention as debatable and does not fall within the scope and jurisdiction of this Board. It is the duty of the Contracting Authority [id-Direttur] to ensure, that the supply of ‘Franka Stone’ is being obtained by the Preferred Bidder from a licensed quarry.

“4. This Board rejects the request made by the Appellant to this Board to appoint an ‘Expert’ to verify whether the licensed quarry is exhausted or not...”

8. Fis-sentenza moghtija fis-27 ta' Frar 2015 din il-Qorti, filwaqt li laqghet l-appell tas-socjeta` appellanti, ghamlet il-konsiderazzjonijiet segwenti:

“38. Din il-Qorti hi tal-fehema li dan l-argument sollevat mis-socjeta` appellanti kellu jigi investigat *pro funditus* mill-Bord, fis-sens li l-

Bord kellu jistabilixxi jekk mill-barriera l-antika kienx hemm gebel bizzejjed sabiex l-offerent rakkomandat jezegwixxi l-obbligu tieghu skont it-tender. Anke l-istess Bord, permezz tac-Chairman tieghu, hass li kellu jirrimarka fir-rigward li ‘..... *some time should be allowed to enable witness to verify whether any part of the old quarry was restored and to establish the amount of material is left in the same quarry.*’¹ Din l-Qorti tosserva li fic-cirkostanzi tal-kaz dan kien kumment floku u kellu jigi segwit mill-Bord, ghax ghandu jirrizulta car li l-hsieb wara l-klawsola numru 6.1.2. m’huwiex biss li jezigi li l-offerent rakkomandat ikollu barriera munita bil-permessi necessarji, izda li dik l-istess barriera tkun teknikament vijabbli fis-sens li minnha jkun jista’ jinqata’ gebel sufficjenti sabiex l-offerent rakkomandat ikun fil-pozizzjoni li jezegwixxi bis-shih l-obbligu assunt minnu. Zgur li m’huwiex l-ispirtu wara l-imsemmja klawsola li tippermetti sitwazzjoni fejn l-offerent rakkomandat, ghalkemm ikollu barriera licenzjata, jissupplixxi l-gebel minn barrieri ohra li hu qed jopera illegalment u li fuqhom hemm avvizi ta’ infurzar.

“39. Ghalhekk fic-cirkostanzi li kellu quddiemu l-Bord kien fl-obbligu li jassigura li din is-sitwazzjoni ma tavverax ruhha, u dan seta’ jsir billi, kif osserva l-istess Chairman, jinghata zmien lix-xhieda biex jaghmlu din il-verifika dwar il-barriera numru SG4, jew jinnomina espert kif ghandu dritt li jaghmel skont il-ligi, u precizament skont ir-regolament 85 [7]....”

9. Fuq dawn il-konsiderazzjonijiet din il-Qorti fis-sentenza taghha waslet ghad-decizjoni li tilqa’ l-appell tas-socjeta` appellanti u, filwaqt li irrevokat id-decizjoni tal-Bord, ordnat li l-atti jigu rimessi quddiem il-Bord –

“...sabiex dan ikompli jinvestiga l-allegazzjoni tas-socjeta` appellanti li l-barriera l-antika nru. SG4 hija ezawrita u, fil-kaz negattiv, jinvestiga jekk ghandhiex bizzejjed gebel biex l-offerent rakkomandat ikun jista’ jissodisfa l-obbligi tieghu skont it-tender document. Imbaghad il-Bord, ghandu jghaddi biex jiddeciedi l-appell fil-meritu.”

10. Konformament mal-imsemmija ordni l-atti gew rinvjati lill-istess Bord sabiex dan jagixxi fit-termini tad-decizjoni ta’ din il-Qorti. Ukoll, il-Bord innomina lill-Geologista Dottor Saviour Xerri bhala espert biex jaghmel rapport fid-dawl ta’ dak deciz minn din il-Qorti.

¹ Sottolinear ta’ din il-Qorti

11. F'Dicembru 2015 il-Bord zamm it-tieni udjenza li fiha gie ezaminat ir-rapport prezentat mill-espert tekniku. Wara li l-Bord sema' x-xhieda tal-espert u s-sottomissjonijiet tal-partijiet involuti, wasal ghad-decizjoni segwenti:

“.....After having credibly assessed the expert’s report ... finds against the appellant and recommends that the deposit paid by the latter should not be reimbursed.”

12. Il-Bord wasal ghal din id-decizjoni wara li ghamel is-segwenti osservazzjonijiet:

“Having noted the Hon. Court of Appeal’s decision, wherein, the latter decided that the case is to be referred back to the Public Contracts Review Board to investigate whether the Quarry SG4, pertaining to the Recommended Bidder, had enough volume of “*Franka Stone*” to meet the requirement of the Tender under Appeal, had appointed an experienced geologist, namely Dr. Saviour Xerri, to prepare and submit a report to the Public Contracts Review Board.

“The purpose of this Second Hearing, held on 17 December 2015, was purely to present the Expert’s report, which was distributed to all interested parties. This Board has reached the following conclusions:

“1. From the Expert’s report, this Board justifiably notes that the Quarry SG 4 had ample supply of “*Franka Stone*” to meet the requirements of the Tender in Question. The appointed expert, (under oath), confirmed that “*Quarry SG 4 in the limits of San Lawrenz, Gozo, contains enough good quality “Franka Stone” reserves for a number of years to come*”.

“In this regard, this Board credibly confirms that the Quarry SG 4 can supply the requested quantity of good “*Franka Stone*” as dictated in the Tender Document.

“2. With regards to the Appellant’s request for the submission of a report, which formed part of an application for a MEPA permit by the Recommended Bidder, this Board, justifiably notes that the documentation which the Appellant requested to submit, had no relevance at all with the verification of the availability of good “*Franka Stone*” from Quarry SG 4.

“In this regard, the Appellant’s request for further submission of documentation was totally out of order. This Board treated all submissions during the Public Hearing which was held on 3 June 2014.

“To this effect, this Board does not accept the Appellant’s request to submit further documentation which is not relevant to the purpose of the Public Hearing.

“This Board, through the Expert’s Report, (attached herewith), carried out the decision made by the Hon. Court of Appeal...”

L-Appell

13. L-aggravju tal-appellanti huwa bazat fuq l-allegazzjoni taghha li l-barriera SG4 “l-antika” hi ezawrita u ma tistax tintuza mill-appellat biex dan ikun jista’ jissodisfa r-rekwizit tekniku tas-sejha ghall-offerti. Tghid li, minkejja li din il-Qorti fis-sentenza taghha tas-27 ta’ Frar 2015 kienet ordnat lill-Bord jahtar espert tekniku sabiex jikkonstata jekk il-fatt minnha allegat kienx minnu, il-Bord naqas milli jissenjala lill-espert li dan kellu jezegwixxi l-inkariku tieghu fuq dik il-parti tal-barriera li kienet munita bil-permess. Izda minflok ma sar hekk, skont is-socjeta` appellanti, l-espert kien gie mqabbad mill-Bord, “..... *biex jinvestiga b’mod generali jekk il-Barriera SG4 hijjex ezawrita jew le, u dan minghajr ma jinvestiga jekk il-materjal jinstabx fil-parti l-antika jew fl-estensjoni illegali tal-barriera*”.²

14. Tkompli tghid li, mhux talli l-Bord naqas milli espressament jissenjala lill-espert li dan kellu jinvestiga dik il-parti tal-barriera, imma

² Rikors tal-Appell.

talli fit-tieni udjenza li nzammet quddiem il-Bord wara s-sentenza ta' din il-Qorti, fuq talba tad-difensur tas-socjeta` appellanti sabiex dan jistaqsi domandi lill-espert dwar l-allegazzjoni tieghu li parti mill-imsemmija barriera ma kenitx koperta bil-permessi necessari, ic-Chairman osserva li *“that was not part of the expert’s assignment. The expert’s assignment did not include the investigation whether any part of the quarry was covered by a permit or not”*.

15. Is-socjeta` appellanti tilmenta wkoll li l-Bord cahad it-talba taghha sabiex din tigi awtorizzata tipprezenta r-rapport li kien ghamel il-Perit Professur Lino Bianco inkarigat mill-appellat stess, liema rapport³ kien thejja sabiex skont l-appellanti l-appellat Joseph Attard *“jittenta jikkonvinci lill-MEPA sabiex tissanzjonalu l-izvilupp illegali u tikkunsidra ittih permess ghall-izvilupp”*. Tghid li dan ir-rapport *“huwa nnifsu bizzjed konferma li l-unika parti tal-barriera [ossija il-barriera antika] li hija koperta bil-permess hija ezawrita”*.⁴

16. Fil-parti konkluzjonali tal-aggravju taghha l-appellanti tghid hekk:

“.... Is-sejbien tal-espert, u senjatament li fil-barriera SG4 hemm gebel x' jitqatta' ma kienx punt dibattut, izda l-kontestazzjoni kienet kjarment illi l-gebel disponibbli jinsab fil-parti illegali tal-SG4 u mhux fil-parti l-antika.....dan kien l-esercizju li l-Bord ta' Revizjoni kien ordnat jaghmel u mhux semplicement li jigi kkonstatat li hemm gebel x' jitqatta' minghajr ma jigi stabbilit jekk dan huwiex fl-estensjoni illegali jew le. Dan jinghad b'aktar konvinzjoni meta huwa l-offerent rakkomandat innifsu li iddikjara li l-barriera l-antika hija ezawrita.”

³ Esebit fl-atti a fol. 25.

⁴ Fit-tabella pag. 7 tar-rapport tal-Professur Bianco, hemm indikat li fil-barriera l-antika r-rizervi minerali sa massimu ta' fond ta' 20 metri huwa 0. L-istess rapport jghid li *“the assumed maximum depth of excavation below surface is 20 metres”*.

17. Tghid li l-Bord kien marbut li jagixxi fit-termini ta' dak ordnat minn din il-Qorti stante li dik is-sentenza hija *res judicata* u ghalhekk torbot lil kulhadd, inkluz il-Bord.

18. Min-naha taghhom l-appellati jissenjalaw li jirrizulta car mir-rapport tal-espert nominat mill-Bord li dan irrelata fuq dik il-parti tal-barriera li hi koperta bil-permessi necessarji.

Konsiderazzjonijiet tal-Qorti

19. Il-kwistjoni li ghandha quddiemha din il-Qorti, izjed milli jekk il-barriera l-antika ghandhiex *Franka Stone* bizzejjed sabiex l-offerent rakkomandat jistax jitqies bhala *technically compliant*, hija jekk l-espert nominat mill-Bord ezaminax biss dik il-parti tal-barriera koperta bil-permessi jew jekk ezaminax u irrelata wkoll fuq dik il-parti tal-istess barriera li ghadha mhux koperta bil-permessi.

20. Din il-Qorti tosserva li minn ezami tar-rapport prezentat mill-espert Dr. Saviour Xerri kif ukoll minn dak li dan l-espert xehed quddiem il-Bord jirrizulta car li dan ezamina biss dik il-parti tal-barriera koperta bil-permess. Dan jirrizulta minn zewg fatturi:

21. [1] Fil-parti introduttiva tar-rapport tieghu l-espert, b'referenza ghall-kuntest li fih kien gie mahtur, jaghmel referenza ghall-klawsola numru 6.1.2 tad-dokument ta' sejha u jghid hekk: *"Tender document stated that 'Bidder must produce evidence that the quarry from which the franka stone is supplied is operated with all the necessary permits/licences"*. Fl-istess nifs, fis-sezzjoni sussegwenti intestata *"Scope of the report"* huwa jghid li ghamel l-inkariku tieghu *"In the light of the above"*.

22. Minn dan johrog car li sa mill-bidu nett l-espert kien konxju li l-inkarigu tieghu kien jestendi biss ghal dik il-parti tal-barriera li kienet koperta bil-permess.

23. [2] Maghdud mal-premess hemm il-konsiderazzjoni ulterjuri li waqt is-seduta quddiem il-Bord l-espert ikkonferma b'mod car li hu kien ezamina dik il-parti tal-barriera biss.

24. Fil-verbal tal-udjenza hemm registrat hekk:

"The witness replied that he had just carried out his assignment. The quarry he investigated was covered by permits. He did not consider any other reports. On being shown by Dr.Gauci a plan of the quarry witness explained that this did not tally exactly with the plans he used. The quarry he reported on was covered by permits..."

25. Dwar l-ilment tas-socjeta` appellanti li ma giex permess lilha li tesebixxi r-rapport tal-Professor Bianco biex jigi konfrontat mar-rapport tal-espert nominat mill-Bord, il-Qorti tosserva li kienet fid-diskrezzjoni

tal-Bord li jichad tali talba. Fil-fehma ta' din il-Qorti l-Bord kellu elementi ta' prova sufficjenti biex seta' jasal ragjonevolment ghad-decizjoni li wasal ghalha u ghalhekk din il-Qorti bhala qorti ta' revizjoni ma hix tal-fehma li jkun opportun li tiddisturba l-apprezzament tal-fatti maghmul mill-Bord.

26. Ghaldaqstant l-aggravju huwa infondat u qed jigi michud.

Decide

Ghar-ragunijiet premessi tichad l-appell, bl-ispejjez a kariku tal-appellanti.

Silvio Camilleri
Prim Imhalled

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Imhalled

Noel Cuschieri
Imhalled

Deputat Registratur
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