It is only just and appropriate that in view of appellant's wealth, the appellees should have the right to immediately receive the maximum rent allowed by law, if she decides to retain the property rather than finding alternative accomodation. Arguably at her age this would be no easy task, but it would allow her to find a home more suited to her single status and to her yearly income. The appellees should not be made to bear the burden of her choice to retain the property, but it should be her responsibility to pay a rent which after all is below the value the said appellees may realize were the property to be put on the open rental market

MALTA

COURT OF APPEAL
(Inferior Jurisdiction)

Hon. JUDGE
LAWRENCE MINTOFF

Sitting of the 23 June, 2021

Inferior Appeal Number 170/2019/1 LM

Albert Naudi (K.I. nru 029334M) f'ismu proprju u bħala mandatarju ta' ħutu l-assenti Phyllis mart Paul Mifsud, Marcelle mart John Azzopardi u Patricia mart Kevin McGlade skont prokuri hawn annessi u mmarkati bħala Dokumenti X, Y, u Z u Marcel Pizzuto (K.I. nru 0404747M), Moyra mart Albert Naudi (K.I. nru 1060848M), Raymond Pizzuto (K.I. nru 0220256M), Susanna Maria mart Anthony Vassallo (K.I. nru 0202758M)
("the Appellees")

vs.

Patricia Gauci (K.I. nru 1187A) *("the Appellant")*
Awtorità tad-Djar ("*Amicus Curiae*")

The Court,

Preliminary

1. This appeal was filed by respondent **Patricia Gauci (I.D. no 1187A)** [hereinafter "the appellant"] from the decision delivered on the 18th January, 2021, [hereinafter referred to as "the appealed judgment"] by the Rent Regulation Board [hereinafter referred to as "the Board"], whereby it decided the pleadings presented by plaintiffs **Albert Naudi (I.D. no 0293344M) appearing in his own name as well as special mandatory for and on behalf of his sisters Phyllis wife of Paul Mifsud, Marcelle wife of John Azzopardi and Patricia wife of Kevin McGlade as duly authorised by virtue of the powers of attorney exhibited and marked as Dok. X, Dok. Y and Dok. Z respectively, Marcel Pizzuto (I.D. no 0404747M), Moyra wife of Albert Naudi (I.D. no 1060848M), Raymond Pizzuto (I.D. no 0220256M) and Susanna Maria wife of Anthony Vassallo (I.D. no 0202758M)** [hereinafter referred to as "the appellees"], in her regard as well as against **l-Awtorità tad-Djar** [hereinafter referred to as "the Authority"] as follows:

> *"Consequently, given the reasons above mentioned, the Board rejects the eighth plea of defendant Gauci; and accepts the first, second and third request of the applicants in that it is declaring that Patricia Gauci is the lessee of 59, Ornos, Inganez Street, Rabat, Malta, in terms of Chapter 158 of the Laws of Malta, and it is ordering that the rent to be paid from the date when it falls next due (i.e. 17th April 2021), shall be that of EUR 12,000 annually.*
>
> *The Board also clarifies that in view this amount of rent shall apply in respect of the lease of this property, unless the lease is previously terminated, for a period of six years, after which it shall be subject to being revised in accordance with Article 12B(1) of Chapter 158 of the Laws of Malta, unless an agreement is reached between the parties.*

Each party is ordered to pay her/his own individual costs and expenses incurred with respect to these proceedings."

The facts

2. The facts of the present proceedings concern the premises at 59 named "Ornos" in Inguanez Street, Rabat, [hereinafter referred to as "property"] held by appellant under title of lease from the appellees subject to a yearly rent of €591.90. The appellant had acquired her title by virtue of the dispositions of Act XXIII of 1979, following the termination of the temporary emphyteutical grant conceded to her and to her late husband Paul Gauci by the late Maria Anna Naudi and Rene, siblings Pizzuto and parents of the present appellees, for a period of 17 years as from the 17th April, 1964 for an annual temporary sub-ground rent of Lm55.

The merits of the case

3. The appellees instituted the present proceedings against appellant and against the Authority by filing an application before the Board on the 2nd August, 2019 in the Maltese language whereby it requested the said Board to:

"I. Jiddikjara u jiddeċiedi illi l-intimata Patricia Gauci hija l-inkwilina tal-fond 59, Ornos, Inguanez Street, Rabat, Malta ai termini *tal-Kap. 158 tal-Liġijiet ta' Malta liema fond kien konċess b'titolu ta' enfitewsi temporanja għall-17-il sena b'konċessjoni enfitewtika temporanja lil Paul u Patricia Gauci u dan mis-17 ta' April 1964 u dan versu is-subċens annwu u temporanju ta' Lm55 fis-sena u dan skont l-istess kuntratt tas-17 ta'April 1964 fl-atti tan-Nutar Dottor Carmel Giuseppe Vella hawn anness u mmarkat bħala Dokument A.*

II. Jordna li jitwettaq it-test tal-mezzi tal-inkwilina Gauci li għandu jkun ibbażat fuq it-test tal-mezzi stabbilit fir-Regolamenti dwar it-Tkomplija tal-Kirja (Kriterji ta' Test tal-Mezzi maħruġa taħt l-Artikolu 1531F u 1622 tal-Kodiċi Ċivili) u kwalunkwe regolamenti li jistgħu minn żmien għal żmien jissostitwixxuhom, liema test għandu jkun ibbażat fuq id-dħul tal-inkwilina Gauci bejn l-1 ta' Jannar u l-31 ta' Diċembru 2018 u fuq il-kapital tal-istess intimata Patricia Gauci fil-31 ta' Diċembru 2018.

III. Jiddikjara u jiddeċiedi illi ai termini *tal-Att XXVII tal-2018, il-kera għandha tiġi riveduta għal ammont li ma jeċċedix it-2% fil-mija fis-sena tal-valur liberu u frank tas-suq miftuħ tal-fond 59, Ornos, Inguanez Street, Rabat, Malta, b'effett mill-1 ta' Jannar 2019 u sabiex jiġu stabbiliti kundizzjonijiet ġodda fir-rigward tal-kera u fin-nuqqas jekk l-intimata Gauci ma tissodisfawx il-kriterji tad-dħul u tal-kapital tat-test tal-mezzi jiġi permess żmien ta' ħames snin sabiex il-fond jiġi vakat, oltre li tiġi ordnata tħallas kumpens lir-rikorrenti għall-okkupazzjoni tal-fond matul l-imsemmi perijodu li jammonta għad-doppju tal-kirja li kienet tkun pagabbli skont l-Artikoli 12 u 12 A tal-Kap. 158 tal-Liġijiet ta' Malta u dan skont il-kera li kellha tkun viġenti* ai termini *tal-Att X tal-2009 li m'għandhiex tiġi kunsidrata inqas mill-kera annwali dovuta fl-1 ta' Jannar 2019 meta l-istess kera għandha togħla fuq it-tlett snin ta' qabel.*

IV. Jordna, f'każ illi l-intimata Gauci ma tissodisfax il-kriterji tad-dħul u tal-kapital tat-test tal-mezzi, l-iżgumbrament tal-istess intimata Gauci mill-fond 59, Ornos, Inguanez Street, Rabat, Malta fi żmien ħames snin millum.

Bl-ispejjeż u bl-inġunzjoni tal-intimati għas-subizzjoni u b'riserva u mingħajr preġudizzju għad-drittijiet kostituzzjonali u konvenzjonali tar-rikorrenti u għal kwalsiasi talba għad-danni prekunjarji u non-pekunjarji u talbiet oħrajn jew kwalsiasi azzjoni oħra li tista' talvolta tiġi preżentata."

4. The Authority replied on the 13th September, 2019 whereby it stated that its role in the present proceedings was merely that of *amicus curiae* and as such it should not be burdened with costs. As to the merits, it submitted that if appellee were to satisfy the means test imposed by law, then the annual rent should not be more than 2% of the value of the property whilst

taking into consideration the criteria laid down by law for the Board to follow in establishing the fair rent.

5. The respondent filed her reply on the 17th September, 2019 wherein she requested this Court to reject the pleadings put forward by the plaintiffs for those reasons which she explains in her said reply, with costs.

The appealed judgment

6. The Board made the following considerations in its' judgement:

> *"**Considers***
>
> *Firstly, the Board is rejecting the eighth plea raised by defendant with respect* to lis alibi pendens *and the application of Article 792 et seq of Chapter 12 of the Laws of Malta. This plea was raised as there is a Constitutional case pending between the same persons with regards to the right of use of this same property. For such a plea to succeed, it is imperative that both pending cases have the same subject-matter (Vide John Debono et vs Mario Buhagiar et decided on 21st January 2016 and Art 792 of Chapter 12 of Laws of Malta). In the judgement given by the Court of Appeal in Crocifissa Sammut et vs Joseph Spiteri, decided on 10th October 2003, it was outlined that the elements which need to be proved are:*
>
> 1. Li l-kawza trid tkun bejn l-istess partijiet - eadem personae;
> 2. Irid ikun hemm l-istess oggett - eadem res;
> 3. It-talbiet irid ikollhom l-istess meritu - eadem causa petendi.
>
> *The same was stated in the judgements, Marsaxlokk Sailing Club Company Limited vs J and H Company Limited, decided on 30th June 2004, Balzan vs Argento et 1.2.90 Vol LXXIV p3 p 429; and Reznikow et vs Kotivov 24.3.94 Vol LXXVIII p3 p 170.*
>
> *It has not been proven to this Board that these two proceedings deal with the same subject matter. This case deals with a demand to declare that defendant is the lessee, and that the means test of the lessee, is to be done in order for the rent to be increased, in case the lessee satisfies this means test, or in order for lessee to be evicted according to law within the stipulated time laid down in the law, in case the*

lessee does not satisfy this means test. The litigation before the Constitutional Court is examining whether the application of the relative article of the law is violating or otherwise the applicants' fundamental rights, and if in the affirmative, the Court is being asked to award compensation to applicants.

The Board states that this case is within the competence of this Board and cannot be sent to the Constitutional Court, as the eighth plea is implying. Hence, this eighth plea is being rejected.

Further Considers

By virtue of a contract dated 17th April 1964, in the acts of Notary Doctor Carmel Giuseppe Vella (Doc A attached to the application), Maria Anna Naudi and Rene Pizzuto gave by virtue of a temporary emphyteusis to the spouses Gauci, this property 59, Ornos, Inguanez Street, Rabat, Malta, for 17 years starting from 17th April 1964, in lieu of the payment of Lm 55 a year. Marie Naudi died on 16th September 1977, and she was succeeded by her children, who are some of the applicants in this case, i.e. Albert Naudi, Phyllis Mifsud, Marcelle Azzopardi and Patricia Mc Glade.

René Pizzuto died on 7th August 1994, and according to the unica charta *will of the 7th October 1977, in the acts of Notary Dottor Angelo Sammut, he left as his heirs, his children, i.e. some of the applicants in this case who are Marcel Pizzuto, Moyra wife of Albert Naudi, Raymond Pizzuto and Susanna Maria wife of Anthony Vassallo. The* causa mortis *declaration was made in the acts of Notary Doctor Mario Bugeja dated 15th February 1959.*

At the lapse of the seventeen year period, this temporary emphyteusis was converted to a lease by virtue of the applicable law, and the rent, up till this application was presented, was that of EUR 591.90c annually.

Further considers

As regards the merits, the defendant confirmed on oath that her income for the year 2018 was that of EUR 15,243 and STG 1,017.19c; that the capital for the year 2018 was that of EUR 122,378,69 and STG 41,867.77; that her income for the years 2015 to 2019 was that of EUR 74,915.36 and STG 3,384.98, that the capital for the years 2015 to 2019 was that of EUR 494,235.29 and STG 182,977.48. The defendant also presented an affidavit, where she explained that most probably, this property had a pre-war rent; that she and her husband invested a lot of work in this property; that they took care of any repairs and maintenance that was needed; and that she

always paid the rent regularly. She was born on 3rd October 1940, and thus she is 80 years old.

Reference is made to Subsidiary Legislation 16.11 where it was stipulated:

5 (3) For a person who is forty-six (46) years of age or older to meet the income criteria of the means test, the income of the said person during the relevant period, shall not exceed forty-two thousand euro (€42,000);

5 (7) For a person who is seventy-five (75) years of age or older to meet the income criteria of the means test, the income of the said person shall not exceed fifty thousand euro (€50,000).

6. (2) For a person who is forty-six (46) years of age or older to meet the capital criteria of the means test, the capital of the said person shall not exceed two hundred thousand euro (€200,000).

(6) For a person who is seventy-five (75) years of age or older to meet the capital criteria of the means test the capital of such person shall not exceed six hundred thousand euro (€600,000).

The Board, after having taken note of the above and the documents submitted, declares that the defendant meets the means test outlined in the subsidiary regulations and Art 12B(5) of Chapter 158 of the Laws of Malta.

The Board took note of the report prepared by its technical members, Architects Valerio Schembri and Marie Louise Caruana Galea, who concluded that the value of this property is that of EUR 600,000. The defendant presented a valuation report sworn by Architect Carmelo Farrugia, who estimated the current market value of the house in question at EUR 520,000.

The Board outlines that by virtue of Article 23(3) of Chapter 69 of the Laws of Malta, the chairperson of this board shall be bound by the reports of the Panel whenever the reports of the two members of the Panel assigned to a particular case are unanimous. In this case, unanimity was reached, and thus the Chairman is bound by the value given by the other two members of the panel.

The Board now shall proceed in terms of Article 12B (5) of Chapter 158 of the Laws of Malta to establish the amount of rent payable. The Board makes reference to what is stipulated in Article 12B(6) of Chapter 158, that is in establishing the amount of rent payable in accordance with sub-article (1), the Board shall give due account to the means and age of the tenant, and to any disproportionate burden particular to the landlord. The Board may determine that any increase in rent shall be gradual.

The Board outlines that the applicants did not produce any evidence as to any disproportionate burden particular to them. The Board took note of the rent being paid; the value of the property and its potential; the means of the defendant and the age of the defendant. The Board considers that the defendant, although meeting the requirements of the means test, has not only an income, but also some capital.

After examining all the circumstances of this case, the Board is of the opinion that, considering the documents presented by the defendant, particularly the fact that the defendant has a substantial amount of capital, it would be unjust with regards to applicants for this not to be taken into account by the Board. As a result, the rent due should be increased with the rate of 2%, with the result that the rent to be paid annually shall be that of EUR 12,000 annually, i.e. EUR 1,000 monthly. Since the rent falls due in April of each year, the Board shall order that this increased rent, shall apply from the coming April 2021".

The Appeal

6. The appellant filed her application on the 8th February, 2021 whereby she is requesting this Court to:

"i) confirm the decision where the Board decided that the appellant meets the income and capital criteria of the means test and that she is the legitimate lessee of the property in question in line with the provisions of Cap. 158 of the Laws of Malta;

ii) revoke that part of the decision where the Board ordered that the rent is to be paid from the date when it falls next due and shall be of €12,000 annually; and instead declare that the increase in rent should start from 1% and gradually up to 2% of the market value of the property over a number of years, for the reasons mentioned above".

Her only grievance is that the Board made an erroneous appreciation of the evidence submitted and thereby wrongly applied the subsidiary legislation when it ordered that the annual rent payable to appellees was to be the

maximum amount of rent payable by law established at 2% of the value of the property.

The Authority's reply

7. The Authority replied on the 16th February, 2021 where it presented its submissions as to the manner in which the fair rent should be established, and this whilst declaring that it will submit itself to the superior judgment of this Court.

The appellees' reply

8. The appellees filed their reply on the 18th March, 2021 whereby they contend that the appealed judgment should be upheld by this Court as it is just and equitable and confirms with both the law and recent jurisprudence.

Considerations

9. The Court shall now consider the appellant's grievance in the light of the Board's deliberations, whilst taking into account the submissions made by the appellees and by the Authority. The appellant contends that the Board made an erroneous appreciation of the evidence and this resulted in the wrong application of the subsidiary legislation. Whilst referring to her annual income and her bank deposits, as well as to the discrepancy between her architect's valuation of the property and that established by the two architect members of the Board, the appellant declared that 2% of €600,000 resulted in the

extraordinary sum in annual rent of €12,000, which is both excessive and unsustainable for the appellant. She contends that almost all of her annual income would be paid towards rent and maintenance of the property, but she would require at least €700 per month to cover day-to-day and medication expenses. In view of S.L. 16.11 and taking into consideration her yearly income and elderly age, the appellant submits that the Board should have set a gradual increase of rent and suggests 6 years as a reasonable term. Here she refers to the provisions of both subarticle 12B(5) and subarticle 12B(6) of Cap. 158. The appellant holds that she has no assurance and confirmation from the Authority that she will receive a subsidy, and if she is to receive a subsidy, there is no indication as to what this will be. She contends that in increasing the rent due to be paid to appellees, the Board had limited itself in considering the value of the property whilst the subsidiary legislation requires that the financial state and the age of the tenant should be taken into account, mainly to allow a gradual increase. The appellant confirms that she fully agrees with the submissions made by the Authority in respect of the decision quoted by appellees and which had been decided by the Constitutional Court in the names **Gerald Camilleri *vs.* L-Avukat tal-Istat et**.[1] However she emphasized that each case must be decided on its own merits and that the rental value should be established according to the particular facts of each case. The appellant insists that the referred decision confirms that there is a middle road between the social purpose and the interests of the owner, and this was attainable only if the rental value of the property is calculated within the range mentioned by law. She submits that taking into account the social, financial

[1] 06.10.2020

and legal situation, as an 80 year old with eyesight problems, she was indirectly being ordered to vacate the property within a short timeframe which made it impossible to find alternative accomodation, considering also the present pandemic. The appellant therefore insists that the Court must interpret and enforce our laws in a just way and the Board should have decided on a gradual increase in rent.

10. Prior to making its submissions on the present case, the Authority declares that it is thereby conforming to its duties as *amicus curiae.* Whilst referring to subarticles 12B(5) and 12B(6) of Cap. 158, it submits that the Board may decide to establish a lower rent in view of the means and the age of the tenant, but it may also order that any increase in rent ought to be gradual to ease the impact of a higher rent upon the tenant. It also submits that in accordance with subarticle 12B(2) of that same law, the Board may establish fair conditions in respect of the rent. The Authority states that one should consider the scope of the law upon which the present proceedings were based. It submits that the law was intended to address the disproportionality that resulted between the rent payable and the restriction upon the property. However in all cases it must not be forgotten that the tenants were acting in terms of law and that it has been reiterated in court judgments that when there is a restriction on the right to property for a social reason, then the compensation to be allocated for the breach of constitutional rights must not reflect the rent payable on the open market. It insists that this was so because the law rightly accepted that citizens as much as the State had a duty towards fellow citizens who were more in need, and whilst citing

subarticle 12B(6) of Cap. 158, the Authority insists that the Board should not only consider the value of the property when establishing the rent due, but also the situation of the tenant, as well as that of the owner. The Authority contends that it had wrongly been understood by some, that according to the judgment delivered by the Constitutional Court in the names **Gerald Camilleri *vs.* L-Avukat tal-Istat**[2], the Bord must establish the rent in accordance with the maximum allowed at 2%. However the Constitutional Court was only pronouncing itself upon those specific proceedings and not in a general way and it had actually confirmed the existence of a "middle-ground" between the social purpose in respect of social accomodation and the interests of the owner. The Authority here repeats its argument that the Constitutional Court was only deciding in respect of that particular case and it adds that the landlord's appeal asking for a higher rent had not been accepted. The Authority insists that for the Board to verge closer towards the maximum rent allowed by law, it must be morally convinced that the tenants can truly bear the increase in rent. It contends that in establishing the rent due, the Board should not consider that the Authority may offer a subsidy in rent due to the "capping" of the said subsidy. The Authority takes the opportunity here to explain the manner in which the subsidy is calculated according to the relevant scheme and declares that this is never established according to the amount of rent payable. It ends its submissions by referring to subarticle 12B(6) of Cap. 158, whilst stating that if the landlord would like to enforce the increase in rent as from the date when proceedings are filed, then a request must be made to the Board at the start of those proceedings. If this is not done, then

[2] *Supra.*

the landlord cannot presume that the Court will out of its own order retroactive payment of rent.

11. The appellees contend in their reply that the appealed judgment is just and equitable, and should therefore be upheld by this Court. Whilst referring to the *ex parte* valuation, which after all they submit was not significantly different from the Board's valuation, they argue that once unanimity had been reached by the two technical members of the Board, the Chairman was bound to adopt their valuation. They express their doubts as to whether the appellant can eventually be in a position to pay the rent even if this were to allow for a gradual increase, since her expenses would probably increase due to her age. The appellees suggest that appellant should surrender the property and rent a more modest property. After all, she was entitled to a subsidy from the Authority and she had herself admitted to significant bank deposits. They submit that no sense can be made from appellant's argument that she had never breached the law or her legal obligations, and insist that she is incorrect to argue that the annual rent established at 2% of the market value is not a reasonable sum because one must consider the recent jurisprudence of the Constitutional Court confirming that the market yield is in the region of 3.5% to 4%. The appellees contend that if as the appellant is suggesting it will be difficult to find alternative accomodation in a short amount of time, this was partly due to her inaction because she should have sought to make arrangements a long time ago.

12. The Court considers proper the decision taken by the Board to establish the annual rent at 2%, without providing for any gradual increase. After taking

note of the valuation presented by the technical members of the Board, as well as the valuation prepared by appellant's trusted architect, it rightly declared that by virtue of subarticle 23(3) of Cap. 69 it was bound to accept the first valuation. The Board then proceeded to establish the annual rent payable within the parameters established by subarticle 12B(5) of Cap. 158, also considering the dispositions of subarticle 12B(6) of that same law. It was right to note that appellees had not produced any evidence as to any disproportionate burden, but also correctly considered the means of the appellant who though satisfying the means test, had shown that she not only had an income but also substantial capital. Earlier in its' appealed judgment the Board had already considered in depth the said means and capital, and noted the following:

> *"...the defendant confirmed on oath that her income for the year 2018 was that of EUR15,243 and STG1,107.19c; that the capital for the year 2018 was that of EUR 122,378,69 and STG 41,867.77; that her income for the years 2015 to 2019 was that of EUR 74,915.36 and STG 3,384.98, that the capital for the years 2015 to 2019 was that of EUR 494,235.29 and STG 182,977.48".*

13. Whilst also taking into consideration the value of the property and its' potential, as well as the age of the appellant, the Board very rightly so declared that it would be unjust with the appellees if it were to disregard the substantial amount of capital held by appellant. The Court cannot but note that the Board's particular concern here undermines appellant's, as well as the Authority's argument that the Board unjustly gave particular weight to the value of the property. It also refutes the Authority's insistence with its argument that a balance must be struck between the interests of the landlord and the necessity to provide social accomodation, because although, as the

Board rightly pointed out, the appellant successfully passed the means test, the substantial capital in her estate puts into doubt any argument that in the present case there is need for social accomodation. Therefore without hesitation the Board established the annual rent due at 2% of the value of the property, which was equivalent to €12,000 or €1,000 monthly, payable as from April 2021.

14. The Court cannot but agree with the above considerations, especially where the Board argued that it was giving particular weight to the fact that appellant held a substantial amount of capital. It is only just and appropriate that in view of appellant's wealth, the appellees should have the right to immediately receive the maximum rent allowed by law, if she decides to retain the property rather than finding alternative accomodation. Arguably at her age this would be no easy task, but it would allow her to find a home more suited to her single status and to her yearly income. The appellees should not be made to bear the burden of her choice to retain the property, but it should be her responsibility to pay a rent which after all is below the value the said appellees may realize were the property to be put on the open rental market.

15. As to the submissions made by the Authority, the Court notes that the Board did not in any manner consider that appellant may be entitled to a subsidy from the said Authority. This possibility is not being given any weight in this Court's judgment either, and it states that it has made its thoughts abundantly clear on the matter in its judgment of the 3rd February, 2021 in the names **Anthony Aquilina *vs.* Michael Camilleri et**.[3] Whilst referring to the

[3] Inf.App. no. 122/18LM.

considerations made in that judgment and declaring that they should be accepted as forming part of this judgment too, it deems it unnecessary to repeat same.

Decide

For these reasons, the Court hereby decides to reject the present appeal, whilst confirming the appealed judgment in its' entirety and declining the appellant's pleadings.

All costs and expenses of all parties incurred in respect of proceedings before the Board shall be paid as decided by the said Board, whilst those incurred in respect of the present appeal shall be borne by appellant.

Read.

Hon. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar