



## **QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta ta' l-20 ta' Gunju, 2013

Appell Civili Numru. 59/2012

**Joseph Desira**

**vs**

**L-Awtorita Maltija dwar l-Ambjent u l-Ippjanar**

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Joseph Desira tat-18 ta' April 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 mil-applikazzjoni PA 421/10 ghal 'part change of use from class 4 to class 11 (vulcaniser). Application includes internal alternations';

Rat ir-risposta tal-Awtorita li ssottomettiet illi l-appell kellu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet id-difensuri tal-partijiet;

Kopja Informali ta' Sentenza

Rat id-decizjoni tat-Tribunal li tghid hekk:  
Ikkunsidra:

B'applikazzjoni tat-2 ta' Frar 2010 - Full Development Permission – PA/0421/10 fejn l-appellant, f'sit fi Triq Hal-Ghaxaq c/w, Triq il-Pitirris, Ghaxaq talab:

"Part change of use from class 4 to class 11 (vulcaniser). Application includes infernal alterations."

L-applikazzjoni giet michuda mill-Awtorita fit-2 ta' Mejju 2011 ghar-ragunijiet segwenti:

"1. The site proposed for development falls 'within a Category 1 Settlement where only those uses which are compatible with the residential area can be permitted. In terms of scale and nature, the proposed tyre centre does not fall into the category of acceptable land uses in a residential area, and therefore runs counter to policy SMSE 06 and policy SMHO 02 of the South Malta Local Plan, and to policy BEN 1 of the Structure Plan.

2. The site proposed for development is located on a distributor road, and therefore the proposed tyre centre would have a significant and unacceptable impact in terms of traffic safety. The proposal therefore runs counter to Structure Plan policies RDS 5 and TEM 4 which prohibit new development that could create a traffic hazard on the arterial road network."

Illi l-Perit Mifsud, ghan-norn tal-appellant ressaq il-kummenti tieghu inter alia kif gej:

"Please note that during the DCC sitting held last year (DCC 4701110) held on 11 22 June 2010, the DCC requested consultation with MIPA legal office to confirm if license can be transferred from one premises to an adjacent premises. In fact DCC wrote the following:

"Legal Office

Kopja Informali ta' Sentenza

Architect shall liaise with your office to transfer existing license to the proposed premises".

Subsequently a meeting was held with Dr. Ian Stafrace, myself and the applicant to discuss the direction of the DCC.

Dr. Ian Stafrace confirmed that it was possible to transfer a license from one premises to an adjacent premises, subject that an application must be submitted on the other site to change use from class 11 to class 4.

In fact another application was submitted as per Dr Ian Stafrace direction - PA 4328/10 to convert the existing legally operational Vulcaniser into a class 4 shop.

The reason for the "swapping" of license is that the site subject to this appeal has a large front garden capable of allowing the parking within the front garden of vehicles requiring the service of a vulcanizer, while the existing operational vulcanizer (site subject to PA 4328110) has a small front garden and is causing a traffic hazard when large vehicles would require his service.

Please also note that I have twice, requested the MEPA to assess both applications together since one is linked to the other after the advice we had from Dr. Stafrace.

The request was made on both files through eapps on 18th January and on 5th April 2011.

On the above. I kindly request the EPRT to reconsider the application due to the above facts."

Illi l-Awtorita ressqet il-kummenti taghha inter alia kif gej:

## "5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 The following grounds are being raised to justify this appeal:

1 The appellant 'was the owner of a vulcanizer, and is seeking to transfer this use from one premise to another. Agreement was reached between MEPA Legal Office and architect that the relocation of the vulcanizer would be possible if a permit was acquired to change the previous location from Class 11 into a Class 4 shop. Hence, in the direction of the Legal Office, this was carried out in PA 4328/10.

2 The reason for swapping of license is that the site subject to this appeal has a large front garden capable of allowing the parking within the front garden of large vehicles requiring the service of a vulcanizer, while the existing operational vulcanizer (now subject to PA 4328/10) has a small front garden and is causing a traffic hazard when large vehicles require his services.

5.2 The Directorate has the following comments to make:

#### Introduction

The Authority is respectfully bringing to attention of the Tribunal that the development proposed for Class 11 use has already been refused in previous permit PA 2963/07 since the proposal does not fall into the category of acceptable land uses listed in policy SMHO 02 of the South Malta Local Plan.

#### 5.2.2 Agreement for Relocation

In comments made by appellant, indication is made that an agreement was reached between the appellant and the Legal Office at MEPA, that for relocation of the vulcanizer to be permissible, a request for the change of use from vulcanizer, on a different site, to Class 4 is required. The appellant applied by way of PA 4328/10 to remove the vulcanizer from another site (and change it into Class 4), and although the application is yet to be decided by EPC Board (case deferred to 15th July, 2011), the development is recommended for approval by the Planning Directorate.

Notwithstanding this, the appellant is requesting to open a Class 11 vulcanizer within a Category 1 Rural Settlement; where the Authority seeks to preserve the residential

amenity of the area. In this light; policy SMHO 02 presents a list of acceptable land-uses for Class 11 development which amongst other factors states that no uses involving percussion hand tools to safeguard the serenity of the Category Settlement from noise, vibration and other issues which result in bad neighbour development. Hence, the development runs counter to Structure Plan policy BEN 1.

In addition, policy SMHO 02 also specifies that Class 11 uses within such areas must be limited to a maximum floorspace of 50m<sup>2</sup> including storage of materials and/or finished products. The requested use as a vulcanizer has an area of approx. 80m<sup>2</sup>. Hence, the development does not fall into the category of acceptable land-uses in residential areas, running counter to policies SMSE 06 and SMHO 02 of the SMLP.

Therefore, although an agreement was made between the Legal Office of MEPA and the appellant to relocate the vulcanizer, the new location must be proposed in an area where such uses are permitted in accordance to the relative Local Plan. In this application, the appellant is seeking to relocate the Class 11 use to a Category 1 Rural Settlement, and to a site "where such use has already been refused in the past (PA 2963/07); and hence it is understandable that the Authority cannot accept this proposal.

### 5.2.3 Impact of Development to Traffic Safety

In comments made, the appellant is stating that the purpose of relocating the vulcanizer is due to the large front garden present which would enable additional parking spaces. The previous location had only a small front garden and was causing a traffic hazard. Nonetheless, the site now proposed for the use as a vulcanizer is situated along a distributor road. Structure Plan policy RDS 5 prevents developments that that rely on direct access onto an arterial or distributor road; whilst policy TEM 4 prohibits parking on the arterial and distributor road network where it presents a safety hazard.

Kopja Informali ta' Sentenza

Therefore it is incorrect to argue that the relocation would not entail traffic hazards.

Furthermore, the parking of vehicles for commercial use within the front garden of the premise is also not permissible since this area is considered as additional storage to the proposed industrial use, and is not acceptable."

Ikkunsidra ulterjorment:

Ghall-korrettezza jigi dikjarat li l-Applikazzjoni PA 2963/07 ma gietx michuda. In fatti, l-istess appellant b'din l-applikazzjoni talab permess "To erect basement garages, ground floor commercial outlets and overlying two residential units." L-applikazzjoni giet pprezentata fit-3 ta' Mejju 2007, Full Development Permission u giet milqugha bil-permess tal-1 ta' Ottubru 2009 - Red 94. L-ewwe! kundizzjoni f'dan il-permess tgħid:-

"The garage shall only only be used for the parking of private cars."

Il-proposta prezenti hi "part change of use from Class 4 ta' Class 11 (vulcaniser).

L-applikazzjoni giet michuda għall-zewg ragunijiet cjoe 1) il-lokalita partikolari, Category 1 Settlement ma tippermettix dan it-tip ta' attivita li mhux kompatibbli ma' area residenzjali, u 2) billi s-sit jghati direttament għal triq l-proposta għandha impatt negattiv fuq it-traffiku.

L-appellant jittenta jiggustifika l-applikazzjoni billi qed jipproponi li l-istess xogħol li kien jsir band'ohra, jsir fis-sit mertu ta' dan l-appell, li skond l-appellant hu izjed adattat għal dan it-tip ta' xogħol.

Kif tajjeb irrilevat l-Awtorita s-Policy SMHO 02 residenital Areas and Residential Priority Areas, telenka l-attivitajiet li jistghu jigu awtorizzati f'dawn l-areas; fast il-kundizzjonijiet imposti hemm dik tad-daqs - cjoe mhux aktar minn 50m<sup>2</sup>; li ma jintuzawx ingenji mekkanici u elettornici, li jirrikjedu 3

Kopja Informali ta' Sentenza

phase electrical supply, u li ma jsirx xoghol ta' mechanic, panel bearing, spray painting ecc. L-attivit a proposta ta' vulcaniser taqa' fl-istess kategorija ta' attivita.

Fil-kaz in ezami jirrizulta li l-izvilupp propost jokkupa area ta' 80m<sup>2</sup>, li hu in excess ta' dak inclikat u koncess fil-Policy - apparti mill-fatt li l-attivit a 'per se' mhix wahda minn dawk accettati, anzi, bhala kategorija eskluzi.

Hemm wkoll c-cirkostanza l-ohra, xejn traskurabbli tat-traffiku.

Indubbjament l-izvilupp propost jiggenera kwantita ta' traffiku, billi x-xoghol propost hu fuq ir-roti ta' vetturi, ta' kull daqs; u billi s-sit jinsab propju b'access dirett ghat-triq, hu in kontravvenzjoni ta' Structure Plan Policy RDS 5 u TEM 4.

Fic-cirkostanzi ghalhekk r-ragunijiet moghtija fir-rifjut, huma validi u perfettament applikabbli ghall-kaz.

It-Tribunal, ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tat-2 ta' Mejju 2011, fl-Aplikazzjoni PA 0421/10.

### **Ilkunsidrat**

L-aggravju tal-appellant huwa s-segwenti:

1. It-Tribunal ghamel referenza estensiva ghal policy SMH02 tal-pjan lokali ghan-nofsinhar ta' Malta izda r-referenza saret b'mod hazin minghajr referenza ghas-sottomissjonijiet tal-appellant u ghalhekk gie applikata skorrettement.

Fil-qosor l-appellant qed jallega illi hu gia kellu hanut ta' vulcaniser munit b'permess ftit metri boghod mill-post propost bhala sit alternattiv. L-iskop wara tali 'swapping' ta' permess kien li s-sit il-gdid propost kellu front garden akbar u ghalhekk kien ikun ta' inkonvenjent anqas meta kien ikun hemm trakkijiet kbar. Il-kontenzjoni tal-appellant hi illi t-Tribunal mexa fuq certi kondizzjonijiet ta' policy SMH02 rigward il-kobor tas-sit permissibbli fiz-zona

proposta u ma ta ebda kondiserazzjoni ghas-sottomissjoni tal-appellant li t-Tribunal seta' jiddpartixxi minn dawn ir-regoli jekk ikun hemm 'overriding reasons', kif jidher li hu dan il-kaz.

In oltre waqt it-trattativi quddiem il-Kummissjoni ghall-Kontroll tal-Izvilupp kien hemm l-intiza cara li jsir it-tibdil necessarju fil-permess ezistenti biex isir it-trasferiment tal-permess ghas-sit il-gdid u fil-fatt saret applikazzjoni 4328/10 biex is-sit illum munit bil-permess isirlu 'change of use from vulcaniser to Class IV' liema permess gie approvat. Dan il-ftehim ma giex kunsidrat mit-Tribunal, u lanqas dahal fil-mertu tal-planning gain li kien jirraprezenta tali arrangement, u li ghalhekk kien jikkostitwixxi overriding reason ghala l-policy ma kellhiex tigi applikata 'ad unguem'.

Dan l-appell fih zewg binarji li ser jigu trattati flimkien ghax konnessi. Is-sottomissjoni principali tal-appellant hi illi t-Tribunal naqas li jikkunsidra fit-totalita tieghu l-policy SMH02 u senjatament dik il-parti fejn ghal 'overriding reasons' seta' jiddipartixxi mir-regoli stretti necessarji biex jinghata l-permess rikjest. Hu minnu illi t-Tribunal ma ddikjarax esplicitament li ma kienx hemm 'overriding reasons' li minhabba fihom kellu jiddipartixxi mir-regoli tal-policy SMH02 f'dik li jirrigwarda l-uzu propost pero dan ma jfissirx li applika hazin il-policy jew ma tax aditu ghar-ragunijiet moghtija mill-appellant ghalfejn kellu jinghata l-permess. It-Tribunal infatti kkonsidra li l-appellant gab bhala gustifikazzjoni l-adattibilita tas-sit il-gdid u fil-fatt fil-premessi semma' b'mod dettaljat dak li kien qed jigi propost u r-ragunijiet. Kwindi ma jistax jinghad li injora ir-ragunijiet ghat-trasferiment tal-attivitа ta' vulcaniser mitluba mill-appellant. Pero l-Qorti tqis illi t-Tribunal ma dehrlux li kien hemm raguni gravi bizzejjed biex jiddipartixxi mill-kundizzjonijiet impost fil-policy SMH02 semplicement rigward id-daqs permissibbli izda b'mod generali il-kundizzjonijiet kollha fil-policy SMH02 rigward l-uzu ta' ingenji u t-tip ta' uzu li jista' jsir fiz-zona ma kienx jippermetti anzi jeskludi tali uzu propost. B'zieda ma' dan it-Tribunal ikkunsidra wkoll illi l-uzu propost kien imur kontra Structure Plan Policy RD15 u TEM4 ghaliex l-uzu



propost li kien jikkoncerna roti ta' vettura li skond il-policies imsemmija ifisser generazzjoni ta' kwantita ta' traffiku b'access dovut ghat-triq arterjali u ghalhekk il-parkegg f'dawn l-akkwati jistghu jinterferixxu mal-flow of traffic.

Il-Qorti ma tqis ghalhekk illi l-appellant hu gustifikat li ma gietx trattata l-kwistjoni li kien hemm 'overriding reasons' anzi jidher li t-Tribunal dehrlu li l-policies li kienu ser jigu vjolati bl-applikazzjoni ma setghux jimmeritaw ezitu favorevoli tenut kont tal-fatti tal-kaz. Il-Qorti ma tqis li f'dan is-sens it-Tribunal applika hazin xi policy jew naqas jikkonsidra xi aspetti li setghu influixxu fuq id-decizjoni teighu. Wara kollox aspetti ta' interpretazzjoni u applikazzjoni ta' policies, fatti teknici u ta' planning huma afdati f'idejn l-Awtorita, u t-Tribunal, u mhux sindikabli mill-Qorti.

Ghalhekk ma jistax jigi argumentat li l-kwistjoni ma gietx trattata u l-fatt li t-Tribunal ma sab xejn li jimmerita li jmur kontra l-policies mhix raguni ghall-akkoljiment tal-aggravju li t-Tribunal naqas li jikkunsidra li kien hemm ragunijiet 'overriding' li ssemew mill-appellant u li ma gewx kunsidrati mit-Tribunal. Il-fatt li gew skartati ma jfissirx li ma gewx kunsidrati.

L-appellant jilmenta wkoll illi kien hemm ftehim bejn l-Awtorita u l-appellant li seta' jsir swapping ta' permessi u fil-fatt gie mitlub jaghmel applikazzjoni ghal change of use fuq is-sit gia munit bil-permess kif fil-fatt ghamel. L-appellant jissottometti illi t-Tribunal ma ta ebda aditu ghal dan. Il-Qorti semghet ix-xiehda ta' Dr Ian Stafrace fuq din il-kwistjoni li dak iz-zmien kien il-kunsulent legali tal-Awtorita. Dak li jirrizulta mix-xiehda tieghu u mill-atti hu biss illi l-Awtorita setghet in principju tikkonsidra change of use basta li jsiru zewg applikazzjonijiet wahda biex jitnehha l-permess fuq is-sit prezenti u jinghata l-permess fuq is-sit il-gdid. Dan pero ma jfissirx, u anqas jirrizulta mill-atti, li sar xi ftehim li b'daqshekk il-permess kien ser jinhareg awtomatikament izda biss li jigu trattati flimkien. Imkien fl-atti ma jirrizulta li l-applikant inghata xi legitimate expectation li ser jinhareg il-permess mitlub jekk jaghmel

zewg applikazzjonijiet jew li sar xi ftehim u kwindi gie akkwistat xi dritt ghax ma hemm ebda prova ta' ftehim. Il-fatt li d-DCC stiednet lill-perit tal-applikant jittellem mal-Awtorita ghat-trasferiment tal-licenzja ma tfisser xejn mehuda barra mill-kuntest ta' dak li kien isehh, u x-xhieda ta' Dr Stafrace fuq din il-kwistjoni kienet cara kif inhi cara l-kumment tal-perit tal-appellant fejn ighid li wara d-direzzjoni mid-DCC saret laqgha ma' Dr. Stafrace fejn spejga l-possibilita li tezisti trasferiment ta' licenzja basta jsiru zewg applikazzjonijiet. Kull ma gie diskuss ghalhekk hu jekk kienx possibbli li jsir trasferiment ta' licenzja minn sit ghal iehor u r-risposta tal-Awtorita kienet li din possibbli basta jsiru zewg applikazzjonijiet. Dan ma kienx ifisser approvazzjoni awtomatika izda biss direzzjoni ghall-applikant dwar dak li kien qed jipproponi b'mod li jsir evalwazzjoni holistika tal-proposti kollha. Billi ma kien hemm ebda ftehim jew intiza cara fuq xi ghoti awtomatiku ta' dan il-permess sotto skrutinju, it-Tribunal ma kellux raguni ghalfejn jidhol fih spejalment meta fl-istess appell l-appellant jirreferi biss ghal possibilita (in generali – kliem tal-Qorti) li jista' jsir trasferiment ta' permess minn binja ghal ohra basta l-binja l-antika jinbidel l-uzu taghha.

Lanqas ma jidher mill-atti li z-zewg applikazzjonijiet kellhom bil-fors jigu trattati u decizi fl-istess hin. Pero anki kieku dan kien il-kaz ghall-grazzja tal-argument, it-Tribunal ma naqasx meta kkonsidra dan l-appell ghalih billi l-iskop tat-trasferiment u kwindi l-applikazzjoni l-ohra numru 4328/10 kienu ben noti ghat-Tribunal minn qari tal-fatti riportati mill-istess Tribunal fid-decizjoni tieghu.

### **Decide**

Ghal dawn ir-ragunijiet il-Qorti tiddeciedi li l-appell mhux gustifikat u ghalhekk qed tichdu filwaqt li tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tad-29 ta' Marzu 2012. Bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

Kopja Informali ta' Sentenza

-----TMIEM-----