



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-26 ta' Gunju, 2014

Appell Civili Numru. 75/2013

Joseph Portelli

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joseph Portelli tas-17 ta' Dicembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-28 ta' Novembru 2013 'to sanction change of use from wedding hall into a licensed supermarket including an extension to the supermarket and a parking area';

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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 :-

B'applikazzjoni tal-25 ta' Jannar 1993, pre-1993 application, l-applikant fil-Corrigo Hall, Triq Hompesch, Fgura ippropona :-

“to sanction change of use from wedding hall into a licensed supermarket including an extension to the supermarket and a parking area.”

L-applikazzjoni giet michuda fit-23 ta' Frar 2001, saret talba ghal reconsideration izda d-decizjoni giet ikkonfermata b'rifjut tal-25 ta' Ottubru 2007 ghar-raguni segwenti :-

“In the course of this reconsideration, the substance of the proposed development has significantly changed and these changes have also been carried out on site. Article 37(3) of the Development Planning Act (as amended) does not enable consideration to proposals which have been significantly altered at reconsideration stage, and therefore the illegalities on site cannot be considered for sanctioning in this application. In view of this, the proposed development cannot be considered further unless the illegal development is first sanctioned or removed and this in terms of policy Circulars 2/96 and 2/98.”;

Fl-appell tieghu, il-Perit Dr. Edwin Mintoff issottometta li gew approvati diversi applikazzjonijiet simili u ghalhekk r-rifjut tal-applikazzjoni jammonta ghal diskriminazzjoni kontrih.

Fir-rapport taghha, l-Awtorita' ikkumentat kif gej :-

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

5.1.1 The first permit PB 3529/91 as issued on 6th July 1992 granted an “Extension to an existing wedding hall”. A new request for further development was submitted in letter dated 29th October 1992 where architect requested ‘Attached please find new plans of the works at Corrigo Hall at Zabbar of Mr. Joseph Portelli.....’ No development fees were submitted.

5.1.2 In 21st January 1993, architect had submitted a letter to the newly established Planning Authority wherein he requested that “I had applied for a planning permit for the works, site and client mentioned below, to the PAPB. The permit has not yet been issued. Could the newly established Planning Authority kindly consider this request. Works to be carried out: Extension of garages”.

5.1.3 A refusal was eventually issued on 26th April 2001. The official proposal was still “Extension of garages” and the reasons for refusal were:

Site lies outside the limits for development defined in Temporary Provision Scheme for Zabbar and so it is located in an area which it is proposed should remain undeveloped and open. The proposed development would run counter to this scheme and would represent intensification of development in an area not zoned for development.

There is no justification for further development on this site as required by Structure Plan policy SET 12.

The proposed development in terms of its floor area and site coverage, is of an excessive scale and would lead to an overdevelopment of site. This would not be in the interests of the amenity of the area as a whole and would exacerbate the problems of overdevelopment in the area. The proposal is therefore unacceptable and runs counter to Structure Plan policy BEN 1.

5.1.4 A request for reconsideration was submitted and a request was made by applicant to change the proposal from ‘Extension of Garages’ to ‘To sanction extension to supermarket and parking area’. The Directorate however, in its report

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dated 11th January 2006 assessed the proposed development along with the request to change the official proposal and resulted that in accordance to the Development Planning Act Article 37(3), such a substantial change in the proposal cannot be accepted at reconsideration stage (Doc 103 refers). After this report, further fresh plans were submitted by applicant and which clarified the nature of the development as had actually been carried out (without permit) along with additional proposed development.

Furthermore, in letter dated 12th October 2006, architect submitted a fresh site plan which now showed a much larger site area than that shown in the original permit as well as a further new request for a change in proposal which now read "To sanction change of use from wedding hall into a licensed supermarket including an extension to the supermarket and a parking area".

5.1.5 However, when the DCC Board had inspected the site on 18th October 2006, the Board noted in minute 115 that "Board noted excessive sprawl encroaching into good agricultural land. Alien forms and materials intrude into the rural character of the open space and Board considers development incompatible with the rural aspect and also considers this development highly objectionable". Consequently, in meeting held on 16th January 2007, the Board rejected this reconsideration request. Subsequently, minutes in file by the DCC clarified that the Board had assessed the original proposal and the Board never considered any change of use on the original permit for wedding hall. All this confirms the reason for refusal as issued in the refusal notice in that the Board refused this request for development on two main issues:

a) In accordance with Article 37(3) of the Development Planning Act, such a substantial change in the proposed development is not permitted at reconsideration stage since it would significantly alter the material substance of its re-assessment.

Substantial illegal development had been carried out on this site from the time that this application was submitted. Its sanctioning, however, was not included in the original application forms (and drawings). The Directorate and the DCC Board had thus stated that such a request for sanctioning cannot be considered at such a late stage in the processing of this application (reconsideration stage) and hence, a fresh application to sanction all works as carried out has to be submitted. In view of this, the DCC decided that in terms of PA Circulars 2/96 and 2/98, this request for development cannot be considered until all illegal works are first sanctioned or removed.

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5.1.6 Conclusively, the Authority states that whilst taking note of appellant's arguments in his 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 report as presented by the Directorate and to the DCC's decision which dismissed this request for development since the DCC Board had based their decision on the valid relevant policies applicable to this area.”;

Fl-ahhar seduta, dik tas-17 ta' April 2011, l-konsulent legali tal-Awtorita' irrileva li l-appellant talab differiment f'ghaxar okkazzjonijiet differenti u li ghalhekk dan l-appell ghandu jitqies abbandunat fit-termini tal-paragrafu 13 tat-Tieni Skeda tal-Att X tal-2010 u talab li l-appell jibqa' differit ghal decizjoni.

Ikkunsidra ulterjorament :-

Kif korrettement irrilevat l-Awtorita', dan hu appell li gie ipprezentat fis-17 ta' Dicembru 2007 u appartu dak li intqal fl-istess appell, ma saret l-ebda sottomissjoni ohra mill-appellant fil-kors ta' smiegh ta' dan l-appell.

Mir-rapport tal-Awtorita' irrizulta li l-ahhar permess li hareg fuq dan is-sit kien dak tas-6 ta' Lulju 1992 'to carry out extensions to an existing wedding hall.'"

L-area originali kienet ta' 624m.sq., giet approvata estensjoni ta' 356m.sq. u ghalhekk t-total tal-foot print approvat hu ta' 980 m.sq.

Fuq l-istess sit hargu s-segwenti enforcement orders;

ECF 225/97 – construction of store without permit.

ECF 255/97 – excavation and building works without permit.

ECF 014/99 – extension and car parking area without permit.

Dawn it-tlett avvizi ghadhom fis-sehh.

Il-premess hu konferma tal-fatt illi wara li saret l-applikazzjoni prezenti, prezentata fil-25 ta' Jannar 1993, l-appellant baqa' sejjer bix-xogholijiet cioe' kostruzzjoni ta'

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store; skavar u xoghol ta' kostruzzjoni, estensjonijiet u parking area ghall-vetturi bla permess; tant li l-Awtorita' harget l-enforcement notices fuq imsemmija.

Irrizulta, in oltre', li l-proposta ghall-'extension of garages' giet michuda fis-26 ta' April 2001 billi s-sit jinsab barra z-zona tal-izvilupp u m'hemm l-ebda gustifikazzjoni ghal aktar zvilupp fl-imsemmija zona u l-floor area propost hu eccessiv.

Kien f'dan l-istadju, cioe' dak ta' reconsideration wara r-rifjut li l-proposta minn 'extension to garges' giet emendata ghal 'to sanction extention to supermarket and parking area'; dan skond ir-rapport tal-Awtorita' tal-11 ta' Jannar 2006 ma jstax jigi accettat f'dan l-istadju billi saru tibdiliet sostanzjali mill-proposta originali.

L-Artiklu 37 (3) tal-Kap. 356 jawtorizza lill-Awtorita' jew lill-Kummissjoni, skond il-kas, li jitolbu lill-applikant jipprezenta pjanti emendati; dan pero' hu suggett ghal zewg kundizzjonijiet; cioe li l-Awtorita' jew il-Kummissjoni ghandhom jaghtu r-ragunijiet biex jiggustifikaw tali talba u li s-sustanza tal-applikazzjoni originali ma tinbidilx.

Fil-kas in ezami irrizulta li t-tibdil propost ma kienx marginali izda sostanzjali.

Skond il-PA Circulars 2/96 u 2/98 tali talbiet ma jstghux jigu milqugha jekk l-izvilupp illegali ma jkunx gie sanzjonat jew jitneha. Dan hu illum inkorporat fir-Regolament 14 tal-Avviz Legali 514 tal-2010.

Il-proposta prezenti hi ghalhekk in kontravvenzjoni tac-Cirkolari PA 2/96, PA 2/98 u r-regolament 14 tal-Avviz Legali 514 tal-2010.

Tenut kont tal-fatt li t-tibdiliet mill-proposta originali huma sostanzjali, kif ukoll li sar zvilupp bla permess, li ghalhekk hu illegali, jinhtieg li ssir applikazzjoni gdida li tindirizza d-dettalji kollha tal-izvilupp propost.

L-appellant iddikjara in sostenn tal-appell tieghu li nghataw diversi permessi simili mill-Awtorita'; u ghalhekk b'dan ir-rifjut qed isofri diskriminazzjoni.

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Dan l-ilment, pero', baqa' b'ebda mod ma gie sostanzjat, billi ma saret l-ebda referenza ghal xi permess jew permessi partikolari li jistghu b'xi mod jincidu fuq il-kas prezenti; anzi l-process kollu hu karatterizzat bin-nuqqas ta' partecipazzjoni tal-appellant li fi hdax il-seduta mifruxa fuq tlett (3) snin ma prezenta l-ebda sottomissjoni dwar dan li gie minnu sempliciment accennat fl-appell ipprezentat fis-17 ta' Dicembru 2007.

Ezaminata fid-dettal il-proposta tal-appellant, il-motivazzjoni tar-rifjut u l-aggravju tal-appell fil-kuntest tal-policies tal-ippjanar rilevanti, l-appell ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut tal-25 ta' Ottubru 2007, ghall-applikazzjoni PA 3529/91.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal interpreta hazin l-artikolu 37(3) tal-Kap. 356 billi kkonsidra li l-appellant ma kellux dritt fi stadju ta' rikonsiderazzjoni jitleb tibdil fil-pjanti u termini tal-proposta biex dawn jinkludu sanzjonar ta' illegalitajiet. It-Tribunal applika hazin l-ligi billi l-artikolu rilevanti jirrigwarda cirkostanzi fejn it-tibdil jigi mitlub mill-Awtorita cirkoskritta ghar-ragunijiet elenkati fl-istess artikolu u fejn il-bidla ma tbiddilx is-sustanza tal-izvilupp. Invece l-artikolu 2(1) tal-Avviz Legali 266 tal-2001 ma timponi ebda restrizzjoni simili fuq l-applikant li jitleb li jipprezenta pjanti godda fi stadju ta' rikonsiderazzjoni;
2. It-Tribunal interpreta hazin il-kliem 'sustanza ta' zvilupp' fl-artikolu 37(3) tal-Kap. 356, peress illi l-imsemmi artikolu ma jivjetax tibdil fil-pjanti meta dan iwassal ghal bidla sostanzjali fl-applikazzjoni izda jivjetah biss meta l-bidla sostanzjali tkun fl-izvilupp. Il-ligi trid li l-izvilupp ma jinbidilx u f'dan il-kaz kien gia sar u xejn ma kien qed jinbidel f'dak l-istadju. Ghalkemm l-applikazzjoni kienet qed tinbidel, l-izvilupp baqa' li kien. In oltre l-fatt li applikazzjoni tinbidel biex tinkludi sanzjonar ma jwassalx ghal bidla sostanzjali fl-applikazzjoni billi l-izvilupp kien sar qabel saret l-applikazzjoni;
3. Ic-cirkolari PA 2/96 u PA 2/98 ma kienx ta' ostaklu ghal konsiderazzjoni tal-applikazzjoni billi c-cirkolari PA 2/98 ma kinitx applikabbli ghal kaz billi titratta illegalitajiet f'sit fejn ser isir zvilupp li fuqhom l-applikant ma ghandux kontroll. It-Tribunal ikkunsidra li talbiet kif

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maghmula bl-applikazzjoni ma jistghux jigu milqugha jekk l-izvilupp illegali ma jkunx gie sanzjonat jew jitnehha. Il-paragrafu 3.2 ta' cirkolari PA 2/96 tghid precizament bil-kontra, u fil-fatt hu pprezenta l-pjanti l-godda fi stadju ta' rikonsiderazzjoni biex l-izvilupp illegali jigi sanzjonat kif trid ic-cirkolari PA 2/96;

4. Ir-rifjut hu diskriminatorju billi nghataw diversi permessi simili ghal dak mitlub mill-appellant, u fil-fatt gew kwotati f'dan l-appell diversi permessi.

Jibda biex jinghad illi t-Tribunal ghandu jiddeciedi in linea mal-aggravji mressqa, liema aggravji iridu jigi mressqa b'mod car mill-appellant. F'dan il-kaz l-appellant ressaq zewg aggravji quddiem it-Tribunal, l-ewwel li d-decizjoni kienet diskriminatorja in vista ta' permessi ohra mahruqa u fit-tieni lok, l-applikazzjoni saret in linea mal-policies tal-MEPA.

Jigi rilevat illi l-appellant tul il-proceduri naqas li juri interess fl-appell tieghu u fl-ebda hin ma ssostanzja l-aggravji tieghu quddiem it-Tribunal. Fun din il-bazi biss l-appell quddiem din il-Qorti ghandu jigi rigettat minghajr dilungar. Hu nuqqas u abbuz illi l-appellant jinqeda bil-proceduri f'dan l-istadju inoltrat sabiex jissostanzja dak li ma ghamilx quddiem it-Tribunal. Madankollu billi partijiet mill-aggravji mressqa f'dan l-appell huma ta' natura li jolqtu direttament applikazzjoni ta' ligi li tinfluixxi fuq l-operat prezenti u anki futuri tal-Awtorita u t-Tribunal, il-Qorti eccezzjonalment ser tikkonsidrahom biex jidher li ma jkunx sar zball ta' ligi a skapitu ta' cittadin, avolja wera negligenza u nuqqas ta' responsabilita biex jikkawtela l-interessi tieghu fl-istadju opportun.

L-ewwel aggravju

Hu minnu illi l-artikolu 37(3) tal-Kap. 356 jawtorizza lil Awtorita jew il-Kummissjoni, skond il-kaz fi stadju ta' rikonsiderazzjoni li jitolbu lil applikant jipprezenta pjanti emendati basta li jiggustifikaw it-talba taghhom u s-sustanza tal-applikazzjoni ma tinbidilx.

L-artikolu 2(1) tal-Avviz Legali 2011 ukoll jaghti d-dritt implicitu lil applikant fi stadju ta' rikonsiderazzjoni li jipprezenta pjanti godda minghajr ebda kondizzjoni jew restrizzjoni ulterjuri.

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L-argument tal-appellant hu illi fil-kaz tal-appellant ma jezistux ir-restrizzjonijiet imposti fuq l-Awtorita meta jitqies id-dicitura tal-provvedimenti in konsiderazzjoni.

Din il-Qorti tqis illi dak li qed isostni l-appellant hu illi wara li applikazzjoni ghal zvilupp tigi rifjutata u l-istess jipprezenta talba ghal rikonsiderazzjoni, din it-talba li hi self explanatory mill-istess dicitura cioe 'rikonsiderazzjoni' tista' tinbidel fis-sustanza taghha stess. In fatti l-appellant biddel it-talba minn extension of garages ghal 'sanction extension to supermarket and parking area'.

Il-kwistjoni legali, apparti l-fattispecie tal-kaz, hu jekk l-artikolu 37(3) fid-dicitura tieghu japplikax meta l-appellant jipprezenta pjanti godda. Il-Qorti tqis li fl-ewwel lok l-argument tal-appellant mhux applikabbli fil-fatt innfisu illi mhux biss kienet tinvolvi bdil ta' pjanti kif irid l-Avviz Legali 266/2001 izda addirittura bdil tal-applikazzjoni, ergo l-bdil tal-izvilupp mitlub li jigi approvat jew sanzjonat.

Fuq din il-bazi, l-argument tal-appellant jaqa'.

Pero l-Qorti tmur oltre. L-Avviz Legali 266 tal-2001 sar in virtu tal-poteri mghoddija bl-artikolu 37(4) u kwindi hi l-fehma tal-Qorti illi qari tal-Avvi Legali ma ghandux jittiehed fl-istratt izda l-ispirtu warajh mehud flimkien mal-artikolu tal-ligi principali li minnu hareg l-Avviz Legali.

Il-ligi riedet tistabilixxi level playing field bejn il-partijiet, principju regolatur tal-gustizzja naturali f'vertenza bejn tnejn u aktar partijiet. Hu ghalhekk illi l-ligi ma tippermettix lil Awtorita li f'talba ta' bdil ta' pjanti fi stadju ta' rikonsiderazzjoni cioe wara li tkun ittiehdet decizjoni u hi biss dik id-decizjoni in konformita mal-applikazzjoni li qed tigi kunsidrata, ma jintalabx tibdil a skapitu tal-applikant fit-termini tal-applikazzjoni ta' zvilupp. Bl-istess mod u manjiera ma ghandux l-applikant jabbuza mid-dritt tieghu ghal rikonsiderazzjoni ta' decizjoni tal-Awtorita billi flok jibqa' in linea mat-talba tieghu, ibiddel l-proposta b'mod li l-ligi tqis 'sostanzjali' u kwindi ma jibqax jigi kunsidrat dik li inizjalment kien l-izvilupp propost bl-applikazzjoni u li fuqha tkun ittiehdet decizjoni. Altrimenti jekk l-argument tal-appellant jithalla jirnexxi jfisser illi

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fl-istadju ta' rikonsiderazzjoni, l-appellant biex jiehdu dak li ma rnekkilux fl-ewwel stadju, ibiddel il-proposta, u kwindi l-applikazzjoni fis-sustanza, minghajr ma tkun ghaddiet l-gharbiel tal-konsiderazzjoni dettaljata inizjali tal-ipprocessar tal-applikazzjoni, u d-doppio ezame li hu permissibbli bir-rikonsiderazzjoni.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju ma fih ebda mertu. L-appellant jipprova jaghmel distinzjoni artifizjali bejn tibdil fis-sustanza u tibdil tal-applikazzjoni, tal-ahhar mhix kontemplata fl-artikolu 37(3). Il-Qorti tqis li jekk l-izvilupp jigi mibdul fis-sustanza tkun qed tinbidel l-applikazzjoni ghall-izvilupp. Il-kliem zvilupp u applikazzjoni huma interkonnessi u interdipendenti minn xulxin. Ovvjament f'dan l-aggravju l-appellant, kuntrarjament ghall-ewwel aggravju qed jaccetta implicitament l-applikabilita tal-parametri ta' tibdil ta' pjanti kif irid l-artikolu 37(3) tal-Kap. 356 kemm ghall-Awtorita u kemm ghall-applikant. Il-fatt, kif sottomess mill-appellant, illi l-izvilupp kien gia sehh meta sar dan it-tibdil fl-applikazzjoni ma hux ta' rinforz ghall-argument tal-appellant billi talba ghal sanzjoni tindika illegalita u l-fatt li l-izvilupp ikun gia sehh meta inbidlet l-applikazzjoni fi stadju ta' rikonsiderazzjoni ma jbidel xejn minn natura illegali tal-izvilupp liema zvilupp illegali ma kienx kopert bl-applikazzjoni ta' zvilupp originali li suppost kienet qed tigi rikonsiderata.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Hu minnu kif jallega l-appellant li PA circular 2/98 mhix applikabbli ghal kaz u illi l-kunsiderazzjoni tat-Tribunal f'dan l-aspett imur oltre l-kontestazzjoni principali pero kif gia inghad dan l-aggravju ma jistax jkollu mertu ghax fit-talba originali ma ntabx is-sanzjonar tal-illegalita kontenuta fil-proposta ta' zvilupp kemm jekk it-talba kienet tinkorpora zvilupp

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gdid ma sanzjonar ta' illegalita u kemm jekk tinkorpora biss l-izvilupp illegali. Fl-istadju ta' rikonsiderazzjoni talba ta' sanzjonar ma tistax issir meta t-talba originali ma kinitx tinkorporah u ghalhekk it-Tribunal bil-mod xott hafna kif indirizza l-kwistjoni, spjega x'ried ifisser.

Ghalhekk dan l-aggravju ma fihx mertu fit-termini tal-appell interpost.

Ir-raba aggravju

Dan l-aggravju mhux ser jigi kunsidrat ghax mhux permissibbli illi appellant iressaq provi li messhom tressqu quddiem it-Tribunal biex jiggustifika l-aggravju ta' diskriminazzjoni li din il-Qorti ser tqisha bhala wahda ta' cerimus paribus altrimenti lanqas jista jkun punt ta' ligi appellabbli. Fl-istadju ta' appell quddiem it-Tribunal, l-appellant ma ggustifikax l-aggravju b'ebda prova u din il-Qorti hi marbuta tirrevedi l-aggravju u d-decizjoni tat-Tribunal. It-Tribunal korrettament cahad l-aggravju ghax mhux sostanzjat nonostante l-apportunita tal-appellant li jiggustifika ruhu. Din il-Qorti ma ghandhiex tippermetti li dak li l-appellant bi htija tieghu ma ghamilx quddiem it-Tribunal jaghmlu quddiem din il-Qorti apparti li hu ferm censurabbli li mal-appell jitressqu tali provi li lanqas biss intalbu li jigu esebiti qabel fil-fatt gew esebiti.

Dan l-aggravju ghalhekk ma fih ebda mertu.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Joseph Portelli u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-28 ta' Novembru 2013. Bl-ispejjez kontra l-appellant.

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