



MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF

SILVIO CAMILLERI

ONOR. IMHALLEF

TONIO MALLIA

ONOR. IMHALLEF

JOSEPH AZZOPARDI

Seduta tat-30 ta' Lulju, 2014

Appell Civili Numru. 182/2014/1

Mediterranean Insurance Brokers (Malta) Limited

v.

Malta Information Technology Agency u

Allcare Insurance Brokers Limited

Il-Qorti:

Dan hu appell li tressaq fit-23 ta' April, 2014, mis-socjeta` Allcare Insurance Brokers Limited wara decizjoni datata 7 ta' April, 2014, moghtija mill-Bord ta' Revizjoni Dwar Kuntratti Pubblici (minn hawn 'l quddiem, imsejjah il-"Bord") fil-kaz 678 (TO73/2013).

Dan il-kaz huwa marbut ma' sejha ghall-offerti mahruqa mill-Malta Information Technology agency (il-MITA) intitolata "*Call for Expression of Interest for the Provision of Insurance Broking Services*" sabiex jigi pprovdut lilha "*professional services relating to the procurement and placement of insurance cover together with advice on the insurance requirements in conformity with appropriate risk management principles*". Is-socjeta` appellanti tefghet offerta flimkien ma' ohrajn u giet maghzula bhala l-*preferred bidder*. Is-socjeta` Mediterranean Insurance Brokers (Malta) Limited (I-MIB) hassitha aggravata minn din id-decizjoni u ressqet appell ghal quddiem il-Bord.

Il-kwistjoni li nqalghet hija din. Skont id-dokumenti tas-sejha, l-ghazla kellha ssir a bazi ta' erba' kriterji u l-kuntratt jinghata lil min igib l-ghola numri ta'

marki bhala total. Wiehed mill-kriterji kien li dak li jkun irid juri “*an established and demonstrable standing as an insurance broker including compliance with the relative legislation*”. F’zewg kriterji l-MIB gabet izjed marki mis-socjeta` appellanti u fi kriterju iehor il-marki taz-zewg kontendenti kienu l-istess; fuq dawn ma hemmx kwistjoni. Għall-kaz tal-kriterju fuq indikat, is-socjeta` appellanti inghatat il-massimu, hamsa u ghoxrin (25) punt, waqt li s-socjeta` MIB inghatat tmintax (18)-il punt, peress li nstab li s-socjeta` MIB kienet instabet hatja mill-Awtorita` għas-Servizzi Finanzjarji ta’ Malta (MFSA) ta’ ksur tal-obbligi legali bhala *insurance broker*, tant illi fil-11 ta’ April, 2012, l-istess awtorita` kienet imponiet il-massimu penali possibbli għal dak il-ksur (€50,582.34).

Fl-appell tagħha quddiem il-Bord, is-socjeta` MIB qalet li tnaqqis ta’ seba’ (7) punti ma kienx gust u kienet tekwivali għal “*a new penalty for the same infringement*”. Il-Bord, b’decizjoni tas-7 ta’ April, 2014, laqa’ dan l-appell tas-socjeta` MIB u ordna li l-offerta ta’ din is-socjeta` tigi “*integrated in the tendering process*” (sic!).

Dak il-Bord, wara li sema’ s-sottomissjonijiet tal-partijiet, ippronunzja s-segwenti decizjoni:

“Having noted the Appellant’s objection, in terms of the ‘Reasoned Letter of Objection’ date 29th January 2014 and also through Appellant’s verbal during

the hearing held on 4th March 2014, had objected to the decision taken by the pertinent Authority, in that:

- “a. Appellant Company was penalized with an ‘Administrative Fine’ by Malta Financial Services Authority. In this regard the Evaluation Board deducted 7 points when referring to ‘Established and Demonstrative standing as an Insurance Broker, including Compliance with the relative Legislation’. Appellant contends that the deduction of these points in assessing the standing of same was unfairly assessed by the Evaluation Board.
- “b. Appellant Company has been providing Brokerage Services for the past ten years to the same Contracting Authority without any issues having arisen.

“Having considered the Contracting Authority’s verbal submissions during the hearing held on 4th March 2014, in that:

- “a) The Contracting Authority noted that Appellant had been in default ” of an ‘Administrative’ misconduct by the Malta Financial Services Authority.
- “b) The Contracting Authority also noted that the Senior Official of the Appellant Company was found in failure to comply with the registration of the Brokers Register.

“Having reached the following conclusions:

- “1. This Board opines that the fact that the Appellant Company was found in default in its trading activities, due to an ‘Administrative Nature’ is not to be construed as being a default due to other serious reasons.

- “2. From submissions, it was vividly clear that the ‘Impeachment’ imposed by the Malta Financial Services Authority was purely of an ‘Administrative Nature’ and it was only temporary until the fine was settled.
- “3. From representations made by the Malta Financial Services Authority’s authorized representative, it was confirmed that the Appellant Company was listed as an Authorised Insurance Broker Company, fulfilling all obligation with local legislation.
- “4. The Official Legal and Financial Authority to regulate such Institutions is the ‘Malta Financial Services Authority’ and the fact that the Appellant Company is still listed as an authorized Insurance Broker Company, satisfies the norm that the Appellant Company is regularized and in conformity with the regulations of the Malta Financial Services Authority’s, the governing monitoring Body of such Institutions.

“In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- “i) The deposit paid by the Appellant Company be reimbursed.
- “ii) The Appellant’s Bid be integrated in the tendering process.”

Is-socjeta` Allcare Insurance Brokers Ltd. (imsejha “Allcare”) appellat minn din id-decizjoni ghal quddiem din il-Qorti u ressqet tliet aggravji, bit-tielet wiehed jolqot direttament il-meritu.

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Wara li rat ir-risposti li pprezentaw iz-zewg appellati u semghet lid-difensuri tal-partijiet, u wara li rat l-atti kollha tal-kawza u d-dokumenti esebiti, sejra issa tghaddi biex tqis u tiddeciedi dan l-appell.

Din il-Qorti sejra tibda biex tittratta l-ewwel zewg aggravi tas-socjeta` appellanti flimkien peress li dawn jirreferu ghall-forma tal-appell li kien tressaq mis-socjeta` MIB u d-decizjoni tal-Bord. Fuq il-materja, din il-Qorti tara li s-socjeta` appellanti ghandha ragun, pero`, ma tarax li d-difetti in kwistjoni fil-forma ghandhom iwasslu ghan-nullita` ta' dak li sar quddiem il-Bord. Kif qalet tajjeb is-socjeta` appellanti, is-socjeta` MIB qatt ma giet skwalifikata mill-process ta' evalwazzjoni, u allura t-talba tal-MIB "*to be readmitted*" fil-"*procurement process*" u d-decizjoni tal-Bord li ordna l-integrazzjoni taghha fit-"*tendering process*" huma zbaljati. Is-socjeta` MIB kienet u baqghet eligibbli li tippartecipa fil-process tat-*tendering*, izda saret l-evalwazzjoni ta' min tefa' l-offerti, is-socjeta` Allcare giet l-ewwel u s-socjeta` MIB giet it-tieni. Dan ma kienx kaz ta' skwalifikazzjoni jew ta' dikjarazzjoni li l-offerta ma kenitx konformi ma' dak rikjest. Dak li kellu jigi determinat, u hekk sar, hu min kellu total tal-aktar punti, u hi l-allokkazzjoni tal-punti li giet censurata mis-socjeta` MIB. Kif inghad, pero`, dan in-nuqqas ta' kjarezza da parti tas-socjeta` MIB u tal-Bord fil-formular tal-*letter of objection* u fid-decizjoni taghha rispettivament, ma ghandux iwassal ghat-thassir tal-proceduri kollha li saru quddiem il-Bord, darba li kien jirrizulta car x'kienet l-oggezzjoni u r-rimedju li kellu jinghata.

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Trattat issa t-tielet aggravju, din il-Qorti hi tal-fehma li ghandha taqbel mas-socjeta` appellanti.

Wiehed mill-kriterji li kellhom jissodisfaw l-applikanti kien “an established and demonstrable standing as an insurance broker including compliance with the relative legislation”. Dan il-kriterju jesigi li l-offerent juri li huwa insurance broker ta' statura stabilita` bi storja ta' konformita` mal-legislazzjoni relattiva. Jirrizulta, izda, li l-MIB kemm ilha stabbilita naqset serjament milli tikkonforma mal-legislazzjoni li tapplika ghalha. Dan il-fatt, b'applikazzjoni tal-kriterju msemmi, kellu jwassal ghal tnaqqis ta' punti fl-evalwazzjoni tal-offerta tal-MIB mhux bhala “a new penalty” izda bhala rizultat tal-apprezzament tal-valur relattiv rispettiv tal-offerti li saru fuq l-iskorta tal-kriterju pre-stabbilit imsemmi. Is-socjeta` MITA riedet socjeta` li l-istorja taghha kienet wahda ta' konformita` mal-ligi u s-socjeta` MIB ma kellhiex din l-istorja u bir-ragun, ghalhekk, tnaqqisulha l-punti.

Il-Bord haseb li ghax il-multa kienet wahda amministrattiva, allura kienet “purely of an administrative nature” li setghet tigi injorata. Il-fatt, pero`, li giet imposta penali amministrattiva ma jfissirx li n-nuqqas huwa ta' entita` zghira jew ta' xi haga amministrattiva. Il-penali giet deskritta amministrattiva ghax giet imposta minn awtorita` amministrattiva u mhux minn qorti. F'dan il-kaz, is-socjeta` MIB instabet responsabbli ta' ksur tal-Att dwar l-Intermedjarji fl-

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Assigurazzjoni (Kap. 487 tal-Ligijiet ta' Malta) u dan peress li ma zammitx, kif kellha obbligu li taghmel, flejjes li jkunu ghandha f'kapacita` fiducjarja separati mill-flejjes taghha. Dan in-nuqqas seta' kellu konsegwenzi serji ghall-klijenti tas-socjeta` f'kaz ta' reklam minn kredituri varji, u n-nuqqas ma kienx wiehed "purely" amministrattiv. Fil-fatt, l-MFSA imponiet l-oghla penali possibbli ghall-ksur ta' dik ir-regola ta' ordni pubbliku, u l-fatt li dik is-socjeta` injorat provvediment tal-ligi intiz ghall-protezzjoni tal-pubbliku mhux materja li kellha tigi injorata.

Il-fatt li s-socjeta` MIB hallset il-multa u issa hija in regola, tant li hija accettata bhala *an authorized insurance broker company*, ma jnehix il-fatt li recentement dik is-socjeta` aggixxiet bi ksur tal-ligi u allura ma kellhiex "standing as an insurance broker (compliant) with the relative legislation" skont kriterju pre-stabbiliti fid-dokumenti tas-sejha pubblika. La darba s-socjeta` MIB ma ssodisfatx wiehed mill-kriterji, kellu jkun hemm nuqqas fil-punti, u tnaqqis ta' seba' (7) punti minn massimu ta' hamsa u ghoxrin (25), huwa fic-cirkostanzi, gust u ragjonevoli.

Li s-socjeta` MIB illum hija in konformi mal-legislazzjoni relattiva mhux bizzzejjed biex jigi sodisfatt il-kriterju in kwistjoni. Il-kriterju jrid li s-socjeta` tkun konformi mal-ligi u "*established*", b'mod li jkollha "*a demonstrable standing*",

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jigifieri storja ta' konformita` legali b'mod li tista' titqies stabbilita (fis-sens pozittiv) fil-kamp ta' assikurazzjoni.

L-agir taghha fil-passat ghandu jittiehed in konsiderazzjoni biex jigi deciz jekk dik is-socjeta` ghandhiex titqies bhala stabbilita u ta' certa statura fis-suq tal-assikurazzjoni, u fil-kuntest tar-reat (fis-sens ta' "*breach*") li ghalih instabet responsabbli s-socjeta` MIB, id-decizjoni li jitnaqqsu seba' (7) punti kienet wahda proporzjonata, gusta u skont il-ligi.

Ta' min jirrileva wkoll li s-socjeta` MIB, meta tefghet l-offerta taghha, ma indikatx dan in-nuqqas fl-offerta taghha, u kien minn tfittxija li ghamlet il-MITA li dan il-fatt gie a konnoxxenza taghha. Il-MITA ghamlitha cara li riedet offerti minn kumpaniji ta' kondotta nadifa (tal-anqas ghal dak li jirrigwardja hwejjeg serji jew ta' certu importanza), u kellha kull dritt tnaqqas punti lil min kien kiser difru mal-legislazzjoni regolatorja.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell tas-socjeta` Allcare Insurance Brokers Ltd. billi tilqa' l-istess, thassar u tirrevoka d-decizjoni li ha l-Bord ta' Revizjoni Dwar Kuntratti Pubblici fis-7 ta' April, 2014, u minflok tichad l-oggezzjoni li s-socjeta` Mediterranean Insurance Brokers (Malta) Ltd. kienet ressqet quddiem dak il-Bord (bit-telf tad-depozitu relattiv), u tikkonferma

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d-decizjoni li kien ha l-kumitat ta' evalwazzjoni f'dan il-kaz u li giet notifikata lill-partijiet b'ittra tal-24 ta' Jannar, 2014.

L-ispejjez ta' dawn il-proceduri jithallsu mis-socjeta` Appellata Mediterranean Insurance Brokers (Malta) Limited.

< Sentenza Finali >

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