



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-27 ta' Novembru, 2014

Appell Civili Numru. 4/2014

Paul Zahra

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Paul Zahra tat-13 ta' Frar 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Jannar 2014 li cahad talba ghal sanzjonar ta' landscaping u pool ma' dar ezistenti PA 5619/09;

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. Il-Kummissjoni għall-Kontroll tal-Ambjent u l-Ippjanar, fid-19 t' Ottubru 2011, irrifjutat l-applikazzjoni għall-permess tal-izvilupp PA 5619/09 – 'L-Ghariex', Triq il-Bdiewa, Bidnija l/o Mosta: To sanction landscaping [and] pool to existing dwelling.

Il-hames ragunijiet għar-rifjut kienu s-segwent:

"1. The proposal cannot be considered further unless the following illegal development is first sanctioned or removed and this in terms of regulation 14 of Legal Notice 514 of 2010. The illegal development consists of demolition and reconstruction of farmhouse without permit.

2. The swimming pool and surrounding hard paving run counter to the Development Control Policy - Swimming Pools Outside Development Zone (January 2000), in particular to paragraphs (3) and (4) which specifies that the swimming pool area shall be limited to not more than 50 sq metres and hard paving limited to 50% of the swimming pool area. Accepting this development would prejudice the main objective of this Development Control Policy which aims at minimising the take-up of land ODZ.

3. The proposal runs counter to the Development Control Policy - Swimming Pools Outside Development Zone (January 2000), in particular to Section 5 paragraph (1). Accepting this development would prejudice the main objective of this Development Control Policy which aims at containing the spatial spread of development, minimising the take-up of land, and limiting the extent of visual intrusion Outside Development Zone.

4. Proposal is not essential to agriculture and is negatively impacting on the agricultural land and on the rural landscape. Proposal therefore conflicts with

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Structure Plan policy AHF4, AHF5 and Central Malta Local Plan policy CG24 - Protection of Areas of Agricultural Value.

5. Structure Plan policy RCO 4 provides that, particularly outside development zone, areas of scenic value will be protected and enhanced. The area in which the site is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan policy RCO 4."

B. In-nota tal-Perit Dott. Edwin Mintoff għall-Appellant, ipprezentata fl-10 ta' Novembru 2011, senjatament il-punti segwenti:

"[...] the issue of illegal development is being addressed in another appeal and it would be illogical to 'remove the said illegal development' prior to ascertaining the outcome of the appeal.

Moreover the appeals board should note that the approval of swimming pools is permitted in areas outside the limits of development and consequently application which bears reference 05619/09 should be given its due consideration.

Contrary to what is being alleged the development which we are seeking to sanction will not create an adverse impact on the skyline as alleged. Indeed with the pool situated well below street level, this is hardly noticed from any point."

C. In-nota risponsiva ta' Mario Scicluna għall-Awtorita', ipprezentata fl-10 ta' Jannar 2012, inter alia l-punti segwenti:

"11. Site under appeal is covered with ECF 13/07, regarding the swimming pool and the landscaping works and ECF 972/96 with regards to the dwelling without permit. The application under review relates only to ECF 13/07 and therefore it does not sanction all the illegalities on site.

12. Since swimming pools and landscaping works outside the development zone are considered as ancillary facilities to a residence, once the residence is considered as legally built. In this case the residence has been built without permit so much so that an enforcement notice has been issued with regards to this issue.

13. In his appeal, the appellant claims that the sanctioning of the farmhouse is being addressed in another appeal. It is to be noted that the application which the appellant is referring to PA 172/06 which was submitted for the sanctioning of the villa and landscaping works. The Environment and Planning Review Tribunal may wish to note that this application was refused at first and reconsideration stages; application was also refused at appeals stage (refer to decision given on 15 May 2009 in PAB 78/08 ISB).

14. Therefore, the residence on site is not covered by a proper permit and hence proposal cannot be considered further unless the illegal development is first sanctioned or removed and this in terms of regulation 14 of Legal Notice 514 of 2010. Thus, the proposed sanctioning in this application is unacceptable in principle.

15. The swimming pool proposed for sanctioning has an approximate area of 70 square metres and the hard landscaping surrounding the swimming pool has an approximate area of 380 square metres. The permitted maximum area for swimming pools is 50 square metres as specified in paragraph (4) of Section 5 of Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone). Paragraph (3) of this same policy requires that hard surfacing around the swimming pool is limited to 50% of the swimming pool area. Thus the swimming pool and hard surfacing are largely exceeding the areas permitted for swimming pools and paving outside development zone.

16. Further to the paved surface surrounding the swimming pool area, the proposal includes the sanctioning of additional hard paving consisting of concrete passage ways which are used as a means of vehicular access and paving adjacent to the existing dwelling unit. The extensive landscaping works have resulted in the formalization of a site outside the development zone at the expense of agricultural land.

17. Considering these works, the proposal is contributing to urban sprawl within the countryside resulting in a negative visual impact on site and surrounding rural area. In addition, the excessive use of cladded boundary walls within the whole site creates a large amount of subdivisions to this land, which together with the passageways, accentuate the formalization of the site.

18. Moreover, none of these boundary walls appear to have been constructed in the traditional methods as stipulated by LN 160/97, and hence these are also considered unacceptable in the rural context.

19. Proposal therefore runs counter to Structure Plan policy RCO 4 which aim at the protection of the scenic value of rural areas and Structure Plan policies AHF4 and AHF5 which seek to protect agricultural land from inadequate development. Proposal also runs counter to Central Malta Local Plan policy CG24 - Protection of Areas of Agricultural Value.

20. In this regard, the swimming pool and the adjacent hard surfacing run counter to paragraph (1) Section 5 of Circular PA 1/00 (Development Control Policy - Swimming Pools Outside Development Zone) which requires that development does not lead to the loss of fertile good quality agricultural land.

Conclusions and Reservations:

21. In view of what has been stated above, applicant should rectify this situation, by submitting a formal application for the proper sanctioning of all illegal development on site.

22. It is to be noted that fresh drawings or a change in proposal description cannot be accepted at appeals stage as the substance of the matter as presented to the Malta Environment and Planning Authority will definitively change and this is not permitted according to the proviso of Schedule 2(2) of Act X of 2010 (Environment and Development Planning Act)."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba sabiex f' sit konsistenti minn residenza li tinsab barra z-zona tal-izvilupp (ODZ) tal-Bidnija fil-limiti tal-Mosta, jigi ssanat xoghol pajsaggistiku (landscaping) kif ukoll il-kostruzzjoni ta' pixxina (swimming pool).

Precedentement il-font intlaqat minn zewg avvizi biex tieqaf u ta' twettieq separate (ECF 972/96 u ECF 13/07) li jaqraw kif gej:

"Ghamilt zvilupp minghajr permess li jikonsisti fi twaqqiegh ta' kmamar antiki u bini ta' strutura gdida."

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Kif ukoll:

“Ghandek zvilupp minghajr permess u dan kif indikat fl-applikazzjoni sanatorja tieghek stess PA 172/06 li qed tkun ipprocessata u li jikkonsisti minn bini ta' hitan inkluz boundary wall, iffurmar ta' passaggi bil-konkos u xoghol ta' landscaping iehor madwar l-art tal-villa (ukoll bla permess) li hija diga kolpita b' Avviz tat- Twettieq ECF 972/96 (diga servut) kif ukoll swimming pool u kmamar relatati ma l-uzu ta' l-istess pool u gnien.”

Ir-raguni ghar-rifjut jistghu jigu riassunti kif gej:

- Hemm zvilupp illegali fuq il-font, li mhux qed jigi ttentat is-sanar tieghu:

Ir-residenza li prezentement hemm fuq is-sit inbriet minflokkmamar antiki li twaqqghu minghajr permess. Ghalhekk, peress li llum qed jigi ttentat biss is-sanar tax-xoghlijiet pajsaggistici u tal-pixxina (izda mhux tar-rikostruzzjoni tar-residenza) japplika r-Regolament 14 tal-Avviz legali 514 tal-2010.

- Il-qisien tal-pixxina u l-firxa tal-pavimentar li jdur maghha huwa eccessiv:

Il-firxa tal-izvilupp tal-iswimming pool u l-hard paving ta' madwara jeccedu rispettivament il-hamsin metri kwadru u nofs id-daqs tal-pixxina, kif stipulat permezz tal-paragrafi 3 u 4 tad-Development Control Policy and Design Guidance, Swimming Pools outside Development Zone.

- L-izvilupp mhux essenzjali ghall-agrikoltura:

Anzi, l-izvilupp in ezami qed jgharraq kemm art agrikola tajba kif ukoll l-aspett rurali tal-post. It-talba hi ghalhekk in kontravvenzjoni tal-policies AHF 4 u AHF 5 tal-Pjan ta' Struttura, u l-policy CG 24 tal-Pjan Lokali.

L-aggravji tal-Appellant jistrieu fuq il-premessa li l-kwistjoni tat-twaqqiegh u r-rikostruzzjoni mhux awtorizzata tal-kmamar antiki jew farmhouse, hi l-mertu ta' appell iehor u ghalhekk l-Awtorita' ma kelliex tqajjem din l-eccezzjoni – sakemm ma jigix deciz dak l-appell. Madankollu, f' ir-rigward tal-pixxina, l-Appellant jiddikjara li ma hemm xejn fil-policies li jeskludu li dawn jinbnew fl-ODZ u li din tieghu inbriet taht il-livell u allura hi mohbija tajjeb. Minn dan ghandu jsegwi li mhux minnu li qed tgharraq l-ambjent cirkostanti.

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L-Awtorita' zammet ferm l-oggezzjoni taghha u rilevat li peress li swimming pools huma ancillari ghall-residenzi, wahda ma teskludix lill-ohra; u ghalhekk ma tistax tigi ssanata l-pixxina qabel ma tigi rizolta il-kwistjoni tal-illegaliota' tar-residenza per se. Fil-fatt tirrileva li kienet gja' giet intavolata applikazzjoni sanatorja ghar-residenza (PA 172/06) u li din giet rifjutata u r-rifjut ikkonfermat fl-appell PAB 78/08.

Minn dan isegwi li allura peress li illum gie kkonfermat li r-residenza hi illegali (ghax l-appell citat mill-Appellant illum gie kkonfermat u mar in gjudikat), fil-fehma kkunsidrata ta' dan it-Tribunal, l-Awtorita' imxiet tajjeb meta qabel xejn, citat l-Artikolu 14 tal-Avviz Legali 514 tal-2010 bhala l-ewwel raguni ghar-rifjut odjern.

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, ghar-rigward tal-qisien tal-pixxina u tal-landscaping ta' maghha, jigi rilevat li l-iswimming pool ghandha firxa ta' madwar 70 metru kwadru, cjoe' ghoxrin metru aktar minn kif indikat fil-policies sucitati. Oltre minn hekk, il-pavimentar li suppost ma jeccedix il-hamsin fil-mijja tal-firxa tal-pixxina (cjoe' sa massimu ta' 25 metri kwadri), jammonta ghal 380 metri kwadri. Dan kollu qed jinghad a parte l-fatt li kif jidher mir-ritratti sottomessi fl-ahhar nota tal-Awtorita' (tal-10 ta' Jannar 2012), l-area tal-iswimming pool giet formalizzata f' gnien ornamentali, b' bixra urbanizzanti li tistona sew mal-kuntest rurali fejn jinsab is-sit de quo.

Fl-ahharnett, ma jistax jigi injorat il-fatt li l-appell 78/08 (minn PA 172/06) gie deciz fil-15 ta' Mejju 2009, cjoe' kwazi sentejn u nofs qabel ma gie ntavolat l-appell odjern. Madankollu anke fis-sottomissjonijiet tieghu, l-Appellant ittenta jisgwida lill dan it-Tribunal billi jaghti x' jifhem li dak l-appell kien ghadu pendenti. Dan hu agir oggezzjonabbli ferm u jirrazzenta l-imposizzjoni tas-sanzjoni ai termini tal-Artikolu 14 tat-tieni skeda ghall-Artikolu 41 tal-Att X ta' l-2010 (Kap. 504).

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghall-PA 5619/09 kif mahrug mill-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fid-19 t' Ottubru 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segweni:

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1. Fid-decizjoni teighu t-Tribunal injora li s-sit jinsab fir-rahall tal-Bidnija bi frontage fuq zewg toroq u applika ghalih ir-regoli ta' ODZ qisu jinsab qalb ir-raba meta kellu jaghti importanza lil commitment tas-sit fiz-zona fejn qiegħed imdawwar bil-bini fil-qalba tar-rahall;
2. It-Tribunal zbalja meta caħad l-appell ukoll għaliex kien hemm illegalitajiet mhux imsemmija fl-applikazzjoni ta' sanzjonar meta seta' japprova l-applikazzjoni bil-kundizzjonijiet skond il-MEPA circular 2/12 fejn jista' jinhareg permess bil-kundizzjoni ta' tneħhija ta' illegalita u dan ukoll skond Avviz Legali 116/2012 li emenda Avviz Legali 514/2010.

L-ewwel aggravju

Dan l-aggravju hu infondat fid-dritt u fil-fatt. Jibda biex jingħad illi l-appellant qed jistieden lil Qorti tissindaka gudikat tat-Tribunal ibbazat fuq il-ligi cioe il-permissibilita ta' bini ta' swimming pool u paving f'zona barra z-zona ta' zvilupp. L-appellant mhux jattakka l-policies li taħthom giet riffjutata l-applikazzjoni li in principju l-appellant jidher li kien in vjolazzjoni tagħhom izda qed jistieden lil Qorti sabiex tikkunsidra li z-zona għalkemm desinjata bhala ODZ hi zona fejn ġia hemm bini li għalhekk għandu jintuza kejl differenti minn dak li jistgħu jgħidu l-policies jew ic-cirkulari rilevanti. Dan l-argument fil-fehma tal-Qorti hu irrelevanti f'dan il-kaz għaliex il-policies ma jeskludux il-bini ta' swimming pool u paving izda skond circular PA 1/00 Development Control Policy – Swimming Pools Outside Development Zones paragrafi 3 u 4 partikorment dawn għandhom isiru sa certu kejl u qies f'zoni dezinjati bhala ODZ fejn jidher car illi dan ma sarx mill-applikant.

In oltre l-Qorti tqis illi l-kwistjoni tal-commitment lanqas setgħet titqajjem bhala aggravju għaliex is-swimming pool li hi ancillari għal binja li hemm magħha u li tagħha qed tintalab sanzjoni, qed tintrabat ma' binja li bhala stat legali hi wahda illegali u tiffirma mertu ta' appell li hu res judicata (ara PA 172/06 PA 78/08 deciz fil-15 ta' Mejju 2009). Kwindi dak li qed jipprova jissanzjona l-appellant hu swimming pool u paving mhux magħqud ma' binja legali u kwindi zgur ma jistax jinvoka ebda commitment ma binjiet ohra fl-akkwata anki kieku kien rilevanti l-aggravju, li mħuwiex.

Għalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju wkoll ma fihx mertu peress illi l-artikolu 14(5) tal-Avviz Legali 116/2012 ma jimponix fuq it-Tribunal li johrog il-permess soggett ghat-tnehhija ta' illegalita mhux imsemmija fl-applikazzjoni izda hi fakolta diskrezzjonali moghtija lit-Tribunal biex jiffaccilita l-hrug ta' permess fejn jidhirlu li hemm illegalitajiet mhux imsemmija li jistghu jitnehhew bla ma jkunu ta' xkiel li jinhareg permess.

Il-Qorti tqis illi t-Tribunal ma kienx car bizzejjed meta qal li l-Awtorita kellha ragun li tikkwota l-artikolu 14 tal-Avviz Legali 514/2010 bhala raguni ta' rifjut ghax jezistu illegalitajiet fuq is-sit. Ma jfissirx li ma kienx korrett pero ghaliex kif inghad il-principju taht l-artikolu 14(1) jibqa' l-istess cioe li ebda sanzjonar ma jista' jigi permess jekk ma jinkludix l-illegalita kollha fuq is-sit. Pero l-Avviz Legali tal-2012 ikkonferixxa diskrezzjoni fuq it-Tribunal li japprova l-applikazzjoni bil-kundizzjoni li illegalita mhix inkluzo tigi mnehhija entro terminu u jekk dan ma jsirx l-applikazzjoni tkun awtomatikament rifjutata. F'dan il-kaz it-Tribunal ma uzax id-diskrezzjoni ghax l-appellant kien qed jinjora volutamente enforcement notice fuq il-bini innifsu meta dan kien res judicata u xorta talab sanzjoni ta' pool u paving li huma struttura ancillari ghal bini illegali.

Kwindi l-aggravju tal-appellant qed jigi michud.

Decide

Ghalhekk il-Qorti qed tichad l-appell ta' Paul Zahra u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Jannar 2014, bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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