



QORTI TAL-APPELL

(KOMPETENZA INFERJURI)

(TRIBUNAL TA' REVIZJONI TAL-AMBJENT U L-IPPJANAR)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum L-Erbgha, 17 ta' Frar, 2016

Numru 4

Appell Nru. 51/2015

Andrew Muscat

vs

**L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u
l-kjamat in kawza Antonia Said**

Il-Qorti,

Rat ir-rikors tal-appell ta' Andrew Muscat, terz interessat, tas-26 ta' Ottubru 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Ottubru 2015 li biha gie konfermat il-hrug tal-permess PA 1934/14 'to extend pavement under the area covered with the concession for placing of tables';

Rat ir-risposti tal-Awtorita u l-applikant li opponew ghall-appell u ssottomettew 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:

Ra r-ragunijiet ta' l-appell hekk kif gej:

"I write to you on behalf of Andrew Muscat of "April Love", Trejjet ix-Xaghri ta' Barbra, N adur, Ghawdex. My client is a registered objector. He would like to appeal from the permit issued on the 1st September 2014.

My client would like to appeal on the following grounds:-

(1) Procedurally the application should be dismissed. By a decision granted by the ombudsman in case number EN 0011; it was concluded that the said placing of tables is illegal and violates planning laws. Likewise it has been concluded that the canopy overlying the said tables is also in breach of planning laws. By law unless these irregularities are sanctioned this application should be dismissed.

(2) Without prejudice to the above this application in so far as it sought to narrow the existing square, should have been done by a PC application not by a PA application.

(3) The proposed development would completely bar the access to the shop pertaining to the objector. The permit states that no tables should be placed in front of the shop. The permit should have also limited that pavement proposed. Appellant is the owner of a licensed shop in front of the said pavement.. If a pavement is to be constructed all access to objector's shop would be barred.

(4) There is no legitimate scope for the widening of the existing pavement except that the applicant is seeking to create problems for the appellant who would be negatively by the proposed pavement widening, since as explained above his shop would be totally inaccessible to vehicles.

(5) It is noted that the authorisation from transport Malta was not obtained prior to the validation process.

For these reasons your board is humbly requested to accept this appeal and revoke the said permit.”;

Ra r-risposta tal-Awtorita' prezentata fis-27 ta' Novembru 2014 u li taqra hekk kif gej:

“3.0 COMMENTS ON APPELLANT’S ARGUMENTS

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

3.1.1 In this request for appeal, appellant is stating that this request for development is justified in view that the proposed development satisfies all the requisites of the relevant policies.

3.1.2 However, after noting all of appellant's arguments as presented in this request for appeal the Authority disagrees with these justifications and states that the development as proposed breach the relevant policies as will be discussed below.

3.1.3 The appellant begins by making reference to Ombudsman Case Number EN 0011; where appellant concluded that the said placing of tables and chairs is illegal and violates planning laws. Appellant also concluded that the canopy overlying the said tables and chairs is also in breach of planning laws. The Tribunal is notified that permits dated 1989 and 2013, were issued by the Lands Department in terms of placing of tables and chairs (as per document 28a). This tables and chairs permit was subsequently transferred to applicant namely Antonia Said on the 13th of May 2013 (Red 28 Doc 'B'). With regards to the canopy overlying the said tables and chairs, the Tribunal may wish to note that a DNO 1136/12 was issued for clearance to construct a temporary tented structure.

3.1.4 The appellant claims that this application is seeking to narrow the existing square, and hence should have applied for a Planning Control application and not a Planning Application application. The Authority does not agree with these comments since PC applications are only required for changes in the alignment of the building line and for changes in front garden as per Legal Notice 71/07.

3.1.5 The Appellant is also alleging that the proposed development would completely bar the access to the shop pertaining to the objector and that the permit states that no tables should be placed in front of the shop. The Authority notes that this comment is misleading and irrelevant as Condition 4 as issued with this permit makes it clear that "No tables and chairs are to be placed in front of the shop in the corner". Furthermore the Authority cannot understand the basis of this claim since the pavement extension in front of the said shop would not bar all access to his shop, this statement is neither legally nor factual.

3.1.6 The appellant stated that there is no legitimate scope for the widening of the existing pavement except that the applicant is seeking to create problems for the appellant who would be negatively by the proposed pavement widening as his shop would be totally not accessible to vehicles. The Authority notes that both Transport Malta and the Local Council support this development as they both found no objection to the proposed extension of pavement. With regards to access of vehicles, the Authority states that no private owner of any building affronting a pavement has a right to access vehicles, in front of his property. The Authority notes that authorization has been granted by Transport Malta as per letter dated 10th March 2014, to which reference is made under condition 2 of the permit issued.

In view of the above arguments the Authority states that the decision as taken by the EPC was taken in conformity with the relative policies and hence, respectfully requests the Environment and Planning Review Tribunal to confirm the decision as issued by the EPC, whereby an approval for development permission was issued. The Authority reserves the right to forward further submissions during the appeals process as necessary.”;

Ra r-risposta tal-Avukat Dottor Errol Cutajar ghall-applikanta prezentata fit-30 t'Ottuburu 2014 li taqra hekk kif gej:

“We write to you on behalf of Antonia Said of 'St Francis', Our lady of Lourdes Street, Nadur Gozo, in favour of whom the above permit was granted on the 1st September 2014, from which a third party appeal has been lodged by Andrew Muscat of 'April Love', Trejjet ix-Xaghri ta' Barbra, Nadur Gozo.

Our client, is hereby, stating her reply, to the above indicated appeal as follows;

1. With respect to paragraph (1) of the appeal, it is being pointed out that, our client's mother has been granted a concession, for the placing of tables and chairs on the area in the street, by the Commissioner of Lands since December 1989, (Permit No 252/89) (L679/89) whereby at that time, the concession in question was also notified to P APB, and other entities existing at that time, according to the procedures established at that time, and this prior to the creation of the Malta Environment and Planning Authority in 1992. This means that the granting of this permit was completely regular, and as such, the Ombudsman's decision was based on wrong impressions. (Doc 'A' Attached). The tables and chairs concession, was subsequently transferred unto our client, the applicant Antonia Said, on the 13th May 2013. (Doc 'B' Attached).
2. With reference to paragraph (2) of the appeal, with all due respect, PC applications are only required for changes in the alignment of the building line and the Front Garden line, and not pavements.
3. With respect to paragraph (3) of the appeal, the access to the shop pertaining to the appellant, even though this is purely irrelevant, MEPA made it a point in its decision, (Condition No 4), that no tables and chairs are to be placed in front of the shop in the corner. The appellant, notwithstanding this, is still objecting that the extension of the pavement in front of his shop, would still bar all access to his shop. Our client, does not understand the basis of this claim, since it does not make any sense whatsoever, neither legally nor factually.
4. With respect to paragraph (4) of the appeal, no private owner of any building affronting a pavement has a right to access by vehicles, in front of his property.
5. With respect to paragraph (5) of the appeal, is not true, for authorisation has been granted by Transport Malta as per letter dated 10th March 2014, to which reference is made under condition no 2 of the permit issued.

So, on these basis, there are no valid grounds for the revocation or variation of any of the conditions of this permit, and as such, the appeal should be refused.”;

Ra s-sottomissjoni ulterjuri tal-partijiet prezentati fil-process ta' dan l-appell;

Ra l-verbal tal-access mizmum fuq is-sit minn dan it-Tribunal fit-30 ta' Lulju 2015;

Ra l-PA file 1934/14 u d-DNO file 1136/12;

Ra l-atti kollha ta' dan l-appell.

Ikkunsidra ulterjorment:

Illi l-aggravji mressqa f'dan l-appell huma s-segwenti:

1. Illi din l-applikazzjoni mertu ta' dan l-appella kellha tigi rifjutata ghal-fatt li t-tqeghid tal-imwejjed u siggijiet mhumiex koperti b'permess tal-izvilupp u ghaldaqstant huma illegali;
2. Illi l-izvilupp approvat, ossia t-tkabbir tal-bankina, qed inaqqs mil-wesa' tal-pjazza u ghaldaqstant kellu jkun suggett ghall-PC application u mhux PA application;
3. Illi t-tkabbir tal-bankina qed jigi eziz ghall-quddiem il-hanut proprejta tal-appellant u ghaldaqstant ser jostakola l-access ghall-istess hanut;
4. Ma ebda skop ghal dan it-wessiegħ tal-bankina ghajr li ser jinholoq diffikulta t'access u parkegg ta' vettura tal-appellant quddiem l-hanut proprejta tieghu;
5. Ma kienx hemm kunsens ta' Transport Malta qabel ma giet validata l-applikazzjoni oderjna

L-ewwel aggravju:

Illi l-ewwel aggravju, dwar l-allegat illegalita tal-imwejjed u siggijiet, l-appellant qed jagħmel referenza għar-rapport tal-Kummissarju għall-Ambjent u l-ippjanar fl-Officju tal-Ombudsman datat 21 ta' Mejju 2014 fuq ilment dwar permess ta' tinda fuq imwejjed u siggijiet fis-sit mertu ta' dan l-appell skont id-DNO 1136/12 mahrug fit-22 ta' Jannar 2013.

Illi f'dan ir-rapport, il-Kummissarju kkonkluda li l-imwejjed u siggijiet ma kienux koperti bil-permess tal-MEPA skont Klassi 14, fl-Avvizz Legali 115 tal-2007 (DNO).

Illi l-istess ilment li kien tressaq quddiem il-Kummissjaru għall-Ambjent u l-ippjanar li l-imwejjed u siggijiet mhumiex koperti b'permess tal-izvilupp u qed jerga jigi mressaq quddiem dan it-Tribunal f'dan l-appell.

Illi dan it-Tribunal wara li ezamina kemm il-file tad-DNO 1136/12, u l-applikazzjoni mertu ta' dan l-appell, ossia, PA 1934/14, seta' jinnota li fl-applikazzjoni tal-ahhar gie prezentat b'mod car il-prova li l-imwejjed u siggijiet kienu fil-fatt gja koperti b'koncessjoni mil-Land Department b'permess tas-sena 1989 skont id-dokument a fol 28A fl-inkartament tal-PA 1934/14, liema dokument rega' gie prezentat bhala prova mill-applikant fil-process ta' dan l-appell. Dan id-dokument ma kienx gie prezentat fl-inkartament tad-DNO 1136/12 li kien suggett ghar-rapport tal-Kummissarju.

Certament gjaladarba l-applikant kien gja qed jaghmel uzu minn koncessjoni migjuba skont il-proceduri ta' permess jew licenzji adottati qabel ma gie fis-sehh l-Att dwar l-ippjanar tas-sena 1992 u li din ghada valida sallum, ghaldaqstant ma kienx jehtieg permessi ulterjuri mill-Awtorita'. F'dan irrigward bl-ebda mod ma dan it-Tribunal jista' jqies li t-tqeghied ta' dawn l-imwejjed u siggijiet fuq is-sit inezami huma illegali. Ghaldaqstant dan l-aggravju qed jigi michud.

It-Tieni aggravju:

Dan l-aggravju ukoll ma fihx mertu, hekk kif f'dan il-kaz il-proposta ma tinkludi ebda tibdil fil-linja tat-triq jew tal-bini (building alignment) li ghaldaqstant huwa suggett ghall-applikazzjoni tal-kontroll tal-izvilupp (PC application) skont l-Artikolu 59(2) 9 (4) tal-Kap 504. F'dan il-kaz twessiegh jew tibdil fil-bankina li taghmel parti minn pjazza huma suggett ghal-konsiderazzjonijiet dwar kontroll tal-izvilupp bhal parkegg, disinn u mpatti fuq id-dehra tal-pjazza fejn jinsab is-sit, imma mhux il-kaz li hemm xi tibdil fl-konfigurazzjoni tal-pjazza jew il-bini li jiformaw l-istess pjazza kif indikat fil-Pjan Lokali.

It-Tielet u Raba' aggravji:

Dan it-Tribunal huwa tal-fehma li dawn l-aggravji mhux relatati ma konsiderazzjonijiet ta' ippjanar. L-ilment principali huwa marbut mal-fatt li skont l-appellant it-twessiegh tal-bankina ser ifixkel lill-appellant milli jkun jista' jipparkja l-vettura, partikolarment meta jkun hemm bzonn ta' hatt u garr ta' merkanzija. F'dan il-kaz, il-kwisjtjoni ta' parkegg hija suggett ghar-regolamenti tat-traffiku u mhux konsidersazzjoni ta' ppjanar.

Minn naha l-ohra hekk kif seta' jikkonstata waqt access mizmum fuq is-sit, dan it-Tribunal seta' jinnota li t-twessiegh tal-bankina mhux qed jostakola jew jimblokka bl-ebda mod l-access quddiem il-hanut tal-appellant. Dan it-Tribunal seta' jinnota ukoll li t-twessiegh tal-bankina kien necessarju sabiehx jidderiegi ahjar it-traffiku li mit-triq biswit il-hanut tal-appellant tisbokka ghal fuq il-pjazza fejn hemm l-imwejjed u siggijiet tal-applikant.

Il-hames aggravju:

Mill-inkartament tal-PA 1934/14 huwa evidenti li l-applikant kien prezenta l-kunsens ta' Transport Malta mal-applikazzjoni tal-izvilupp skont id-dokument

a fol 1E, ghaldaqstant dan l-aggravju ma fih ebda mertu u dan it-Tribunal qed jastjeni milli jiehu konjizzjoni ulterjuri ta' dan l-istess aggravju.

Ghal dawn il-mottivi, dan it-Tribunal qed jichad l-appell, u jikkonferma l-permess PA 1934/14.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. L-applikazzjoni hi nulla ghax kien jehtieg PC application ghal bdil fl-alignment tat-triq kif inhu dan il-kaz billi qed tigi estiza l-bankina ghal got-triq ezistenti;
2. Skont rapport tal-Ombudsman l-imwejjed u tinda gia ezistenti kienu hemm illegalment u ghalhekk l-Awtorita kellha tirrifjuta li tikkonsidra l-applikazzjoni qabel tigi sanzjonata l-illegalita. Il-permess li rrefera ghalih it-Tribunal tal-1989 kien ikopri biss tlett imwejjed u siggijiet. Sussegwentement il-permess bil-metragg ta' hdax-il metru nghata b'encroachment tas-16 ta' Mejju 2013. Ghalhekk il-permess qatt ma messu nhareg ghax kien illegali;
3. Il-bankina giet estiza sa quddiem il-hanut tal-appellant b'mod li hi ta' ostakolu serju ghal xogholijiet ta' hatt u tghabija mill-hanut.

It-tielet aggravju

Dan l-aggravju qed jigi michud ghax ma jitrattax punt ta' ligi izda punt ta' fatt u wiehed ta' ippanar. In oltre dan l-aggravju gie trattat u deciz mill-istess Tribunal b'mod li din il-Qorti ma tqis li l-appellant ma nghatax id-debita konsiderazzjoni ghall-ilmient tieghu. Il-fatt li ma jaqbilx mal-konkluzzjoni tat-Tribunal ma jfissirx li hemm xi nuqqas mertu ta' aggravju ta' appell.

L-ewwel aggravju

Dan l-aggravju sar quddiem it-Tribunal u gie trattat u deciz. L-appellant isostni illi hemm lok ghal PC application fl-estensjoni ta' bankina minn kif qeghda bhalissa. Hu jsostni li l-Kap. 504 jaghmel riferenza ghal changes in alignment ta' roads u buildings li huma soggetti ghal PC application. Tibdil ghal estensjoni ta' bankina jfisser tidjieg fit-triq u kwindi tibdil fl-allinjament tat-triq. It-Tribunal fid-decizjoni tieghu qal illi t-

twessigh ta' bankina li taghmel parti minn pjazza tista' timpingi fuq kwistjonijiet ta' parkegg, ta' disinn jew dehra izda ma hemm ebda tibdil fil-konfigurazzjoni tal-pjazza jew l-bini fil-pjazza kif indikat fil-pjan lokali u ghalhekk ma hemm ebda tibdil ta' linja tat-triq li jinnessita PC application u mhux applikazzjoni normali ta' zvilupp.

Il-Qorti tirrelewa illi l-artikolu 59(4) tal-Kap. 504 jirrikjedi planning control application meta jkun hemm tibdil fil-linja tat-triq. F'dan il-kaz it-Tribunal qal illi t-twessiegh tal-bankina ma hux ekwiparabbli ma bdil fil-linji tat-triq ghax it-triq fil-pjan lokali baqghet li kienet ghalkemm it-twessiegh tal-bankina semmai kien jinnessita konsiderazzjonijiet ta' ippjanar ta' xort ohra izda ma tammontax ghal bdil fil-linja. Kwindi ma kienx hemm bzonn ta' PC application izda applikazzjoni normali. Din il-Qorti tqis li tali konsiderazzjoni hi wahda ta' interpretazzjoni tal-ligi mill-lenti tal-ippjanar u mhux kwistjoni ta' applikazzjoni ta' ligi li giet applikata hazin mit-Tribunal. La darba l-interpretazzjoni tat-Tribunal ghal kliem tal-ligi hi wahda ragonevoli u ma tmurx kontra l-kliem espress tal-ligi u tista' tigi meqjusa bhala plawsibbli tenut kont ta' dak li tghid il-ligi, din il-Qorti ma tintromettix ruhha billi taghti hi interpretazzjoni differenti minn dik tat-Tribunal li fi kwistjonijiet purament teknika u ta' ippjanar hi aktar idonea biex tintinterpreta kwistjonijiet simili.

Ghalhekk l-aggravju qed jigi michud.

It-tieni aggravju

Ir-rapport tal-Ombudsman li l-appellant jistrieħ fuqu hu prova izda ma jikkostitwix decizjoni li trid toqghod fuqu t-Tribunal. Fil-fatt l-appellant isostni illi s-siggijiet u mwejjed huma illegali kif inhi l-canopy fuqhom. Ghalhekk kien jehtieg sanzjonar qabel issir applikazzjoni ghal twessiegh tal-bankina biex jigu akkomodati l-imwejjed u siggijiet. It-Tribunal innota li kien ġia jezisti koncessjoni mil-Lands Department tal-1989 għall-imwejjed u siggijiet. It-Tribunal ikkonkluda li ladarba din il-koncessjoni kienet ezistenti qabel l-1992 u ma gietx irtirata, ifisser li kienet għadha valida u ma kien jehtieg ebda permess għid. In kwantu għal canopy jidher li din hi koperta b'DNO permit 1136/12. L-appellant isostni illi l-encroachment mogħti fl-1989 kien ikopri biss tlett imwejjed u mhux l-imwejjed kollha koperti bl-encroachment tas-16 ta' Meju 2013

li kien ikopri metragg ta' hdax-il metru. Kwindi l-permess ma setax jinghata ghal dak li l-encroachment ma kienx ikopri. Hu car fil-fehma tal-Qorti illi t-Tribunal ma ikkonsidrax sew din il-kwistjoni. Hu minnu illi kien gia jezisti encroachment permit tal-1989 li ovvjament jipprecedi d-dhul fis-sehh tal-ligi tal-ippjanar tal-1992 u ghalhekk ebda applikazzjoni sussegwenti ma kienet mehtiega quddiem l-Awtorita. Pero dan il-permess kien limitat ghal tlett imwejjed bis-siggijiet magghom. Sa hemm kien jestendi l-permess ossia l-encroachment. Fil-permess tal-Lands tal-2013, ma hemm ebda referenza ghall-ammont ta' mwejjed u siggijiet li setghu jitqieghdu izda biss ghall-estensjoni ta' art li kienet qed tinghata encroachment fuqha. Dan ifisser illi t-Tribunal kellu jidhol fil-kwistjoni ta' kemm hemm imwejjed illum u jekk dan kienx jinnecesita xi forma ta' sanctioning jekk irrizulta li kien hemm aktar minn tlett imwejjed jew permess ad hoc jekk ma jrrizultax kemm kien ser jitpoggew imwejjed tenut in konsiderazzjoni fatturi ta' ppjanar mill-fatti accertati. Ghalhekk id-decizjoni tat-Tribunal li l-appellant kien gia kopert b'permess ghal tqieghed ta' mwejjed u siggijiet bil-permess tal-1989 u ghalhekk ma hemmx lok li jidhol f'applikazzjonijiet ta' ligijiet, pjanijiet jew policies applikabbli fil-mument tal-applikazzjoni hi semplicistika u errata fil-ligi ghax ma ttiehdux in konsiderazzjoni l-fatti ezatti tal-kaz.

Ghal din ir-raguni l-aggravu qed jigi milqugh biex it-Tribunal jezamina u jiddetermina l-kwistjoni a bazi ta' dak relevat minn din il-Qorti.

Decide

Ghal dawn ir-ragunijiet il-Qorti qed tilqa' l-appell ta' Andrew Muscat u in linea ma' dak deciz, qed tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Ottubru 2015, u tibghat l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell. Spejjez ghall-Awtorita.

Onor. Mark Chetcuti LL.D.

Imhallett

Anne Xuereb

Deputat Registratur