

# THE ROLE OF THE COURT OF APPEAL (INFERIOR JURISDICTION)

*IN MALTESE DEVELOPMENT  
PLANNING LAW*

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# Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

## 1 Brief Historic Overview

Under the previous legislation, it was already an established principle that *'the decisions of the Tribunal shall be final'* and an appeal from such decisions could be made by the appellant or any of the appellate parties to the appeal before the Court of Appeal (Inferior Jurisdiction) *'on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.'*<sup>1</sup> Such an appeal had to be lodged within twenty days from when the decision of the Tribunal was delivered in public and the Court was in turn bound to conclude *'in a timely manner'*<sup>2</sup> even though no provision was made to enforce a timeframe within which the Court was required to deliver judgment. In the previous law, it was also established that *'an appeal from a partial decision of the Tribunal may only be filed together with an appeal from the final decision of the Tribunal.'*<sup>3</sup> Moreover, the Secretary of the Tribunal was vested with all legal and judicial representation of the Tribunal in all judicial proceedings instituted against the same Tribunal,<sup>4</sup> including, of course, proceedings following a Tribunal decision.

## 2 The new Chapter 551

All the above features were in fact retained under the current **Environment and Planning Review Tribunal Act**.<sup>5</sup> Moreover, today **Article 39** of the said Act further provides that, apart from *'points of law decided by the Tribunal'*, decisions of the Tribunal may also be appealed on *'any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'*. Really and truly, this was already the case under previous legislations because the principles of natural justice were always deemed to qualify under the ambit of 'law' by our Courts. In point of fact,

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<sup>1</sup>Article 39 of the **Environment and Planning Review Tribunal Act, 2016**.

<sup>2</sup>Article (41)(16) of the **Environment and Development Planning Act**.

<sup>3</sup>Article (41)(3) of the **Environment and Development Planning Act**.

<sup>4</sup>Article (41)(12) of the **Environment and Development Planning Act**.

<sup>5</sup>Part V of the **Environment and Planning Review Tribunal Act, 2016**.

the implications resulting from the non observance of such rules should now seem very obvious, since these rules are now listed as rules of good administrative behaviour, which the Tribunal *'shall apply'*.

In **Max Zerafa vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**<sup>6</sup> the Court of Appeal (Inferior Jurisdiction) maintained that it had no jurisdiction to reassess the evidence and technical facts which led to the Planning Appeals Board's conclusions. A decision which is based on the 'wrong' interpretation of facts is not tantamount to a point of law and thus falls outside the competence of the Court. Consequently, the Court was precluded from ascertaining whether the Tribunal was correct in interpreting the facts leading to its conclusions. The Court held:

*'Din il-Qorti tista` tirrevedi biss kwistjonijiet dwar punt ta' Dritt decizi mill-Bord. Dan ifisser li m'hemmx appelli fuq kwistjonijiet ta' fatt, fuq kwistjonijiet ta' apprezzament ta' provi. Biex appell ikun ammissibbli, il-kwistjoni trid tkun necessarjament dwar kwistjoni ta' Dritt, li tkun gamet kontroversja dwarha, li tkun giet diskussa u elucidata fil-motivazzjoni u li tkun giet definita fid-decizjoni appellata.'*

On the other hand, in **Joseph Tonna vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,<sup>7</sup> the Court found against the Planning Appeals Board because the latter failed to give regard to the 'surrounding commitment' in determining whether the permit should have been issued as required by the relevant section of the law. In its conclusions, the Court held:

*'Illi fl-opinjoni ta' din il-Qorti, din hija applikazzjoni hazina tal-Ligi, u dan peress li dak li l-Bord kellu jaghmel kien fl-ewwel lok jara jekk kienx hemm commitment ghal tali tip ta' zvilupp, u dan fil-mument li kienet ser tittiehed id-decizjoni.'*

Although, in recent judgments, the Court gave a different interpretation as to how

<sup>6</sup>**Max Zerafa vs l-Kummissjoni ghall-Kontroll ta' l-Izvilupp**, decided on 12<sup>th</sup> January 2004 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 20/2012].

<sup>7</sup>**Joseph Tonna vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar** decided on 24<sup>th</sup> February 2011 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 6/2010].

this particular section of the law should be applied by decision makers, it reiterated the idea that the wrong application of any section of the law is subject to its scrutiny.

Similarly, the Court declared that it has jurisdiction 'on a point of law' after it found that the Tribunal adduced extraneous requisites to a particular planning policy. In **Carmel Gauci vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,<sup>8</sup> the Tribunal found against appellant after concluding that Policy PLP20<sup>9</sup> required applicants to furnish evidence which attests that the building was occupied as a residence until the date of application. Nonetheless, the Court observed that no such requirement was made in the said policy PLP20 and thus concluded that that the Tribunal made a wrong application of the law.

On the other hand, the Court consistently held that it had no jurisdiction to decide whether the Tribunal made a wrong appreciation of the facts before it, in consequence of which, the wrong policies were 'applied'. In **Joseph Tanti vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et**<sup>10</sup> the Court held:

*'... id-decizjoni bazikament tikkontjeni semplici applikazzjoni ta' diversi policies tal-Pjan ta' Struttura għall-fatti tal-kaz kif rahom u apprezzahom il-Bord. Apprezzament tekniku dan li jjsfuggi l-mansjoni revizzjonali ta' din il-Qorti. Jidher car għalhekk mal-ewwel illi l-appellant qiegħed jappella fuq fatti. Dan ... ma huwiex possibbli legalment.'*

Nevertheless, the Court has held in recent judgments, that it would also evaluate 'points of facts' in exceptional circumstances where it results that the Tribunal's conclusions are based on a manifest injustice or a gross error of fact. This was the conclusion of the Court in **Martin Baron vs L-Awtorita' ta' Malta dwar l-Ambjent u**

<sup>8</sup>**Carmel Gauci vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**, decided on 4<sup>th</sup> December 2013 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 28/2013].

<sup>9</sup>Policy PLP 20 regulated structural extensions to residences situated outside development zones at the time.

<sup>10</sup>**Joseph Attard vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**, decided on 28<sup>th</sup> October 2002 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 13/01].

**I-Ippjanar et.:**<sup>11</sup>

*'Dan l-aggravju biex jinqara bhala appell fuq punt ta' ligi deciz mit-Tribunal ma jistax jttiehed fil-perspettiva ta' apprezzament tal-provi da parti tat-Tribunal li fuqhom din il-Qorti ma ghandhiex poter tissindaka hlief f'kazijiet eccezzjonali ta' manifesta ingustizzja jew zball grossolan ta' fatt liema fatt kien dak li ddetermina d-decizjoni tat-Tribunal.'*

Should the Court decide to annul the Tribunal's decision, the case is sent to the Tribunal for reassessment. As held in **Costa Brava Company Limited vs Dormax Promotional Printing Limited**,<sup>12</sup> the Tribunal has no option but to follow the Courts directions.

The approach taken by the Court in **Paul Polidano vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**<sup>13</sup> is perhaps more intriguing, although legally questionable. In this case, the Court quoted from a previous judgment in the names of **Martin Debrincat vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et** and warned the Tribunal that it would pronounce judgment on the merits, should the Tribunal persist in ignoring the directions given by the Court.

All the above judgments go to show that questions of law may take various forms. It is therefore not surprising that the legislator has once again steered away from defining 'a point of law'.

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<sup>11</sup>**Martin Baron vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna**, decided on 22<sup>nd</sup> January 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 54/2013].

<sup>12</sup>**Costa Brava Company Limited vs Dormax Promotional Printing Limited**, decided on 28<sup>th</sup> March 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 52/2004/2].

<sup>13</sup>**Paul Polidano vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar** decided on 31<sup>st</sup> May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 13/2011].



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