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Informed

Tourism Appeals Board

Nicolo Orlando

(vs)

Malta Tourism Authority

Case No: 108 of 2018

2 September 2019

The Board:

Saw the appeal of appellant Nicolo Orlando from the decision of the Malta Tourism Authority ("the Authority") dated 16 May 2018 by virtue of which the Authority refused appellant's request to have the minimum requirements of his Second Class Snack Bar licence waived and to have the Second Class Bar licence for his establishment waived completely;

Saw the reply of the Authority and all the documents exhibited with both the appeal and the reply;

Saw all the evidence and documentation produced by the parties;

Heard the testimony of appellant Nicolo Orlando and Andre' Zammit, the Authority's Director Licensing, Compliance and Regulatory;

Heard the submissions of the parties;

Considered:

In his appeal appellant contests the decision of the Authority not to waive the minimum Snack Bar requirements in his regard and allow him not to offer alcoholic beverages for sale since he offers only a healthy food menu basically, on three grounds:

1. The minimum requirements as listed in the Snack Bars Detailed Standards in Subsidiary Legislation 409.15 ought to be waived for appellant insofar as the sale of alcoholic beverages is concerned. Just as a bar can be exempted from selling alcohol, likewise a Snack Bar can and should be exempted from selling alcohol, even more so when one considers that the focus of a snack bar is food rather than drinks;

2. Although it is acknowledged that there is a lacuna in the law for operators offering solely healthy food, it is through no fault of appellant that this line of business is not currently provided through a specific licence for health bars, and the appellant should therefore not be obliged to offer certain products to the detriment of the operation of his business; and
3. Appellant ought not be required to pay for, renew and hold a Second Class Bar licence when he does not operate a "bar" in the traditional sense of the word. The minimum standards which apply for the appellant's business are already met and provided for through the Second Class Snack Bar licence, which appellant holds, regularly pays for and renews, and any minimum requirements to the operation of a bar which offers alcohol do not apply to appellant's business.

In its reply the Authority rebutted appellant's arguments namely on the following grounds:

1. All catering establishments are obliged to sell alcoholic beverages as a minimum standard in terms of the Catering Establishment Regulations (S.L. 409.15). According to the Third Schedule of S.L. 409.15 it is mandatory for Second Class Snack Bars to serve alcoholic beverages i.e. beer from at least three different brands and spirits from at least five different brands. Thus, if the Authority were to exempt appellant from selling alcoholic beverages, the Authority would be considered as acting in breach of the law.
2. It is not true as appellant alleges that the payment of the licence fee of a Bar Second Class does not cover the full operation of a Bar Second Class from the establishment in question. In fact, appellant does not and has never been requested to also pay the contribution fee that licence holders of a Bar Second Class licence are expected to pay.
3. The minimum requirements as laid out in the law are intended to ensure that there is a minimum standard in place for each and every licenced catering establishment, thus ensuring that the consumer is guaranteed to find a minimum variety of food and drink whenever they visit a licensed catering establishment. Should the Authority decide to exempt licence holders from adhering to certain minimum standards as appellant is requesting, this will lead to an inferior product and service being provided to consumers and tourists and will also lead to individuals taking advantage of such exemptions in order to evade from paying relative licence fees.
4. Furthermore, the obligation on the appellant to sell alcoholic beverages will surely not tarnish in any way appellant's reputation with his clientele as he alleges, and this especially when there are available alcoholic beverages which are created to specifically cater for appellant's clientele, from vegan wines to gluten-free beers. This could also increase his profit.

Considered:

This appeal is in regard to a Second Class Snack bar licensed establishment operated by appellant offering a menu comprising healthy foods and superfoods, water and juices, a menu which caters for vegan and vegetarian diets, and which is made up solely of nutritious options. In this regard, appellant asked the Authority to exempt him from the requirement to sell alcoholic beverages as this goes against his business concept.

During the evidence tendered by appellant Nicolo Orlando in the sitting held on 15 October 2018 it was not clear whether appellant had requested this waiver from the Authority in writing. During counter-examination, appellant stated that he "communicated verbally with the people taking care of the application that my establishment was meant to sell only 100% healthy food medically Yes there was written but not in the application. There is not such application in Malta. It was a piece of paper and the man at MTA actually inquired. They have a copy of the menu"

Subsequently, appellant submitted a copy of his letter sent to the Health Directorate dated 2 November 2016 confirming that no alcohol or soft drinks were going to be offered for sale from the premises – Document NC1 submitted with a Note some time before the sitting held on 26 November 2018. This same letter results to be in appellant's file with the Authority which had exhibited a copy of the said file also before the said sitting of 26 November 2018. From appellant's letter of 2 November 2016 it results that the Health Directorate had carried out a first inspection of the premises in relation with appellant's application for a Second Class Snack Bar licence on 1 November 2016. Appellant was asked by a Health Directorate employee "to briefly introduce a typical activity day." Appellant wrote in his letter *inter alia* "... This will be followed by the preparation (wash, rinse and display) of cold uncooked vegetables, fruit, spices and herbs. A selection of nuts and dried fruit will also be availablep.s. the menu at Green Mood will change every 3-4 months and we intend to offer only fresh seasonal ingredients. There is absolutely no selling of any toxic/alcoholic food/beverage such as carbonated/soft drinks, beer, whiskey, etc. The only drinks available at Green Mood are fresh fruit juices/smoothies, water and organic herbal tea, (this might be the first outlet – Salad Bar – in the country operating this way.)"

From Documents NC2 and NC3 attached to appellant's above-mentioned Note and also evidenced in the Authority's file it results that appellant sent his letter of 2 November 2016 to Christine Vella, Senior Head at the Authority's Gozo Office on 13 September 2017. It also results that Ms. Vella had replied to appellant and on 19 September 2017 told him that she "will be discussing with (her) legal advisers and reverting back."

From the Authority's file it also results that:

- a) On 15 November 2016 the Environmental Health Directorate wrote to appellant that it has no objection to operate the Green Mood Snack Bar subject to a number of conditions, the first one of which was that

"Applicant is to adhere to the attached copy of a declaration dated 9 November 2016."

In his said declaration of 9 November 2016 appellant had declared that "With reference to my application filed with the Malta Tourism Authority to operate a

snack bar I, Nicolo Orlando the undersigned intend to prepare and offer for sale the following:

1. Rice, Quinoa, Buckwheat,
2. Fresh Vegetables and fruits.
3. Smoothies
4. Dried fruits and Nuts (mixed).
5. Spices and Herbs.

I wish to point out that all vegetables and fruits are to be bought from duly licensed dealers and manufacturers.”

This fact is also confirmed by Andre’ Zammit in his testimony when he said in counter-examination that “He (appellant) gave that (a detailed explanation about his menu and type of drinks he was going to sell) to the food safety unit that needs to approve what Mr. Orlando needs to serve But we (the Authority) never gave him the green light.”

b) On 24 November 2016 Adrian Saliba from the Authority’s Quality Assurance Directorate sent a Memo to Ms. Christine Vella wherein he *inter alia* told her that **“Please note that this Snack Bar is not going to serve Alcoholic Beverages. Serving only healthy Raw Food and Beverages.”**

c) In its approval letter of 2 May 2007 in regard to appellant’s application for a licence, the Authority granted its approval and assignment for a Snack Bar of Second Class Category licence subject *inter alia* that:

“You are requested to adhere to the declaration signed with the Food Safety Unit on 15 November 2016.”

This is an obvious reference to the above-mentioned declaration of appellant attached to Environment Health Directorate’s letter of 15 November 2016.

d) From the Menu applicant had submitted to the Authority during application stage, apart from the list of prices to the healthy food he planned to offer, appellant had indicated in larger front “Only Healthy Food” and under the Snack Bar’s name “Food from Mother Earth.”

From the above-mentioned facts, it is evident that the Authority was well aware that appellant was going to offer healthy food.

Considered further:

The Board considered at length the legal arguments brought by the parties, and to avoid unnecessary repetition refers to pages 1 and 2 of this decision for the ample legal arguments made by the parties. This Board can understand the stance taken by the Authority that it sticks to the strict letter of the law, however it cannot then underestimate the arguments made by appellant and also the above-mentioned facts that occurred during application stage.

At this point, the Board makes reference to the decision of this Board dated 29 October 2013 in the names *Oswald Scicluna pro et noe (vs) L-Awtorita' tat-Turizmu ta' Malta* which dealt with the operation of a catering establishment. In that appeal, this Board made the following considerations:

"Il-Bord ra d-definizzjonijiet tal-hames tismijiet¹ imsemmija fir-Regolamenti dwar Stabbilimenti li Jipprovdu Ikel², u ghalkemm 'ristorant' huwa l-aktar "designation" li tista' tixbah il-generu tal-fond soggett ta' dan l-appell, u cioe' il-generu ta' "Farmhouses", il-Bord huwa tal-fehma li dan il-generu ma jaqa' taht l-ebda wahda mit-tismijiet imsemmija fir-Regolamenti, stante li element necessarju fit-tifsira ta' 'ristorant', u cioe' l-accessibilita' libera lill-pubbliku ma tirrizultax.

Peress illi huwa ben saput li dan il-generu ta' "Farmhouse" li joffru ikliet ghal hbieb, bhala fenkati u majjalati, qieghed dejjem jizdied, dan il-Bord ihoss li ghandu jimxi fuq dak li ghamlu Bordijiet precedent meta ghamlu rakkomandazzjonijiet lill-awtoritajiet koncernati u jirakkomanda li l-awtoritajiet koncernati ghandhom jikkunsidraw li jfasslu regolamenti appoziti ghall-generu ta' "Farmhouses" li b'xi mod jipprovdu ikel u xorb u/jew jzidu t-tismija/ "designation" ta' "Farmhouses" fir-Regolament 5 tar-Regolamenti dwar Stabbilimenti li Jipprovdu Ikel," bil-konsegwenti possibilita' ta' diversi klassifikazzjonijiet."

The Board does not see any need to depart from the reasoning in the *Oswald Scicluna* appeal decision in the circumstances of the present case. As with farmhouses, the genre of snack bars offering healthy food in Malta and Gozo is on the increase. Since appellant does not wish to offer alcoholic drinks and beverages as this would go against the basic concept of his business, it is evident that this genre of catering establishment does not fall strictly under any one of the five designations mentioned in the Catering Establishment Regulations, 2005 – S.L. 409.15.

Consequently, the Board is recommending that the competent authorities consider drafting specific regulations for the genre of "healthy food snack bars" and/or adding the designation of "healthy food snack bars" in Regulation 5 of the Catering Establishment Regulations, with the consequent possibility of various classifications and/or waiving the requirement of serving alcoholic beverages i.e. beers from at least three different brands and spirits from at least five different brands.

Finally, there remains to be considered the third request of appellant, namely that he ought not be required to pay for, renew and hold a Second Class Bar licence when he does not operate a 'bar' in the traditional sense of word. In view of the above-mentioned considerations it is evident that this request ought to be also acceded to since appellant will not be required to sell alcoholic beverages following this decision.

For these reasons, in view of the above-mentioned considerations made by the Board, the Board is disposing of this appeal by acceding to the requests of appellant and rejecting the arguments of the Authority and consequently revoking the decision of the Authority dated 16 May 2018 by virtue of which the Authority refused appellant's request to have the minimum requirements of his Second Class Snack bar licence

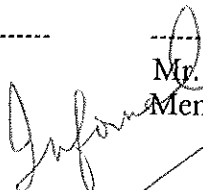
¹ Snack bars, bars, nightclubs and/or discotheques and kiosks – regulation 4.

² S.L. 409.15 of the Laws of Malta

waived and to have the Second Class Bar licence for his establishment waived completely.

The expenses of this appeal are to be paid by the Authority.

Dr. Ivan Sammut
Chairman



Mr. Jean Pierre Busuttill
Member

Mr. Kevin Cutajar
Member

Dr. David Camilleri
Secretary