



The Supreme Court sitting as a Court of Appeals for Administrative Affairs

AAA 2469/12

Before: The Honorable President A. Grunis
The Honorable Deputy President M. Naor
The Honorable Justice E. Rubinstein

The Appellants:

1. Morris Bremer
2. Eddie Weisbaum
3. Motty Maoz
4. David Haimov
5. Eliyahu Miller
6. Yitzchak Elkoser
7. Pinchas Tzelik
8. The General Association of the Merchants and the Self-Employed

v.

The Respondents:

1. The Tel Aviv-Jaffa Municipality
2. A.M.P.M.
3. Tiv Taam Daily Ltd.
4. Tiv Taam Reshatot Ltd.
5. Tiv Taam Hacarmel Holdings Ltd
6. Tiv Taam Hodnigs (*sic.*) 1 Ltd.

Appeal of the judgment of the Tel Aviv-Jaffa Administrative Affairs Court dated February 22, 2012, in AP 2500/07, given by the Honorable Justice E. Covo.

Date of Session: 23rd of Nissan, 5773 (April 3, 2013)

On behalf of Appellants 1-7: Adv. Ivri Feingold

On behalf of Appellant 8: Adv. David Shub

On behalf of Respondent 1: Adv. Rachel Avid

On behalf of Respondent 2: Adv. Meir Porges; Adv. Shlomi Bracha

On behalf of Respondents 3-6: Adv. Ronen Buch; Adv. Eli Shimelevich

Judgment

Deputy President M. Naor:

1. Before us is an appeal against the judgment of the Tel Aviv-Jaffa District Court, sitting as an Administrative Affairs Court (Deputy President E. Covo) in AP 2500/07 dated February 22, 2012. In the judgment, the Court rejected the Appellants' petition to instruct the Tel Aviv-Jaffa Municipality to close various businesses that are open on the Sabbath.

Background

2. Appellants 1-7 are owners of retail businesses selling food (grocery stores), which operate in the city of Tel Aviv-Jaffa (hereinafter: the "**Appellants**"). Appellant 8 serves as the representative of merchants in Israel on various matters. Respondent 1 is the Tel Aviv-Jaffa Municipality (hereinafter: the "**Municipality**"), while Respondents 2-6 (hereinafter: the "**Respondents**") operate "supermarket" stores across the city of Tel Aviv-Jaffa. The Respondents operate their businesses during all days of the week, including the Sabbath. This, in violation of the Tel Aviv-Jaffa (Opening and Closing of Stores) By-Law, 5740-1980 (hereinafter: the "**By-Law**"), which prohibits opening stores on the day of rest.
3. Prior to filing the petition to the Administrative Affairs Court, the Appellants approached the Municipality a number of times so that it would exercise its authority and close the Respondents' businesses. On July 26, 2007, the Appellants received a response from the Municipality's Inspection Department, that each Sabbath, businesses operating on the day of rest are fined in the amount of NIS 660. On July 15, 2007, the Appellants sent an additional letter in which they requested that the Municipality take action to close the businesses, pursuant to its authority by virtue of the Business Licensing Law, 5728-1968 (hereinafter: the "**Business Licensing Law**" or the "**Law**"). Until the submission of the petition which is the subject of the Appeal, the Appellants did not receive any response on the merits of the issue.

The Proceedings in the Administrative Affairs Court

4. The Appellants' complaint in their petition was that the Municipality is refraining from enforcing the laws related to observance of the weekly day of rest, as it is not taking action to close the businesses that are open on such day. They argue that the Municipality must close the businesses that are open on the Sabbath, pursuant to its authorities by virtue of the Business Licensing Law, the Municipalities Ordinance [New Version] (hereinafter: the "**Municipalities Ordinance**") and the By-Law. The Appellants argued that the Respondents gain a competitive advantage over the Appellants due to their openly violation of the Law, since the Respondents attract consumers who prefer to do their shopping on the Sabbath. Had the Respondents refrained from violating the Law, so it is argued, such consumers would do their shopping during the week, and at least some of them

would do so at the Appellants' businesses. According to the Appellants, the Respondents' conduct amounts to "unfair competition" which compromises the Appellants' right to freedom of occupation. As such, the Municipality has a duty to take action against the Respondents, in accordance with the Business Licensing Law. The Appellants further argued that closing the Respondents' businesses is necessary in light of the social and religious objectives of the day of rest, and since the operation of the Respondents' businesses on the Sabbath constitutes a nuisance and adversely affects the residents' quality of life.

5. The Municipality, on its part, argued that it enforces the observance of the day of rest in accordance with what is determined in the Law and in accordance with its administrative discretion. According to it, it is not permitted to exercise the sanctions prescribed in the Business Licensing Law in order to prevent competition or to preserve the sanctity of the Sabbath, since these are not among the purposes of the Law. As for the By-Law: the Municipality argued that it is indeed acting by virtue thereof, since the By-Law, which prohibits the operation of businesses on the Sabbath, only permits imposition of monetary fines, and such fines were indeed imposed upon the Respondents. According to the Municipality, by virtue of the Municipalities Ordinance, it is vested with authority to approach the Municipal Court and to request to close a business transgressing the provisions of the By-Law, however, it argues, the exercise of such authority is subject to discretion. In the judgment it was even noted that in the case at hand, the Municipality decided not to exercise its authority in accordance with a general policy, which, according thereto, derives from the population's needs and desires. The Respondents, in general, joined the Municipality's arguments.
6. During the hearing of the petition, the Administrative Affairs Court instructed the Attorney General to submit its position on the matter at hand. The Attorney General did not appear at the petition hearing however submitted his position in writing. According to that stated in his position, the Municipalities Ordinance authorizes the local authority to arrange the opening and closing of businesses, *inter alia*, on days of rest, and taking religious tradition reasons into consideration, and grants it the enforcement and inspection authorities in the matter. The authority of local authority to arrange this matter is grounded in the perception that the authority, which represents the local residents, must strike a balance "between the interest of preserving the nature of the Sabbath as a day of rest, which has both national and social characteristics, and making certain economic activity possible." Having said that, the Attorney General emphasized that he attaches importance to the enforcement of the by-laws promulgated by the local authorities "for obvious reasons of maintaining the rule of law, and in light of the public interests of protecting the nature of the Sabbath as a day of rest, in accordance with the characteristics of each area, and taking the composition of the local population into consideration, as prescribed in the By-Law."

Finally, the Attorney General stated that the Business Licensing Law is not relevant to the matter, since this law was not intended to be a means of enforcing the By-Law regarding the operation of businesses on the Sabbath and on days of rest.

7. In its judgment, the Court addressed two main questions: Are preventing unfair competition and preserving the sanctity of the Sabbath among the objectives of the Business Licensing Law and is the Municipality permitted to close businesses that operate on the Sabbath by virtue of this law; and are there other laws that authorize the Municipality to enforce the closing of the Respondents' businesses on the Sabbath, and if so, does the Municipality's decision not to exercise its authority to request to close the businesses justify the Court's intervention.
8. As for the first question, the Court ruled that preventing unfair competition is not included among the purposes of the Business Licensing Law, which are listed in Section 1 thereof, based both on the language of the Law, and in accordance with case law. The Court explained that while freedom of occupation must be taken into consideration in the framework of the Law, only the freedom of occupation of the license applicant should be examined, "and the Municipality does not have the authority to consider the impact of giving a certain person the possibility of opening his business, on the level of competition in the market, or how it shall impact another person's income" (paragraph 16 of the judgment). According to the Court, such considerations could empty of content the Business Licensing Law, which was meant to ensure that businesses that comply with the purposes of the Law shall be entitled to a business license. The Court further ruled that the "inconvenience" caused to the Appellants' businesses does not constitute an infringement of their freedom of occupation, since they are all subject to the same Municipality policy. Therefore, the Court ruled that the Appellants were not discriminated against and their freedom of occupation was not infringed. As for preserving the sanctity of the Sabbath, the Court ruled that this is a clear religious purpose, which is a matter of public controversy, and in any event is not listed among the purposes of the Business Licensing Law. As such, it is not possible to take steps against businesses that are open on the Sabbath due to them "violating the sanctity of the Sabbath" and offending religious values. The Court clarified that the sanctions prescribed in the Law cannot be used other than for the purposes which the Law was meant to realize, and therefore, the Municipality should not be forced to take steps against the Respondents under the Business Licensing Law.
9. The Court also further rejected the Appellants' argument that the activity of Respondents' businesses on the Sabbath constitutes a nuisance. Firstly, it was determined that it is problematic that the Appellants, who are grocery stores owners, and whose first priority is their personal economic interest, present themselves as those who are also representing the interests of the city's residents. The Court further ruled that the Appellants adduced no evidence that the opening of the Respondents' businesses constitutes a nuisance. As such, it ruled, the presumption of proper administration applies to the Municipality.
10. As stated, the second question the Court dealt with was whether it is appropriate to force the Municipality to take steps against the Respondents by virtue of provisions of other laws. The Court stated that the only and direct sanction that is possible due to the violation of the By-Law is the imposition of a monetary fine, by virtue of Section 265 of the Municipalities Ordinance. As the Municipality clarified, it indeed exercises this sanction. The Court stated that notwithstanding that according to the Appellants, the fines do not deter and are "mocking the poor", the Municipality is not entitled to take other enforcement actions when the

monetary fine was prescribed as the means of enforcement in the case of violation of the By-Law. As such "There is no relevance to the question whether or not the sanction that was taken in the framework of the law is effective" (paragraph 27 of the judgment).

11. The other source of authority which the Court discussed is Section 264A of the Municipalities Ordinance. This Section grants the Municipality authority to request that the Municipal Court order owners, managers or operators of a business operating on the Sabbath to refrain from opening it contrary to the By-Law. The Court emphasized that when considering which means of enforcement to apply, the Municipality must strike a balance between the conflicting interests, including: freedom from religion, freedom of conscience, freedom of occupation and the public's needs, on the one hand, and on the other hand the desire to preserve the values of tradition and avoid offending religious feelings. The Court addressed the fact that the Municipality did not file motions to close the Respondents' businesses pursuant to Section 264A, but ruled that even if the authority refrains from using all of the means it has at its disposal for enforcement purposes, this does not suggest that there was a flaw that justifies the Court's intervention, since "as long as the Court is under the impression that the authority is not completely refraining from enforcing the law, and that it is not applying selective enforcement, as a rule, there is no place for judicial intervention" (paragraph 35 of the judgment). The Court ruled that it must take caution not to replace the authority's discretion with its own discretion, also since at hand are matters that are at the heart of public and political controversy. According to the Court, to the extent that the Appellants wish to convince that the balance struck by the Municipality between the State's Jewish character and the fundamental values that anchor individual liberties, should be altered, they should act in the public arena, and convince that their position is superior using democratic means.
12. In summary, the Court ruled that it must apply great judicial restraint when it comes to an enforcement policy in a matter which is at the heart of political and public controversy. The Court determined that the Appellants did not meet the burden lies with them to demonstrate that the Municipality's policy in enforcing the By-Law is so extremely unreasonable that it justifies judicial intervention. The Court ruled that "in these circumstances, it is presumed that the authority acted lawfully, in light of all of the facts, and its **decision** not to exercise the authority to file motions to close the businesses – is reasonable and proportional" (paragraph 39 of the judgment; emphasis added – M.N.). Therefore, the Court rejected the Appellants' petition and obligated them to pay the Municipality's expenses in the amount of NIS 75,000.

Hence the Appeal before us.

The Appellants' Arguments

13. The Appellants are claiming against the judgment of the Administrative Affairs Court. According to the Appellants, the Court erred in ruling that it is inappropriate to intervene in the By-Law enforcement policy which the Municipality is applying. They argue that as long as the By-Law remains in effect, the principle of the rule of law precludes the possibility of accepting a situation in

which the Municipality does not enforce the closure of businesses that knowingly and publicly violate the By-Law. The Appellants argue that the Municipality, by contenting itself with imposing fines of only NIS 660 (the amount of the fine was raised after the petition was filed and is currently NIS 730) each and every Sabbath, and particularly when it comes to only one fine each Sabbath for each business, is making a mockery of the Law and encouraging its violation. They further argue that the Municipality's enforcement failures cause them heavy financial damage; compromise the fundamental principle of the rule of law and the principle of equality in enforcement; and prejudice constitutional basic rights, including the right to property, the freedom of occupation and equality. Since large businesses, whose daily profits exceed the amount of the fine, can allow themselves to open their doors on the day of rest despite the fine and in doing so, increase their profits, while small businesses, such as the Respondents (*sic.*), cannot do so, and therefore are injured.

14. According to the Appellants, the lower court erred when it primarily dealt with the Business Licensing Law, since, according to them, the main issue is the Municipality's duty to exercise all of the legal means at its disposal. Additionally, according to them, the Court also erred when it ruled that the Business Licensing Law does not authorize the Municipality to take action in the case at hand. The Appellants believe that in the business licenses that were issued to the Respondents by virtue of the Business Licensing Law (hereinafter: the "**Business Licenses**"), it is explicitly prescribed that they are not valid during the Sabbath and Israel holidays. Therefore, they argue, the activity of the Respondents' businesses is carried out on the Sabbaths without them possessing a valid business license, and therefore the sanctions prescribed in the Business Licensing Law regarding unlicensed businesses should be imposed thereupon. The Appellants further argue against the Court's ruling that the Municipality is not authorized to enforce the observance of the day of rest by means of the Business Licensing Law since such enforcement is not part of the Law's purposes. According to them, in this matter, it is necessary to distinguish between refusal to issue a license by virtue of the Business Licensing Law and enforcing such Law. While the first can be done only on grounds related to the purposes of the Law, the principle of the rule of law warrants that there be no similar distinction with respect to the enforcement of the Law – any violation of the Law, regardless of the purpose of the violation or the motivations of those requesting to enforce, must be enforced.
15. The Appellants also claim against the lower court's ruling that their freedom of occupation was not infringed. According to them, the meaning of the Court's ruling that "[the Appellants] and the Respondents are subject to the same Municipality policy and therefore [the Appellants] are not discriminated against, and their freedom of occupation is not infringed" (paragraph 17 of the judgment), is that the Appellants are not discriminated against and that their freedom of occupation was not infringed because they, too, could choose to violate the Law and be fined. According to them, the harm caused to the business owners who obey the rest laws due to the violation thereof by the Respondents, is in and of itself the infringement of their freedom of occupation. The Appellants further argue that as a result of the enforcement actions – i.e. imposition of fines – which the Municipality initiated, there is discrimination between the strong and the weak. The Appellants also argue against the Court's ruling that the Business

Licensing Law should not be exercised because "preservation of the sanctity of the Sabbath" is an unambiguous religious purpose, and emphasize that they did not argue a religious purpose at all.

16. According to the Appellants, the essence of the judgment lies in the lower court's ruling that it is inappropriate to intervene in matters which are at the heart of public and political controversy. However, according to them, the controversy itself is not at all relevant to the determination in the matter at hand. The Appellants argue that the principle of obeying the law is not a matter of public controversy. The Municipality cannot absolve itself from enforcing a law only because the matter the law governs is a matter of public controversy. To the extent that the Municipality is not interested in enforcing the By-Law, so the Appellants say, it must act to change it. The Appellants address the great importance of the day of rest, as is expressed also in the rulings of this Court, not only in accordance with the values of the State of Israel as a Jewish state, but also in light of universal and social values.
17. In light of that stated, the Respondents (*sic.*) argue that the lower court erred in its decision not to intervene in the Municipality's conduct. They emphasize that there is no dispute that the Respondents' activity constitutes a violation of law. As such, according to them, the Court's ruling that it is inappropriate to intervene in the Municipality's conduct as long as it doesn't completely refrain from enforcing the law, without considering whether the enforcement actions indeed achieve the purpose for which they were intended, is unreasonable and – so they argue – contradicts case law which provides that the Court must examine the enforcement actions.
18. Finally, the Appellants are claiming against the NIS 75,000 expenses the Court imposed upon them. They argue that these are exceptionally high expenses which have no justification when the Appellants pointed to an undisputed violation of a law, which is related to important public matters. The Appellants further argue that the Court ignored the fact that the Appellants are people with limited means, and that they waited more than 4 years for a judgment in their petition.

The Respondents' Arguments

19. The Municipality agrees with the lower court's judgment. It argues that the dispute lies in the question what law should be enforced and consequently, what are the means of enforcement the Municipality can apply. It argues that the law which is to be enforced is the By-Law, and according to it, it indeed enforces this law. In this context, the Municipality argues that "there is no dispute that the [Appellants'] petition was meant to lead to a change in the balance the Respondent strikes, by means of the By-Law and the enforcement thereof, between all the relevant interests to permit the opening of stores on days of rest, the social aspects of a uniform weekly day of rest, as well as those that reflect the Jewish and democratic nature of the State, and as well as those that reflect the right of an individual to freedom of occupation" (paragraph 12A of the Municipality's summations).

The Municipality is further of the opinion that contrary to the Appellants' claim, the Court did not determine that it is prevented from applying judicial review, but rather examined the Municipality's actions in accordance with the criteria of administrative law, and found it to be inappropriate to intervene in the enforcement policy the Municipality applies. With respect to the Business Licensing Law, the Municipality argues that there is no basis to the Appellants' argument that the Respondents' business licenses are invalid on the day of rest, and therefore, the Court justly ruled that it is inappropriate to apply the means of enforcement prescribed in that law. The Municipality emphasizes that it is not possible to apply the means of enforcement prescribed in one law due to the violation of another statute, which does not grant the authority to apply such means of enforcement. As for the expenses imposed upon the Appellants, the Municipality argues that the expenses amount was ruled following an extended proceeding and that the Appellants did not point to a public interest which justifies exempting them from their obligation to pay expenses.

20. Respondent 2 adds that the Appellants are ignoring the nature of the city of Tel Aviv-Jaffa and its residents' needs. It argues that the proper nature of the day of rest is a matter of controversy and there is no justification for accepting the Appellants' position rather than the position that there should be businesses open on the Sabbath. This is particularly so in the city of Tel Aviv-Jaffa, on whose diverse nature, Respondent 2 had discussed at length. According to Respondent 2, "the burden of 'shutting down' the city of Tel Aviv on week-ends is a very heavy burden, which should certainly not be made compulsory for unfounded commercial reasons which have not at all been proven" (paragraph 10 of Respondent 2's summations). Respondent 2 also argues that the Appellants wish to compromise the basic right of each and every resident in the city to shape the content of his or her day of rest in accordance with his or her desire and taste. The Respondent argues that the legislator wished to grant the local authorities complete authorities and full discretion to determine the nature of the day of rest. Therefore, according to Respondent 2, "intervening in the broad discretion given to the Municipality and the public considerations which the Municipality considers when striking such a balance, is not within the scope of the judicial review of the 'administrative action', *a fortiori* when at hand [...] is a matter which was defined by the initiators of the law as 'the serious problem of the dispute between secular and religious'" (paragraph 17 of Respondent 2's summations).
21. Respondents 3-6 argue that it is inappropriate to grant, as a relief, a general declaration pursuant to which the Municipality must enforce the law. To the point of the matter, in addition to the arguments that the other Respondents claimed, Respondents 3-6 emphasize that the Municipality's enforcement policy is to exercise administrative authority, and that there is no justification to intervene in the discretion exercised as long as the Municipality did not completely absolve itself from the responsibility of the enforcement of the law. In this context, Respondents 3-6 argue that the uniqueness of the local authority – as an entity that is closely familiar with the residents' needs and preferences and as a representative democratic entity which is meant to reflect the desires of the city's residents – justifies the broad discretion vested in the local authorities. Respondents 3-6 also claim against the Municipality's policy to impose fines on businesses that are open on the Sabbath, which they argue causes them financial damage, and they argue

that "the Municipality should be more attentive to various needs and preferences in the city in which a population that wishes to shop on the Sabbath resides" (paragraph 13 of Respondents 3-6's summations).

According to Respondents 3-6, the Municipality is not authorized to ask the Municipal Court for an order to close a business by virtue of Section 264A of the Municipalities Ordinance, since this section authorizes the Municipality to request a closing order when at hand is a business that violates a by-law that was promulgated pursuant to Section 249(21) of the Ordinance – which provides that the Municipality is permitted to consider "religious tradition reasons". According to the Respondents, it does not appear that the Municipality promulgated the By-Law pursuant to this section, but rather due to the social reasons prescribed in Section 249(20) of the Ordinance. This conclusion is reinforced, so they argue, by the fact that the By-Law was legislated many years before Section 249(21) was added to the Municipalities Ordinance. Respondents 3-6 also object to the Appellants' argument regarding the Business Licensing Law, pursuant to which the purposes of the Law relate only to the issuing of licenses and not to means of enforcement, and also argue that the By-Law was not intended to protect fair competition but rather to realize a social and religious purpose.

22. The Attorney General also did not appear at the hearing in the Appeal before this Court and resubmitted his position in writing, as was submitted to the lower court, and as specified above.

The Normative Framework

23. The main question which needs to be ruled upon in the Appeal before us, is whether the Municipality is to be forced to exercise means of enforcement which it has the authority to exercise, and which until now it refrained from exercising. Before I turn to address this question, I shall briefly explain the various statutory provisions which were raised in the framework of this proceeding and the enforcement authorities which the Municipality possesses to enforce them.

(a) Business Licensing Law

24. The first source of authority upon which the Appellants wish to rely, is, as mentioned, the Business Licensing Law. The purposes of this Law are prescribed in Section 1 of the Law, which reads:

1. (a) The Minister of Interior may, by orders, prescribe and define businesses that require licensing, in order to ensure all or some of the following purposes therein:

- (1) Proper environmental quality and prevention of hazards and nuisances;
- (2) Prevention of danger to public safety and protection against robbery and breaking in;
- (3) Safety of persons at or in the vicinity of the place of business;

- (4) Prevention of danger of livestock diseases and prevention of pollution of water sources with pesticides, fertilizers or pharmaceuticals;
- (5) Public health, including proper sanitary conditions;
- (6) Upholding the enactments related to planning and building;
- (7) Upholding the enactments related to firefighting."

25. Section 14 of the Business Licensing Law deals with businesses that are operated not in accordance with a license and it prescribes the penalties for such actions. Section 20 of the Law authorizes position holders to order a temporary break of business due to infractions of Section 14.

(b) The Municipalities Ordinance and the By-Law

26. Section 249 of the Municipalities Ordinance deals with a municipality's authorities. Sub-Section (20) therein provides:

"249. A municipality's authorities are:

[...]

- (20) **To arrange the opening and closing of stores** and workshops, restaurants, coffee shops, teashops, beverage shops, cafeterias, canteens and other such institutions [...] and **to supervise the opening and closing thereof**, and to determine – without derogating from the generality of the authority – opening and closing hours on a certain day; provided that the validity of this paragraph shall be subject to any exemption instructed in an order by the Minister (emphases added – M.N.)

27. Section 265 of the Ordinance provides:

"265. (a) The Minister, with the Minister of Justice's consent, may, by an order published in the official gazette (*Reshumot*), notify that **an offence of a certain provision of a municipal by-law is an offence punishable by a fine**, in general, or at prescribed terms or restrictions.

(b) The Minister shall prescribe in an order published in the official gazette (*Reshumot*) –

- (1) The rate of the fine for each offence punishable by a fine, provided it shall not exceed NIS 730, and he may prescribe different rates for the offence, considering the circumstances in which it was committed.

[...]" (emphases added – M.N.).

28. In 1990, following a doubt that was raised regarding the authority of local authorities to promulgate provisions in by-laws regarding prohibiting opening businesses on the Sabbath and on Israel holidays, the Amendment of the

Municipalities Ordinance (Number 40) Law, 5751-1990 (hereinafter: the "**Authorization Law**") was legislated. This law was meant to vest the local authorities with the said authority and to ensure the validity of the existing by-laws (see: Explanatory Notes to the Municipalities(Prohibition to Open Businesses and the Closure thereof on Days of Rest) Bill, 5748-1988, Bills 134 (hereinafter: the "**Explanatory Notes to the Authorization Bill**") (this is the original name of the Authorization Bill, see *Divrei Haknesset* (Knesset Proceedings) 12(3), 1191 (5751)); HCJ 5073/91 **Israeli Theatres Ltd. v. The Netanya Municipality**, IsrSC 47(3) 193, 197-199 (1993) (hereinafter: the "**Israel Theatres Case**"). To this end, the Authorization Law added sub-section (21) to Section 249 of the Municipalities Ordinance:

"(21) A municipality may exercise its authority pursuant to paragraph (20) in the area of its jurisdiction or in any part thereof with respect to the Day of Rest, **considering religious tradition reasons**, and with respect to the 9th of Av; "Days of Rest" – as specified in Section 18A of the Law and Administration Ordinance, 5708-1948. For this purpose, the Sabbath and Israel holidays – from the entrance of the Sabbath or the holiday until the end thereof; the "9th of Av" – as defined in the Prohibition to Open Entertainment Places on the 9th of Av (Special Authorization) Law, 5758-1997" (emphases added – M.N.)

29. The Authorization Law also added to the Municipalities Ordinance Section 264A, which prescribes that the Municipality may approach the Municipal Court in order to enforce a by-law that was promulgated pursuant to Section 249(21) (see also: the **Israel Theatres Case**, on pages 199-200):

"264A. (a) **If a municipality promulgated a by-law pursuant to Section 249(21) and a business opened contrary to the provisions of the by-law, the court which is authorized to address the offence under such by-law may order the owners, managers or operators of the said business, to refrain from opening the business on the days of rest contrary to the provisions of the by-law** (hereinafter: a Prohibition to Open Order), if it was convinced that the business opened contrary to the provisions of the by-law; a motion to grant such an order shall be filed by whomever is authorized to file claims due to an offence under the said by-law, along with an affidavit to verify the facts upon which the motion is based, and the Court may issue the order *ex parte*, with only the petitioner, if it found that there is justification to do so in the circumstances at hand.

(b) [...]" (emphases added – M.N.)

30. The Tel Aviv-Jaffa municipality promulgated the By-Law regarding the opening and closing of stores, pursuant to its authorities under the Municipalities Ordinance, in as far back as 1980. Section 2 of the By-Law provides that businesses shall not be opened on the day of rest:

"2. (a) Subject to that stated in sub-Sections (c), (d) and (e), **the owner of a store or coffee shop shall not open his business and shall not keep it open**

on the Sabbath and Israel holidays, except with a special council permit as stated in sub-section (b).

- (b) The council may grant a **special permit**, if the owner proved that he is **not Jewish** and that he **closes his business on all weekly days of rest** of his confessional group; such a permit can be given at such terms as the council shall deem fit.
- (c) (1) The owner of a **coffee shop**, other than a bar and a business that sells ice cream, may open it on the Sabbath and Israel holidays, except for the Day of Atonement (*Yom Kippur*) and serve meals to his customers, within the building in which the business is located, during the following hours:
 - (a) On the eves of Sabbaths and Israel holidays - until 10:00 pm.
 - (b) On the Sabbath and Israel holidays – between 10:00 am and 3:00 pm and from April 1 until October 31 also from 6:00 pm until sunset.
- (2) A pharmacy shall be open to sell medication on the Sabbath and Israel holidays but only in accordance with a roster which shall be duly prescribed.
- (d) On the Sabbath and Israel holidays, except the Day of Atonement (*Yom Kippur*), a person shall not open and shall not allow anyone acting on its behalf to open a **place of public entertainment**, other than for **cultural and educational activities**.
- (e) On the Day of Atonement (*Yom Kippur*) a person shall not open, and shall not allow anyone on its behalf to open, a store or a coffee shop" (emphases added - M.N.)

31. Additionally, pursuant to that stated in Section 265 of the Municipalities Ordinance, the Municipalities (Offences Punishable by a Fine) Order, 5731-1971 (hereinafter: the "**Municipalities Order**") had been issued in the past, from which it emerges that opening a business on the Sabbath in the city of Tel Aviv-Jaffa, is an offence punishable by a fine:

"1. Any infraction of a provision in any of the sections specified in Column B of the by-laws specified in Column A of the First Schedule is an offence punishable by a fine.

2. (a) The rate of the fine for each offence as stated in Section 1 shall be as per the level of the fine that was prescribed alongside it in the First Schedule in Column C.

(b) In this Order -

Level of Fine	In New Israeli Shekels
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A	730
B	475
C	320
D	245
E	165
F	105
G	85

[...]

First Schedule

[...]

Part B – Tel Aviv – Jaffa

Column A By-Laws	Column B Sections	Column C Level of Fine
1. [...]		
10. Tel Aviv–Jaffa (Opening and Closing of Stores) By-Law, 5740-1980	2(a), (d), (e), 7(a)-(c) 3 7(d)	A B C

An offence under Section 2(a) of the By-Law, which prohibits opening businesses on the Sabbath, is ranked as a Level A offence punishable by a fine, the rate of which is currently NIS 730. This rate was prescribed in the Municipalities (Offences Punishable by Fine) (Amendment no. 6) Order, 5771-2011. The rate of the fine at this level, as was before this amendment and at the time of the filing of the petition which is the subject of this Appeal, was NIS 660, in accordance with what was prescribed in the Municipalities (Offences Punishable by Fine) (Amendment no. 2) Order, 5764-2004.

Discussion and Ruling**A. The Business Licensing Law**

32. In the Administrative Affairs Court the Municipality was not requested to file a Statement of Response and the petition was denied. During the hearing we held in the Appeal, on March 4, 2013, the Municipality's attorney agreed to view the proceeding as though a statement of response had been filed in the first instance court. I will explain the importance of this matter further on.
33. With regard to the Business Licensing Law, my opinion is as the opinion of the lower court and the Attorney General, that it is inappropriate, in this matter, to discuss the exercise of authorities by virtue of this Law, even without addressing the question of which values the Business Licensing Law protects and without discussing the question of the required linkage – if any – between the purposes of the Law and the motivations of those demanding that the Law be enforced. The Appellants' position that the Respondents are violating the Business Licensing Law relies on their argument that "in all of the business licenses that the Municipality grants, it is explicitly and clearly written" that the license is not valid on days of rest. However, the Appellants have not proven this argument of theirs.

The "business license" which the Appellants attached (as Annex IX of the petition which they filed to the Administrative Affairs Court) in support of their said argument, is not – as they imply – a license by virtue of the Business License Law, but rather a "permit to open a business" which was issued under the By-Law. The Appellants did not attach any business license of Respondents 2-6 by virtue of the Business Licensing Law and did not request that such license be furnished.

In the hearing held before us, the Appellants' attorney referred to the permit to open a business which the Appellants filed to the Court and argued that "The Municipality stipulated and obligated the permit-holder to act in accordance with the terms of the license. Meaning, this is very strong evidence that the stipulation also appears in the license. I shall mention that no one denied that. We are assuming that such stipulation exists". Additionally, when the Appellants' attorney was asked if there is a stipulation requiring the holder of the license to act in accordance with the By-Law in the Respondents' business licenses, he responded that "None of the Respondents denied this. None denied the fact that their business licenses are inherently subject to the By-Law, since otherwise this would also be an omission on the part of the Municipality [...] if there is no such stipulation, the Respondents should present a business license and we shall check." However, when the Municipality's attorney was explicitly asked if there is a stipulation regarding compliance with the By-Laws in the business licenses under the Business Licensing Law, her unequivocal answer was that such a stipulation is not included in the license. Therefore, I accept the conclusion that the Appellants did not succeed in proving that the Business Licensing Law is related to the matter before us, and no infraction of the provisions of such law was proven. As such, I do not see any need to further address these matters.

B. The By-Law

34. At the outset, I request to clarify how and at what stage Section 264A of the Municipalities Ordinance was mentioned, which in my opinion is the crux of the discussion before us.

First I shall state that the section was not explicitly mentioned in the Appellants' early applications to the Municipality before filing the administrative petition. The section was also not explicitly mentioned in the administrative petition that the Appellants filed. However, following an oral motion raised by the attorney of one of the petitioners in the hearing before the lower court on October 21, 2009, to amend the petition by way of adding Section 264A of the Municipalities Ordinance, on October 28, 2009 – after the parties' summations regarding *in limine* arguments were filed, but before the petition was discussed on its merits – the Appellants filed a "Motion to Amend and/or Clarify an Administrative Petition". In the motion, the Appellants requested to add to the petition that the Respondents' activity is illegal also "under the Municipalities Ordinance, including Sections 249(20), (21); 264, 265", and, to list, among the means which the legislator granted the enforcement officials: "a motion to the court pursuant to Section 264A of the Municipalities Ordinance and in accordance with the Tel Aviv-Jaffa (Opening and Closing of Stores) By-Law, 5740-1980, to exercise the authorities granted thereto". The Appellants emphasized that "such a motion is filed solely for the sake of caution and is intended to clarify the legal sources upon

which the petitions are based, particularly in light of the Court's remark during the hearing regarding referencing the relevant legislation."

35. In its response to the Appellants' motion to amend, the Municipality's attorney notified that she objects to the amendment of the petition if and to the extent that the purpose of the amendment is to respond to her argument regarding the purposes of the Business Licensing Law and the objectives thereof. Having said that, the Municipality's attorney added:

"If and to the extent that the requested amendment does not intend to materially change the petition, but only to specify additional means of enforcement which the Respondent is **required** by [the Appellants] to apply, within its authorities to determine the arrangements for the opening and closing of businesses on the Sabbath and holidays and to enforce them, then it is **unnecessary**, also according to [the Appellants], since the [Appellants'] allegations regarding how the Respondent exercises its enforcement authority and their attempt to **take the Respondent's given discretion in exercising its enforcement authority away**, received a response in Sections 21-22 of the Respondent's response to the petition, and in this matter, it makes no difference which means of enforcement [the Appellants] demand that the Respondent apply" (original emphases – M.N.)

36. The other Respondents also objected to the motion to amend. Respondent 3 (which is Respondent 2 in the case at hand) argued that at hand was an addition of a cause of action, since the petition in its existing format requested a remedy of exercising specific enforcement authorities, while respondents 4-5 (which are Respondents 3-4 in the case at hand) argued, similarly to the Municipality, that in any event the amendment shall not make any real difference since the sections of the Law that are mentioned in the petition are presented by way of illustration.
37. The Appellants' attorney notified during the hearing that was held on September 21, 2010, that "in light of the responses filed to the motion to amend the petition, from which it emerges that there is no need therefor, I withdraw the motion." Meaning, there was no decision not to relate to Section 264A of the Municipalities Ordinance in the framework of the proceeding before the lower court. Furthermore, all of the parties in fact related to Section 264A in the summations they filed, and thus, the lower court related to this section in its judgment.
38. From the material before us, it does not emerge that any discussion whatsoever had been held in the Municipality, until the examination of the petition, regarding the question whether exercising the authority pursuant to Section 264A of the Municipalities Ordinance should be considered. As stated, the Municipality agreed that the hearing shall be deemed as through a statement of response had been submitted in the first instance court, and it did not request a possibility to present additional material to us (or to the first instance court). Therefore, my assumption is that we possess all of the facts necessary to rule.

(1) The Enforcement Authorities in the Municipality's Possession

39. It is clear that the means of enforcement which are at the Municipality's disposal change according to the law, the upholding of which, it must protect. According to the Respondents, the provision violated is Section 2 of the By-Law and the Municipality is exercising the legal measure of imposing fines in accordance with its authority by virtue of Section 265 of the Municipalities Ordinance, together with the Municipalities Order, in order to enforce the violations of the By-Law. The lower court ruled in the matter that "with respect to the By-Law - there is no dispute the **only and direct** sanction for the violation thereof, is the imposition of a monetary fine" (paragraph 27 of the judgment; emphasis added – M.N.). However, as was explained above, imposing fines under Section 265 of the Municipalities Ordinance is **not** the only sanction in the Municipality's tool box for handling the violation of Section 2 of the By-Law. As stated, Section 264A of the Municipalities Ordinance prescribes that the Municipality is authorized to file a motion to the Municipal Court to grant a Prohibition to Open Order for a business that is violating a provision of a by-law that was promulgated by virtue of Section 249(21) of the Municipalities Ordinance.
40. In this context I shall state that Respondents 3-6's argument, that the Municipality was not permitted to exercise its authority by virtue of Section 264A of the Ordinance, is to be rejected. As stated, their argument is that Section 2 of the By-Law was not promulgated pursuant to Section 249(21) of the Municipalities Ordinance which authorizes the authority to consider considerations of religious tradition, but actually rather pursuant to Section 249(20) of the Ordinance. However, this argument cannot be accepted. The fact that Section 249(21) was legislated later does not lead to the conclusion that Section 2 of the By-Law does not rely thereupon. Section 4 of the Authorization Law – the law which added Sections 249(21) and 264A of the Ordinance – explicitly ratified old by-laws, while determining:

"4. A by-law regarding the opening and closing of businesses, which a municipality or municipal council promulgated **before** the commencement of this law, and which would have been duly effected had this law been in effect at such time, shall be deemed from the commencement of this law, **as though it had been promulgated thereunder**" (emphases added – M.N.)"

Two objectives underlie the day of rest: a social objective and a religious-national objective (see and compare: the **Israeli Theatres** Case, paragraphs 3 and 14 of President Shamgar's judgment; H CJ 5026/04 **Design 22 – Shark Deluxe Furniture Ltd. v. Rosenzweig Zvika, Director of Sabbath Work Permits Department – Inspection Division, Ministry of Labor and Social Affairs**, IsrSC 70(1) 38, paragraphs 16-18 and 20 of President Barak's judgment, and paragraph 2 of my statements there (2005); Yitzhak Zamir **The Administrative Authority** Volume A 62-63, 68 (Second Edition, 2010) (hereinafter: **The Administrative Authority A**)). As mentioned, the Authorization Law was intended to remove the doubt regarding the authority of local authorities to arrange the prohibition to open businesses on the day of rest and permitted the authorities to consider considerations of religious tradition in this matter (see: the Explanatory Notes to the Authorization Bill). Section 2 of the By-Law embodies both social values and Jewish-religious values and Section 4 of the Authorization Law determines that the By-Law should be deemed as though it had been

legislated pursuant thereto and in accordance with the authority vested in the Municipality by virtue of Section 249(21) of the Ordinance (and see: the **Israeli Theatres** Case, paragraph 3 of President Shamgar's judgment).

41. An additional means of enforcement which **may** be available to the Municipality is Section 254 of the Municipalities Ordinance. This section, which was mentioned by the Attorney General, prescribes a fine in the amount of NIS 3,600 to anyone who transgresses a provision of a by-law and an additional fine of NIS 160 for each day the offence continues. However, Section 254 was not mentioned by the Appellants or the Respondents, and therefore I am not addressing the possibility of exercising this means of enforcement. In any event, the Municipality's conduct is to be examined in light of this legal situation, pursuant to which the Municipality has additional sanctions available, beyond the imposition of fines. As such, the question in which the parties are disputed is – given that the Municipality has additional enforcement authorities in order to enforce the By-Law – was the Municipality obligated to exercise them?

(2) The Discretion vested in an Administrative Authority in Determining an Enforcement Policy

42. Is it appropriate to intervene in the Municipality's "decision" to enforce the By-Law by imposing fines without exercising another sanction? In fact, and as I shall clarify, at hand is not really a "decision". There is no evidence that the question whether to exercise an additional sanction was even considered. It should be noted that the petition before us does not address considerations which the Municipality must consider when promulgating a by-law. This distinguishes the case before us from the matter addressed by this Court in H CJ 953/01 **Solodkin v. The Beit Shemesh Municipality** IsrSC 58(5) 595 (2004) (hereinafter: the **Solodkin Case**), which addressed the scope of the local authority's discretion when **promulgating** the by-law itself. Our matter is not the content of the by-law but rather the manner of the enforcement (or lack of enforcement) thereof.
43. The lower court explained that the local authority has broad discretion, specifically in all that relates to determining enforcement policy (see: H CJ 551/99 **Shekem Ltd. v. Director of Customs and VAT**), IsrSC 54(1) 112, 125-165 (2000) (hereinafter: the "**Shekem Case**"), while stressing that it is important the Court not replace the authority's discretion with its own (*ibid*, paragraph 9 of Justice Zamir's judgment).
44. Regarding the matter of the judicial review of an administrative authority's enforcement policy, it was ruled that "indeed, in order for the Court to intervene in the level of enforcement of one law or another, the competent authorities must completely absolve themselves from their duty to enforce the law [...] or refrain from fulfilling their duty in an unreasonable manner" (H CJ 6579/99 **Filber v. The Government of Israel** (November 1, 1999); and see also: the **Shekem Case**, paragraph 8; H CJ 10202/01 **The Organization of Agents and Gas Station Owners in Israel v. The Attorney General** IsrSC 57(5) 713, 718 (2003); **The Administrative Authority A**, on page 275, footnote 114). However, also when dealing with enforcement policy, the authority's discretion exists in light of the law and in light of the need to enforce it (see: H CJ 1027/04 **The Independent**

Cities Forum v. Israel Land Council, paragraph 51 of Judge Arbel's judgment (June 9, 2011) (hereinafter: the **Independent Cities Forum Case**). The authority has a duty to uphold the law and insist on its being upheld by others. As Judge Zamir said in the **Shekem Case** (on page 125): "Indeed, the enforcement of the law, any law, is a fundamental basis of the rule of law [...] obviously that this duty [to enforce the law – M.N.] is imposed upon the competent authority. (See also: **The Administrative Authority A**, on pages 76, 83-84). To the extent that the administrative authority's position is that it is no longer appropriate to enforce the law for which it is responsible, it cannot absolve itself from the duty to enforce, but it rather has the option to act to change the law – and *a fortiori* when, as in the case before us, at hand is a by-law. However, as long as the law has not been changed, the authority must act in accordance with the legal situation actually in effect (see: the **Independent Cities Forum Case**, paragraph 51 of Judge Arbel's judgment; Daphne Barak-Erez **Administrative Law**, Volume A, Section 4.5 and the references there (2010) (hereinafter: **Administrative Law A**))

There are possible exceptions to the authority's duty to enforce the law, such as cases in which the law is anachronistic and does not accord with the existing social positions (The Attorney General's guideline not to enforce the prohibition (before it was cancelled) of homosexual intercourse between consenting adults and the prohibitions against abortions and attempted suicide, can, for example, be mentioned (and see: CrimA596/73 **Machaid v. The State of Israel**, IsrSC 28(1) 774, 774-775 (1974); Michal Tamir **Selective Enforcement** 31-32 (2008) (hereinafter: **Selective Enforcement**); Ruth Gavison **Administrative Discretion in Enforcing the Law** 61-62 (1991); Dalia Even-Lahav "The Executive Authority's Custom not to Enforce Law" **Mishpat U'Mimshal (Law and Government)** B 477, 486-493 and particularly footnote 50 (5755))). Such an exception does not exist in the case before us. The Municipality is not arguing that it is inappropriate to enforce the By-Law due to the nature of the city of Tel Aviv-Jaffa. It argues that **it is doing so**, and is imposing fines upon anyone who opens businesses contrary to the By-Law. The Respondents are the ones arguing that due to the nature of the city, the Municipality should not be forced to enforce.

45. From the authority's duty to ensure the upholding of the law it follows that the authority's range of reasonable discretion at the **enforcement** stage – as broad as it may be – is more limited than the range of discretion it had when **promulgating** the By-Law. **After** promulgating the By-Law, the authority must exercise its discretion in light of the By-Law and the objectives thereof (see: the **Solodkin Case**, paragraph 23; **The Administrative Authority A**, on pages 133 and 136). As a rule, the administrative authority must enforce the By-Law it promulgated and it no longer has broad discretion regarding the question whether to enforce it.
46. The purpose of exercising an enforcement policy is, naturally, to bring about the actual enforcement of the law. Exercising means of enforcement which are not effective does not realize this objective. Lack of effective enforcement of the law means a severe blow to the rule of law (see: HCJ 5377/09 **Regavim v. The Minister of Defense**, paragraph 7 (August 10, 2011) (hereinafter: the **Regavim 1 Case**); HCJ 8806/10 **Regavim v. The Prime Minister**, paragraph 7 (September 4, 2011) (hereinafter: the **Regavim 2 Case**)). It being noted that it is hard to reach a level of total enforcement. It is not always possible to reach total enforcement of

the law. There is also a question of resources (see HCJ 6396/96 **Zakin v. The Mayor of Beer Sheva**, IsrSC 53(3) 289, 304-305 (1999); the **Shekem Case**, paragraph 8; HCJ 6243/08 **The Preservation of the National Lands Movement v. The Minister of Defense**, paragraph 23 (December 2, 2010)), and it is even doubtful whether full enforcement is always desirable (see: **Selective Enforcement**, on pages 42, 48-49). This is one of the reasons for the caution the Court applies when exercising judicial review on the administrative authority's priorities in enforcing a law (see: the **Shekem Case**, paragraph 8). When determining an enforcement policy, the authority must strike a balance between the various legitimate interests related to the matter and it is certainly possible that in light of these considerations it will not be possible or proper to apply an enforcement policy which shall reach total or almost total enforcement. However, as stated, when applying an enforcement policy, the authority must strive to promote the law's objectives and to enforce it: "Determining priorities **does not exempt the authority from enforcing the law** and from applying ongoing self-examination" (emphases added- M.N.) (The **Regavim 2 Case**, paragraph 7; and see also: The **Regavim 1 Case**, paragraph 9: **The Administrative Authority A**, on page 136).

47. Other than the duty to enforce, administrative law has prescribed an additional review mechanism to make sure that the principles outlined in the law and the authorities vested in the administrative authority shall not become a dead letter - the recognition of the existence of **the authority's duty to exercise its discretion** (see: the **Regavim 2 Case**, paragraph 7; **Administrative Law A**, in Section 6.1; Yitzhak Zamir **The Administrative Authority** Volume B 1079-1080, 1087-1088 (Second Edition, 2010) (hereinafter: **The Administrative Authority B**)). "An authority which possesses authority to consider and decide, has been handed not only a right to exercise the authority but also the duty to consider the exercise thereof and to exercise it when that is justified" (HCJ 3872/93 **Mitrael Ltd. v. The Prime Minister and The Minister of Religions**, IsrSC 47(5) 485, 496 (1993); and see also: **The Administrative Authority B**, on page 1079). Case law also provides that the granting of administrative authority to an authority is accompanied with an **ongoing** duty to examine the need to exercise it, also when at hand is discretionary authority:

"[...] Even when we say that the term "may" means granting discretion – and this is indeed what is said – the holder of the discretion is still not allowed, according to case law and law, to not consider at all if a certain person in a certain case should be granted his wish. Discretion – as a rule – is accompanied by a duty, and that duty is that the entity possessing the authority must address the matter before it and consider it. Against such duty, exists the right of the individual that the entity that possesses authority actually consider the matter. See, for example: HCJ 297/82 **Berger v. The Minister of Interior** [12], on page 35 (Justice Barak), and on pages 45, 46-48 (President Shamgar); Y. Zamir **The Administrative Authority** (Volume B) [23], on pages 700-702. After all, we are also dealing with the relationship between rights and obligations that applies in a system entailing discretion in financial outlays.

[...]

As for the actual application of the authority, we knew that in certain circumstances and given certain conditions, the entity that possesses authority must apply its authority, otherwise this would frustrate the purpose of the law. This is the case wherever the law grants discretionary authority" (HCJ 2344/98 **Maccabi Health Services v. The Minister of Finance**, IsrSC 54(5) 729, 758 (2000)).

And as my colleague Justice Rubenstein has ruled regarding exercising authority:

"Case law prescribes that the granting of administrative authority is accompanied with the ongoing duty to examine the need to exercise it, even when at hand is discretionary authority (HCJ 297/82 **Berger v. The Minister of Interior**, IsrSC 37(3) 29, according to which, once authority has been granted to an authority, it is not be left unused (Deputy President - as his title was at the time - Shamgar, on page 46); HCJ 2344/98 **Maccabi Health Services v. The Minister of Finance**, IsrSC 54(5) 729, 758)." HCJ 10440/08 **Besserglick v. The Consumer Protection Appointee at the Ministry of Trade and Industry**, paragraph 14 of Justice Rubenstein's judgment (February 15, 2009) (hereinafter: the **Besserglick Case**); and see also **Administrative Law A**, Section 6.6.

48. When the means applied by the administrative authority do not bear fruit, refraining from applying additional means **could**, in certain circumstances, lead to the conclusion that in fact the authority is refraining from fulfilling its duty to exercise discretion or that the discretion it exercised is unreasonable. In any event, when the existing enforcement policy does not lead to the desired result, the administrative authority must, at the very least, **consider** the exercise of additional means of enforcement that are in its authority. Refraining from considering additional means of enforcement in such circumstances could amount to a flaw in the authority's conduct which justifies the Court's intervention.

From the General to the Specific

49. Section 2(a) of the By-Law provides a categorical determination. The language of the section is that "Subject to that stated in sub-Sections (c), (d) and (e) **the owner of a store or a coffee shop shall not open its business nor keep it open on the Sabbath and Israel holidays** other than with a special permit of the council, as stated in sub-Section (b)" (emphases added M.N.). In the case at hand, there is no doubt that the Respondents are violating the By-Law. As such, in principle, the Municipality must act so that these businesses shall be closed on the day of rest. This matter does not stem from a "religious" or "secular" perspective. It stems from the perspective that the law, including the By-Law, must be upheld.
50. The Municipality indeed applies means of enforcement and the Respondents are fined each and every week. However, it appears that it is evident that in fact, the Municipality is not, to the proper extent, realizing - through the means of enforcement it chose - the objective of the law. As achieving the objective of the By-Law, in light of the social and religious values of the day of rest, would mean that the businesses would indeed be closed on the day of rest and not that businesses that wish to open their doors on the Sabbath can do so provided they

are willing to pay the fine involved. While in fact, despite the fines the Municipality is imposing, the doors of the Respondents' businesses remain open each Sabbath. Therefore, in the case before us, the Municipality is not, by means of the existing manner of enforcement, realizing the law. Owners of small businesses, such as the Appellants and their like, indeed do not open their businesses on the day of rest, but the objective of the law is not at all achieved vis-à-vis the businesses that are part of large retail chains, for whom, in light of their economic resilience and their daily profits each Sabbath, it is worth their while to consistently open their doors on the day of rest, notwithstanding the fine they have to pay therefor. It emerges that these businesses, with their many branches spread all across the city, together with additional grocery stores and supermarkets which are open on the day of rest which do not belong to a given chain store, constitute a significant share of the retail activity in the city of Tel Aviv-Jaffa.

51. By enforcing only by means of the impositions of fines, the Municipality in fact enables, or at least turns a blind eye from, the continuous violation of the By-Law by such group. The situation which results from this enforcement activity is that the Respondents gain profits from an additional business day on the weekend, the Municipality's treasury benefits from significant amounts due to the fines it imposes upon the Respondents each week (the fine is paid to the local authority's treasury pursuant to Section 229A of the Criminal Procedure Law [Consolidated Version], 5742-1982), but the rule of law – which requires obeying the provisions of the law – is compromised. As specified above, an enforcement policy which in effect does not achieve the objective of the law is problematic (see: **The Administrative Authority A**, on page 136). As acting President Zilberg stated in H CJ 295/65 **Oppenheimer v. The Minister of Interior and Health**, IsrSC 20(1) 309 (1966) (in paragraph 9 of his judgment): "Refraining from exercising and realizing an existing and binding law, is not a policy and cannot be a policy, in any respect whatsoever; it only results in demoralization in the relationship between government and citizen, and is followed by insubordination towards **all** of the laws of the state" (original emphasis – M.N.). The difficulty is enhanced when it is impossible to ignore the concern that it is convenient for the Municipality – in light of the economic profits it gains from imposing the fines – not to insist upon the observance of the By-Law (see and compare to the words of Justice Cheshin in H CJ 4140/95 **Superpharm (Israel) Ltd. v. Director of Customs and VAT**, IsrSC 54(1) 49, 103-105 (1999); **Administrative Law A**, in Section 1.14).
52. If the nature of the city of Tel Aviv-Jaffa requires, in the opinion of its leaders who represent the population, not to close businesses such as those of the Respondents, on the Sabbath, the By-Law can be **changed** through the manner prescribed in the law. However, as long as the By-Law has not been changed, the point of departure is that it is to be upheld. The Attorney General stated that the Municipality is authorized to strike a balance "between the interest of preserving the nature of the Sabbath as a day of rest [...] and making certain economic activity possible". However, in my opinion, the appropriate place for striking such a balance is in a Municipality decision whether to promulgate a by-law regarding the activity of businesses on the Sabbath and formulating the arrangements prescribed therein. This is what the Municipality did when it promulgated the By-Law, which includes a prohibition to open on the Sabbath, as well as exceptions to

the prohibition. The Municipality chose not to include businesses such as the Respondents' businesses as exceptions to the prohibition.

Additionally, *prima facie*, if the Municipality's position is that there is no longer justification for the By-Law as it currently exists, then the use of fines as the means of enforcement is not the proper response. If the Municipality is of the opinion that, in light of the unique character of the city of Tel Aviv-Jaffa, opening stores on the day of rest should be allowed – there is no justification to obligate the owners of the stores to pay fines to operate businesses on the Sabbath. If, in the Municipality's opinion, there is nothing wrong with the Respondents' actions, what is the justification for them having to pay a fine? If, on the other hand, there is a justification for closing the stores on the day of rest, it is necessary to consider using additional means of enforcement, and first of all, the above mentioned Section 264A, since enforcement only by means of imposing fines is not achieving the purpose of the By-Law.

53. I accept the lower court's approach that the Municipality's authority to request a Prohibition to Open Order, under Section 264A of the Municipalities Ordinance, is a discretionary authority. The Municipality is not required to exercise this authority in each and every case of violation of a by-law, however it must **consider** if and how to exercise the variety of means of enforcement it has in its "toolbox" (see for example: the **Shekem** Case, paragraph 8; **The Administrative Authority B**, pages 1087-1088). The lower court ruled that "In order for the Court to intervene in the level of enforcement of one law or another, the competent authorities must completely absolve themselves from their duty to enforce the law, or when the enforcement is selective and deriving from irrelevant considerations" (paragraph 34 of the judgment), and reached the conclusion that in the case before us there is no justification to intervene in the manner in which the Municipality is enforcing the law.
54. I cannot agree with the lower court's conclusion. Even if the Court must take caution not to interfere in the balance of considerations struck by the authority, the principle of respecting the authorities and the limited judicial review which the Court exercises cannot exempt the Municipality from the mere **duty to exercise its discretion** (see: the **Regavim 2** Case, in paragraph 7; **Administrative Law A**, Section 6.1; **The Administrative Authority B**, pages 1079-1080, 1087-1089). When the Municipality possesses authority to request a Prohibition to Open Order, pursuant to Section 264A of the Municipalities Ordinance, it has the duty to **examine** from time to time if it is necessary to exercise such authority, as well as additional authorities, to the extent such are in its possession. The continuous nature of this duty has utmost significant when the means of enforcement the Municipality chose to take, do not bear fruit (see: the **Besserglick** Case, paragraph 14 of Justice Rubenstein's judgment).
55. As I mentioned at the outset, the Municipality's attorney agreed to view the proceeding as though a statement of response had been filed. Therefore, the burden to demonstrate that the Municipality **considered** all of the possible means of enforcement to enforce the By-Law and that it fulfilled its duty to exercise discretion in doing so, imposed on the Municipality. However, the Municipality did not do so. The Municipality did not at all demonstrate that it examined and

considered – with an open heart and willful soul - the merits of the need and the possibility of filing a motion for a Prohibition to Open Order or that there was any decision and exercise of discretion in this matter. The Municipality did not even argue that there is a general policy, which derives from actual exercise of discretion, pursuant to which the sanction prescribed in Section 264A of the Ordinance, should not be exercised. As I have clarified, there is no knowledge at all of the adoption of any "decision" not to exercise the authority prescribed in Section 264A. The Municipality did not demonstrate that this matter was considered and what the considerations were. Thus, I did not find in the Municipalities' arguments any basis to the lower court's determination that "[...] the exercise of the authority [to request that the Court grant a Prohibition to Open Order – M.N.] is subject to discretion, **which it was decided would not be exercised, in accordance with the general policy** which derives from the population's needs and desires" (paragraph 6 of the judgment). From the material before us it emerges that the Municipality chose to impose fines on Respondents 2-6, but it does not emerge that it even considered the possibility of approaching the Municipal Court in their matter and requesting a Prohibition to Open Order. Not considering the possibility of filing a motion for a Prohibition to Open Order nor examining any other option so as to achieve – to a reasonable and proportional degree considering all of the considerations - the proper enforcement of the By-Law, constitute a violation of the Municipality's duty to take action and exercise discretion. In these circumstances, the Municipality violated its duty to exercise discretion from time to time, and in doing so, its conduct was flawed in a manner justifying our intervention, in the sense that we shall obligate the Municipality to consider what it did not consider.

Epilogue

56. If my opinion shall be heard, the Appeal shall be accepted. The judgment of the first instance shall be cancelled and the matter shall be returned to the Municipality so that it shall exercise its discretion and adopt a decision on the merits of the manner of exercising the authorities vested therein by Section 264A of the Municipalities Ordinance or any authority in addition to its authority to impose fines. The Municipality shall examine its position regarding the enforcement of the By-Law within 60 days from the date the judgment is granted. The decision to be adopted in this matter shall be delivered to the Appellants' attorney and, of course, is subject to additional judicial review.

The expenses imposed upon the Appellants in the first instance shall be cancelled. There shall be no order for expenses in our instance.

President A. Grunis:

I Agree.

Justice E. Rubinstein:

- A. I join the orderly, methodically arranged judgment of my colleague Deputy President Naor, on each and every element thereof. I wish to add two matters, which I shall list in their reverse order of importance: the conduct of the Municipality as a public entity, and the insult to the Sabbath as a national and religious day of rest for the Jewish people. The combination of the two in the case at hand has produced the contemptible and cheap picture portrayed before us. I shall attempt to view the matter in the context of the objective of the legislation and the nature of the State of Israel as a Jewish and democratic state, and the city of Tel Aviv, the first Hebrew city and the central urban metropolis in our country.
- B. Before us is a municipal by-law, the Tel Aviv-Jaffa By-Law (Opening and Closing of Stores) 5740-1980, pursuant to which the opening and closing of stores on the days of rest is prohibited. As my colleague wrote (paragraph 50) "... the objective of the By-Law, in light of the social and religious values of the day of rest, in light of the social and religious values of the day of rest, would mean that the businesses would indeed be closed on the day of rest and not that businesses that wish to open their doors on the Sabbath can do so provided they are willing to pay the fine involved."
- C. The Municipality interprets its duty to enforce the By-Law in a manner which cannot be described as other than completely emptying it of any content (unless we see a public value in NIS 2,640 per month – 660 multiplied by four – which are collected as fines from the supermarket chain stores), and dares to call this enforcement. Indeed, the matter is presented before us in the appeal of small merchants who cannot hire revolving staff as the supermarkets can and are entitled to a day of rest (it should be assumed that generally they work six days and they are not the ones who actually benefit from five working days) and they do as their fathers and forefathers did: they rest on the Sabbath. But at such time their secular customers, who wish to buy on the Sabbath, run to the open supermarket, from which the Municipality collects the "The Sabbath Tax" (heaven forbid) in the form of a weekly fine while the Municipality congratulates itself on the alleged maintenance of the By-Law. For the supermarkets this is a fraction of their income, like a light ripple on the surface of the water, almost a "bad debt" (one must assume and hope that they cannot deduct it as a tax expense to the tax authorities), and the supermarket is relieved, and the Municipality is appeased, and all the while the grocery store's door shall be sealed, and primarily - the Sabbath shall be tainted.
- D. For the Municipality, a public entity of the highest degree, which is meant to serve all of the residents according to the law, this is a solution which – as is customary at times among us – is a *Torah* sanctioned "*Israbluff*", a "pretense" as though all of the spectators were fools. What is the Municipality's opinion regarding the significance of an offence which has infinite recidivism? Should the enforcing authority suffice with a fine and marking a "check" and just continue doing this, or must it seek another way?
- E. It is clear – as emerges from my colleague's opinion – that in the current situation, the objective of the By-Law is not achieved in the public arena of Tel Aviv.

- F. Although I wonder whether it is necessary to elaborate regarding the Sabbath, I will say the following. The Sabbath has two contents, religious and national on the one hand and social on the other (see H CJ 5026/09 **Design 22 v. Rosenzweig** (2005), in paragraphs 16-17 and 20-21 of President Barak's judgment, and in paragraphs 2-3 of Justice Procaccia's opinion, and in the opinion of Justice (as her title was at the time) Naor). Religiously speaking, it is the fourth commandment of the Ten Commandments, the essence of the universal Jewish constitution, no less, in both of their versions: "Remember the Sabbath day to keep it holy" (**Exodus** 20, 8) and "Keep the Sabbath day to sanctify it, as the Lord your God commanded you." (**Deuteronomy** 5, 12). The religious content of the Sabbath emerges from the wording of both of these openings of the fourth commandment, but the Ten Commandments also include the social aspect. As emerges conspicuously from the wording in **Deuteronomy** (5, 13-15): "Six days may you work, and perform all your labor; and the seventh day is a Sabbath to the Lord your God; you shall perform no labor, neither you, your son, your daughter, your manservant, your maidservant, your ox, your donkey, any of your livestock, nor the stranger who is within your cities, in order that your manservant and your maidservant may rest like you; And you shall remember that you were a slave in the land of Egypt, and that the Lord your God took you out from there with a strong hand and with an outstretched arm; therefore, the Lord, your God, commanded you to observe the Sabbath day." There really is no need to elaborate. The *Torah* has done so better than I. This is the social content of the Sabbath, rest to all.
- G. The Sabbath as a day of rest to all is a contribution of the highest degree. Our Sages say about the verse "To know that I, the Lord, make you holy." (**Exodus** 31,13) that "The Lord told unto Moses: Moses, I have a great gift in my treasure house. It is called Shabbat, and I wish to give it to Israel" (Bavli **Sabbath**, 10, 2). And as philosopher Hermann Cohen (19th and 20th century) said (*Sefer Hashabbat*– which is filled with sources – edited by Dr. Y.L. Baruch (Tenth Printing, 5723, 151)) "From the change of the wording between the first and second commandments... (between **Exodus** and **Deuteronomy**) it is undoubtedly clear that the purpose of the Sabbath is to preserve equality among people, not to notice the difference between their social status" – meaning, the expansion of the Sabbath to the human race. On the Jewish level, the renowned Zionist philosopher, *Ahad Ha'am* (19th and 20th centuries) in his essay "The Sabbath and Zionism" wrote against how assimilators were indifferent to the possibility of the cancellation of the Sabbath. Words that became an idiom: "One can say, without exaggeration, that more than Israel kept the Sabbath, the Sabbath kept them", in that it renewed the spiritual life each week. On the universal human level, philosopher Abraham Joshua Heschel (twentieth century) viewed the Sabbath as "A palace in time, and in the kingdom of time each person shall find his own place" (his book "**The Sabbath**" E. Even Chen translation, 2003, presented in the **Gavison – Medan Covenant** website). The *Chafetz Chaim*, Rabbi Yisrael Meir of Radin, in his book, *Shem Olam*, speaks of the Sabbath as "the center, from which all of the days of the week suckle... like the heart, from which the vitality continues to all of the organs" (*Sefer Hashabbat*, edited by Y.L. Baruch, 139). See also Aviad Hacohen "Day of Rest in a Jewish and Democratic State" *Parashat Hashavua* (A. Hacohen and M. Wigoda Editors, and the references there) **Exodus** 313-320.

- H. I will not refrain from saying that there is a legitimate question regarding the character of the Sabbath in Israel. Many ideas and proposals have been raised, *inter alia* – for example the **Gavison – Medan Covenant** from 2003, by Prof. Ruth Gavison of the Hebrew University of Jerusalem and Rabbi Yaacov Medan of the *Har Etzion Yeshiva* in Alon Shvut (see the **Gavison – Medan Covenant, Main Points and Principles**, by Yoav Artsieli). Regarding the Sabbath, the covenant suggested (third chapter) – *inter alia* – that government offices, industrial factories, banks and trade institutions would be closed; however restaurants and entertainment places would not be prohibited from operating, keeping in line with certain frameworks. A limited number of small grocery stores (particularly them!), gas stations and pharmacies would not be prohibited from operating. And restaurants, museums and other entertainment places would be open on the Sabbath. Of course, this is not to be taken as gospel, but they wish to strike a balance, and there were and may be others like them. It is clear that between those who observe the Sabbath according to the religious requirements, who wish to see it observed with all of its religious details and specifications, and those who have a secular approach, there is a broad middle ground begging to be filled with content. But, until an agreed destination is reached, we must deal with the law and the By-Law.
- I. As for the city of Tel Aviv, I am aware of its current image as a "Non-Stop City" with all of the expressions of contemporary culture, and I do not shut my eyes and ears to that. It is also presumed that the "enforcers" of the By-Law on behalf of the Municipality are tuned in to the messages of many of the leaders of the city, and it naturally follows, of a large population in the city, and attempt to reach out to them. However, with all due respect, Tel Aviv is not in another country and it also has communities that are interested in a significant character of the Sabbath and it is bound by the law of the state and by it being a Jewish and democratic state. The balance between both parts of the definition "Jewish" and "democratic" must also be sought in Tel Aviv, but it appears that currently the "democratic" angle is pushing the "Jewish" angle out. As a reminder from the past – without necessarily trying to draw a complete comparison – I shall bring from the words of Tel Aviv's first mayor, Meir Dizengoff, who was not considered "religious" in the sociological sense, at a rally in 1933 regarding public desecration of the Sabbath: "In my opinion, the meeting should not necessarily have been summoned by the Rabbinate, this is not only a question of religion, but a national and public matter. It is forbidden to publicly desecrate the Sabbath. Each and every nation has a tradition of perceptions, faiths, customs, which preserve it. This is the character of a nation, that grants it existence... the city needs a special Jewish signature." (presented in the **Sabbath Book (From You To You)**, Y. Kaplun editor (2010), 410; and in another place Dizengoff reiterated the same words (*ibid*, from **Tel Aviv**, by A. Druyanov) "... There is an anticipated risk that our beloved city shall become a merchant and trading city as all of the cities in the east, and there shall be no remnant of the spirit of its founders, whose entire direction was to create a Jewish humanistic cultural center...". Of course, Tel Aviv today is not Tel Aviv of Dizengoff's days, and its world may be more diverse, although even then it was not a "religious" city. However, the State of Israel is a Jewish and democratic state, and the way the Sabbath day is expressed on the city streets, according to the By-Law which is the subject of our discussion, cannot be the imposition of ridiculous fines of NIS 660 per week. It is upsetting that according to the

Municipality's position, it is accepted as a given that the realization of the By-Law suffices with "monetary ransom" - Where is the objective and where is the day of rest? As my colleague, the Deputy President, stated, the city council can reexamine the By-Law and if it shall deem fit – it can lawfully change it. In any event, we shall remember that for most people today, Friday is a day off. Would it be unreasonable to concentrate the shopping on Friday, and 'he who is prepared on the eve of the Sabbath shall eat on the Sabbath', and the By-Law will be observed.

- J. The Municipalities (Prohibition to Open Businesses and the Closure thereof on Days of Rest) Bill, 5748-1988, **Bills** 5748, 134 – which is known as the Authorization Bill – is based on the doubt that was cast in the Court (in CrimC (Jerusalem) 3471/87 **The State of Israel v. Kaplan**, IsrDC, 5748 26) regarding the authority of local authorities to promulgate a by-law regarding opening businesses on the Sabbath and Israel holidays; as stated: "The purpose of the proposed law is to remove the said doubt and preserve the *status quo* in the matter being addressed". In presenting the law for a first reading, the Minister of Religious Affairs Z. Hamer (*Divrei Haknesset* (The Knesset proceedings) 11th of Adar 5748 - February 29, 1988, page 2070), stated that the law validates the situation existing prior to the judgment which invalidated a by-law prohibiting opening places of entertainment on the Sabbath due to lack of authority. It was noted that the religious consideration receives its validity within the proposed authorization, but it does not compromise justice and equality, since "This law grants central support, as the judicial authority demanded, to the public and communities anywhere to formulate their lives as per their understanding and belief". It was further said (page 2071), that "Anyone concerned about the Jewish character of the State, about bringing Jews together, and about the character of the Sabbath, should support the law". This was followed by an argument between different parties. Eventually, when the law was presented for second and third readings by MK Uriel Lin (chairperson of the Constitution, Law and Justice Committee, it was noted (*Divrei Haknesset* (the Knesset proceedings) 30th of Kislev, 5751 December 17, 1990, page 1192) that the law is presented not as the "Authorization Law" but rather as Amendment no. 40 to the Municipalities Ordinance (applicable also to local councils); and it was said that opening and closing of businesses can also be determined based on reasons of religious tradition (page 1193). We can see that the law intended to make it possible – not obligate – to grant content that also has religious context. The result is the addition of Section 249(21) and Section 264(a) (*sic.*) to the Municipalities Ordinance, which were presented by my colleague, the Deputy President, in paragraphs 28 and 29, which address the permission to exercise the authority of closing businesses on the days of rest "taking religious tradition reasons into consideration" (Section 249(21)), and the possibility to enforce by order (Section 264(a) (*sic.*)).
- K. Indeed, the amendment in and of itself is mainly grounded in the religious aspect; however the said By-Law from 5740-1980, even preceded Amendment no. 40, and the character of the day of rest may be formulated by consent. It is in any event evident that the legislature and the secondary legislature could not have intended a "pretense", meaning that the secondary legislature would legislate a by-law to be printed in the records – while the enforcer would (in essence) pretend to enforce. The By-Law must be viewed and interpreted in light of all of the

backgrounds – the religious, national and social, while striking proper balances (see HCJ 5016/96 **Chorev v. The Minister of Transportation**, IsrSC 51(4) 1; the above mentioned HCJ 5026/04 **Design 22 v. Rosenzweig**; and HCJ 953/01 **Solodkin v. The Beit Shemesh Municipality** (2004) for discussion of the challenges of balancing). " Sabbath comes, rest comes" and not " Sabbath comes, mocking comes ".

- L. In light of all of the above, there is no escaping the result my colleague reached. One should hope that the leaders of the city will succeed in finding an enforcement solution which shall honor the law and the Sabbath, and also be reasonably satisfactory to the fair and rest-supporting residents of Tel Aviv.

It was decided in accordance with the judgment of Deputy President M. Naor.

Given today, 17th of *Tamuz*, 5773 (June 25, 2013).