



**Civil Court – Family Section**

**Mr. Justice Robert G. Mangion LL.D.**  
Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)

**Today the 9<sup>th</sup> day of November 2016**

Sworn Application No. 163 / 13RGM

Number on list: 23

**X U P in her own name  
and by Decree of the 1st March 2005 also as  
curatrix ad litem of her minor child L Z P**

**vs**

**Doctor Vincent Galea and Legal Procurator Luisa Tufigno  
appointed deputy curators in virtue of court  
decree dated 1st March 2005 to represent  
G W N [also A] who is absent  
from these Islands**

**The Court,**

**PRELIMINARIES.**

Having seen plaintiff's application whereby he submitted and claimed as follows;

1. Whereas by sworn application presented on the 23rd February 2005 before the Civil Court, Family Section. by X U P in her own name and as curator ad litem for her minor daughter L Z P against Dr. Vincent Galea and P.L. Louisa Tufigno as official curators to represent G W N (also A) absent from Malta, she request the said court to: 1. Decide that defendant was responsible to pay maintenance to his minor daughter L Z P; 2. Liquidate the maintenance which defendant has to pay, and to give those directives that appear opportune; 3. condemn the defend-ant to puy plaintiff as representative of their minor daughter L Z P that maintenance so liquidated, with those modalites of time, place and day

which likewise will be established. With costs, including those of the Warrant of Inhibition number 2244/04 against defendant to whose oath reference is being made.

2. Whereas by judgement delivered by the Civil Court, Family Section; on the 27th day of June 2006 in the lawsuit in the names "X U P pro et noe -vs- Doctor vincent Galea et noe", writ of Summons Number 52/2005NC, the said court acceded to plaintiff s demands and declared defendant G N to be responsible for the payment of maintenance of his daughter L Z, and ordered that one third (1/3) of the apartment internally marked number four (4) forming part of a block of flats named "veronica Flats", without external number, situate in Perellos Street (forrnnerly n/s off Main Street) in Saint paul's Bay, be assigned to plaintiff X U in full and final satisfaction and payment of all maintenance due, past, present and future for the minor child. For the purpose of the publication of the relative deed of transfer, the Court nominated Notary Doctor Sylvana Borg Caruana to publish this said deed in the building of the Law Courts, on a date and time to be fixed by the said Notary not later than two months from the date of this judgment, appointed Doctor of Laws Vincent Galea to appear on behalf of defendant in case the latter fails to appear for the publication of the deed. The expenses of these proceedings, as well as of the relative deed of transfer, are to be borne totally by defendant; however provisionally the plaintiff is to pay these expenses relating to the deputy curators, including the curators appearing on the relative deed.

3. And whereas no appeal was entered from the said judgment.

4. And whereas by deed dated the thirteenth March of the year two thousand and seven (30/03/2007), enrolled in the act of Notary Silvana Borg Caruana, Doctor Vincent Galea as curator for the contumacious G W N (also A) assigned and transferred one third (1/3) undivided part of the apartment internally numbered four (4) forming part of a block of flats named "Veronica Flats", without external number, situated in Perellos Street (formerly new street off Main Street), in Saint Paul's Bay, together with all its rights and apertenenances arising from its present position and free and unencumbered, and including one twelfth (1/12) undivided part in ownership of the common parts and of the common services include the entrance, entrance hall, staircase, stairwell, landings, drains and drainage system, roof and airspace overlying the block destined for the common use and for the common utility by the owners of the flats in the block.

5. And whereas applicant G W N (also A) became aware of the said lawsuit and the said judgment following a letter dated the twentyseventh day of May of the hear two thousand and thirteen (27/05/2013) that his mandator Doctor of Laws Henry Antoncich LL.D. received from Doctor of Laws Kris Borg LL.D. for X Nikolaevna P.

6. And whereas applicant nomine is demanding in accordance with Article 811 of Chapter 12 of the Laws of Malta, a new trial of the said lawsuit decided by the judgement delivered by the Civil Court, Family Section, on the twentyseventh day of June of the year two thousand and six (27/06/2006) in the above captioned names (Dok. "A"), such judgment being first set aside, and this for any of the following reasons:

A. Article 811[b] - Lack of Notification:

The lawsuit in question had been instituted by X U P against Dr. Vincent Galea LL.D. and Legal Procurator Louisa Tufigno nominated as official curators to represent the absent G W N. She was therefore in duty bound to provide the said curators with a contact address of the absent person they were representing" Following the Court's request in the said lawsuit, she had also undertaken to provide the official curators with the official address of her ex-husband. Instead, she made a mockery of the whole situation, provided the Russian Authorities with an address, and namely, 8-1-4, Str. Samora Mashela, Moscow, which has no connection with applicant, and the search carried out by the Russian Authorities proved obviously no result.

It needs to be explained that, during the very same time of the pending proceedings in Malta (200512006) the parties were also involved in litigation in Moscow because respondent Muhortova had transfered, alone and without the knowledge of applicant N, the residential apartment situate at 30-2-145 General Glagolev Str., Moscow, to Arexey Igorevich Shomov. In fact, by judgment delivered on the 6th September 2006 The Court in Moscow decided that P had violated the joint property regime of the spouses when she transfered the said apartment without her ex-husband's consent and signature, that purchaser Alexey Igorevich Shomov is a bona fidei acquirer, and ordered responnent P to pay applicant Bernschtein the amount of RUB 499,968. Respondent P did not refund any monies as the court had ordered. During the pendency of the said Moscow lawsuit applicant had provided the Court with his official address which is the same address as the Moscow apartment then in contestation, and had also legal advisors to represent him. Respondent P could therefore have easily given the Court and the official curators this address or at least the contact details of applicant's legal advisor, but she failed purposely to do so. The end result was that applicant A was never notified with his ex-wife's application, was not even informed of the pending lawsuit and never made an attendance for the hearing of the said lawsuit. He only became aware of the eventual judgment when Dr. Kris Borg LL.D. made this known to applicant's mandator and legal counsel in Malta, Dr. Henry Antoncich LL.D., as above explained.

B. Article 811 [a] - Fraud:

The fact that X U P failed to provide the address of applicant G W N so that the official curators can communicate with the absent person they were representing, and following the court's request she made an enquiry with the Russian Authorities to make a search for her ex-husband on an address which she invented and which has no connection whatsoever with him also leads to misrepresentation and therefore to fraud being committed by one party to the prejudice of the other. She wanted to continue her lawsuit uncontested with her lies, half truths, and twisting of facts, and therefore she provided the Court with an address which would definitely have resulted in the negative. Therefore, P's trickery impeded applicant from getting to know in time of her lawsuit and left him in the impossibility of putting a defence to his ex-wife's claims.

And as if this was not enough respondent P also pursued the execution of the judgment obtained by her from the Moscow Court on the 10th June 2003 for the payment of maintenance of one-fourth of the salary or any other income that applicant Bernscheite has, and on the 2010 he paid the Russian Court Bailiffs and in an account provided by her to these bailiffs the amount of RUB 102,824.64 apart from enforcement expenses in the amount of RUB 7,197.72c.

It does not seem either that P followed the procedure for the appointment of curators ex-officio. with the presentation of the relative application for the appointment of curators she had by law, to serve the banns together with a copy of the pleading on one of the person most closely related to the person to be represented ...and where no relations are known, such copy shall be served on some other person known to be or have been a friend of the person concerned (vide Article 931[2] of chapter 12 of the Laws of Malta)...and where no relation or friend as is mentioned is known to the person demanding the appointment of curators the Court may order that instead of the service mentioned in subarticle (2) a copy of the banns together with a copy of the pleading or a summary thereof be published in the Government Gazette and in at least two daily newspapers at the expense of the applicant" (vide Article 931[3] of Chapter 12).

C. Article 811[h] - Conflicting previous Judgment:

The judgment of the 27th June 2006 is in conflict with a previous judgment delivered by the Court of Magistrates of Juridical Division N I 54 Khoroschevo - Mhevniko Distric of North-West Administrative Okrup of Moscow on the 10<sup>th</sup> June 2003 which had ordered applicant N to pay respondent P as maintenance towards their minor daughter one-fourth of his salary or any other amount that he has. Although this was stated not only in Respondent's Sworn Application but also in her affidavit presented in the acts of the said lawsuit no plea of "res judicata" was raised and determined. Respondent had kept insisting for this money and in fact applicant ended up paying his debt in full by depositing the amount in an account which respondent gave the Russian Court Bailiffs as above explained.

D. Article 811[L] - Error:

The judgement of the 27th June 2006 in the above captioned names was also the effect of an error resulting from the proceedings or document of the cause, an error which was not contested and discussed between the parties during the lawsuit. In fact, from the sworn application respondent P primised that by Court Decree of the of the 10th Octobe r 2004 she had been authorised to proceed with the relative lawsuit (Decree Number 1263/2004; which according to law is a two month period, had been prorogued by another Decree (Decree Number 185/2005), so much so that she presented her lawsuit on the 23<sup>rd</sup> February 2005. Plaintiff s lawsuit was therefore null and could not have been proposed and therefore should have been refused with costs against her. This for the reason that the effect of the Decree Number 1263/2004 could no longer be executed since the lawsuit was not presented within two months from the date of the Decree, and her request for extension of that term was made after that the original two month. had already expired (Vide "Francis Schembri -vs- Angolina sive Lina Schembri et", Appeal, 10th November 2008).

7. And whereas the above mentioned facts were largely obtained from information and documents provided by applicant G W N.

And therefore, whilst applicant nomine makes reference to the proof already brought forward in the above captioned judgment, and whilst he reserves the right to bring forward other evidence admissable at law, respectfully begs that this Honourable Court:

1. Revokes, annuls and set aside, for the premised reasons, the judgment in the names "X U P pro et noe -vs- Doctor Vincent Galea et nomine" delivered by the civil court, Family Section, on the 27th June 2006 and order the rescission of the contract published on the 30th March 2007 by Notary Sylvana Borg Caruana with the appointment of curators to represent the eventual contumacious on the said deed.

2. Orders the re-trial of the said lawsuit so that this will be heard, treated and decided according to law.

With costs of the instance and of the one before it against X U P who is being contestually summoned for reference to her oath.

Respondent filed her sworn reply which reads as follows:

Preliminarily, L Z P is- now a major at law and hence represented she is no longer by her mother X U P.

Secondarily it does not appear that the sworn application is accompanied by a security for costs as contemplated in article 249 of the Code of Organisation and Civil Procedure.

On the merits, the claim of the plaintiff noe is unfounded and the judgement of the 27th June 2006 was properly obtained and is valid for all effects and purposes at law, and that henceforth the public deed ordered in virtue of the same judgement, dated 30th March 2007 should stand.

That the first four paragraphs of the praintiffs application are not contested.

In so far as the fifth paragraph is concerned it is not yet established when plaintiff noe really became aware of the judgement obtained against him, yet should it result that plaintiff noe became aware earlier than stated, then defendant reserves the right to raise the plea that this application is time barred.

That the reason brought forward as a basis for the retrial are legally unfounded and are not backed by facts, as will be seen:

#### Article 811(b) - Lack of Notification

Defendant was duly regularly notified according to the procedure available under Maltese law. It is not true that defendant in any way made any false representations regarding the address of the plaintiff on the contrary' the plaintiff made a mockery of the Russian system of registering addresses, as will be proved. In point of fact plaintiff had officially registered himself at 8-1-4 Str. Somora Mashela, Moscow as can be evidenced from an official translation of a document released by the Ministry of Intemal Affairs of Russia.

In addition defendant knew as at 2003, that the plaintiff did not live in the address appearing on his passport as the Police had searched for him there and had not found him there. Also the other address plaintiff gave as having been living in in 2005 was also not correct as this address was a property that belonged to defendant herself which had already been sold to third parties in 2005 and thus plaintiff could not have been living there. Plaintiff never lived in the addresses at Mira Street or General Glagolev Street, in Moscow.

Thus it was the plaintiff who gave false information to the Russian Authorities and this was reason why the curators did not manage to communicate with him. The defendant should not be prejudiced because the plaintiff made false declarations to the Russian Authorities regarding his official residence.

#### Article 811(a) Fraud

In view of the above, the defendant certainly cannot be accused of having obtained any judgement by fraud. It was the plaintiff who gave false information to the Russian Authorities and this was the-reason why curators did not manage to communicate with him. The defendant should not be prejudiced because the plaintiff made false declarations to the Russian Authorities regarding his official residence. The arguments of the plaintiff could only be accepted if the plaintiff was honest and correct and gave correct addresses himself.

The procedure adopted by the defendant for the appointment of curators was the regular procedure contemplated by Maltese law, and it cannot be understood how fraud is being attributed to the defendant for having utilised this procedure.

In so far as the attributed execution of the maintenance money, this money were never collected by the defendant.

Plaintiff also states that he was an executive creditor of the defendant in the sum of RUB499,968 due to a judgement obtained on the 6th September 2009, yet he fails to mention that this judgement expired on the 6th September 2009, as can be confirmed from the Legal opinion.

It was the plaintiff who committed fraud against the defendant when during the application of the community of acquests he bought an apartment in Malta in his own name hiding the fact that he was married.

In addition plaintiff was bound to pay his daughter  $\frac{1}{4}$  of all his income in maintenance, according to the Court judgement executed in Malta, and plaintiff sold two apartments in Moscow and did not pay his daughter anything. It results that all the monies received by the plaintiff duly gambled and defendant had to bring up the daughter single handedly.

#### C. Article 811(h) - Conflicting previous Judgement

The defendant had mentioned this fact in her submissions and in the case brought by her, yet the previous judgement is not in any way in conflict with the judgement obtained in Malta, they are complimentary, one judgement established the fact that plaintiff had to pay maintenace amounting to  $\frac{1}{4}$  of all his worldwide income, and the Maltese judgement seeks to enforce this order. This does not create a conflicting judgement situation.

#### D. Article 811(l) Error

The notion of error as contemplated by article 811(1) has nothing to do with the arguments raised by plaintiff in his application. In any case the defendant's case was proposed within the valid time period as extended by court.

In view of the above plaintiff's requests should be rejected with costs against him.

Having seen that by decree dated 4<sup>th</sup> October 2013, the Court acceded to the request that in view of the fact that L P Z is today of age, she is no longer represented in the acts of these proceedings by her mother.

Having seen the judgement delivered by this Court on the 18<sup>th</sup> November 2014 by means of which respondent's second plea was rejected with costs.

Having heard the evidence on oath and seen the documents presented.

Having seen the respective notes of submissions.

Having examined all the acts of this case and of case 52/05NC, decided on the 27<sup>th</sup> June 2006, which acts were attached to the present proceedings as per court decree of the 5<sup>th</sup> February 2015.

Having seen that the case was adjourned for today for judgement.

**Considers:**

***Summary of events leading to the present court case***

By means of this lawsuit, plaintiff is requesting the retrial of proceedings 52/05NC in the names 'X U P pro et noe vs Dr Vincent Galea LL.D. et noe, on the basis of Article 811 (a) (b) (h) and (f) of Chapter 12 of the Laws of Malta, which provide for the right of a retrial if it results that a judgment was obtained by fraud on the part of any of the parties to the prejudice of the other party; that the application was not served on the party cast, provided that, notwithstanding such omission, such party shall not have entered an appearance at the trial; that the judgment is conflicting with a previous judgment given in a suit on the same subject-matter and between the same parties, and constituting a res judicata, provided no plea of res judicata had been raised and determined; and that the judgment was the effect of an error resulting from the proceedings or documents of the cause.

The judgment in question, delivered by the Civil Court, Family Section on the 27th day of June 2006 had acceded to plaintiff s demands and declared G N to be responsible for the payment of maintenance for his daughter L Z, and ordered that one third (1/3) of the apartment internally marked number four (4) forming part of



a block of flats named "Veronica Flats", without external number, situated in Perellos Street (formerly n/s off Main Street) in Saint Paul's Bay, be assigned to plaintiff X U in full and final satisfaction and payment of all maintenance due, past, present and future for the minor child. For the purpose of the publication of the relative deed of transfer, the Court nominated Notary Doctor Sylvana Borg Caruana to publish the said deed in the building of the Law Courts, on a date and time to be fixed by the said Notary not later than two months from the date of the judgment, appointed Doctor of Laws Vincent Galea to appear on behalf of defendant in case the latter fails to appear for the publication of the deed. The expenses of those proceedings, as well as of the relative deed of transfer, were to be borne totally by defendant; however provisionally the plaintiff was to pay these expenses relating to the deputy curators, including the curators appearing on the relative deed.

No appeal from such judgment was lodged, and the relative deed was published on the 30<sup>th</sup> March 2007. Plaintiff (defendant in the afore-mentioned proceedings) claims that he became aware of the said lawsuit following correspondence sent by Dr Kris Borg for defendant (plaintiff in afore-mentioned proceedings) to his mandator Dr Henry Antoncich, and dated 27<sup>th</sup> May 2013.

Plaintiff is hereby seeking the retrial of said proceedings for the reasons mentioned in his sworn application. On their part, respondents are opposing such claims, stating that there exist no grounds for the case to be retried.

### ***Proof***

**Plaintiff** testifies by means of an affidavit Dok BA1 (fol 77), whereby he states the following:

*"1. I married defendant X Nikolaevna P on the 31st May 1985. I was 29 years and she was 24 years old. From our marriage we had one daughter L Z born to us on the 13th September 1990. She is now 24 years old.*

*2. On the 14th December 1995 I purchased apartment 4, Veronica Flats, Perellos Street, St. Paul's Bay as per deed enrolled in the acts of Notary Doctor John Gambin. I paid for this apartment from monies that belonged personally to me. As a matter of fact, it was my mother who at the time was living in the United States who wanted to purchase the apartment in Malta. Unfortunately, she was not feeling well and so she donated the money to me to buy the St. Paul's Bay apartment. Defendant P knew of these facts and this was the reason why I purchased the apartment in my sole name and she did not appear with me on the contract. Defendant P began to travel to Malta from the year 1996, and every year they stayed for several months as they could obtain a longterm visa on the strenght of my St. Paul's Bay apartment acquisition. It is not true that I abandoned*

*the family. It was the very opposite: she dumped me and so she applied for divorce of our marriage which was granted on the 21st November 2001. I had also left a bank account in Malta and gave authority to defendant P to withdraw from it. In addition I was against our daughter L Z to travel to Malta. Defendant P however applied to the Moscow Court in the year 2002 for permission to travel to Malta with our daughter, alleging that L could have a better education in Malta. Despite my protests, defendant P obtained permission from the Moscow Court of her departure. I had opposed this idea because this primarily meant that I would not be able to see my daughter as frequently as I would have wanted to. X and L came to live in Malta and resided at my St. Pauls' Bay apartment. I remained living in Russia.*

*3. During a visit which I made to Malta in May 2013 I contacted Doctor of Laws Henry Antoncich LL.D. and instructed my legal advisor to write to my ex-wife X Nikolaevna P intimating her to vacate my St. Paul's Bay apartment. This letter was promptly answered by Dr. Kris Borg LL.D. defendant's legal advisor, by a letter of the 27th May 2013 (Vide Dok. "C" attached to my Retrial Application). In his letter Dr. Borg referred to a judgement delivered on the 27th June 2006 in the names "X Nikolaevna P pro et noe -vs- Dr. Vincent Galea et noe" (Cit No. 52/05NC) and moreover stated that as a result of this judgement my ex-wife was a part owner. This letter was e- mailed to me by my said legal advisor and this was the first time I got to know about the judgment above referred or indeed of any judicial proceedings in Malta.*

*4. Dr. Antoncich obtained a copy of the 27th June 2006 judgment which decided by declaring me responsible for the payment of maintenance of my daughter L Alexandrovan, and ordered that 1/3 of the apartment internally No. 4 forming part of a block of flats named "Veronica Flats", in Perellos Street, St. Paul's Bay, which belonged exclusively to me (a fact also asserted in the Maltese Family Court judgment), be assigned to defendant P in full and final satisfaction and payment of all maintenance due, past, present and future for the minor child. (Vide Dok. "A" attached to the Retrial Application). Further researches proved that the relative deed of transfer of the said 1/3 part to defendant P was published by deed dated 30th March 2007 enrolled in the acts of Notary Silvana Borg Caruana (Vide Dok. "B" attached with the Retrial Application - Vide also full copy of this deed Dok. "I" here attached).*

*5. The information obtained from the acts of the said lawsuit filed on the 23rd February 2005 (Writ of Summons Number 52/2005 NC) for the payment of maintenance for my daughter L Z, then still a minor, was astounding to say the least. It has led me to apply for the present Retrial of the relative judgement for the following reasons:-*

(i) *The Civil Court, Family Section, had by Decree of the 9th December 2004 authorised defendant P to file the relative summons (Vide Dok. "I" here attached). She had two months in which to file these proceedings. When the two month period had expired she filed another application requesting an extension of this two month time limit and the Court by a Decree of the 18th February 2005 granted a further two month period (Vide Dok. "I" here attached). These researches were conducted on my behalf by my legal representative Dr. Henry Antoncich. Defendant P eventually filed the Writ of Summons on the 23rd February 2005. I therefore contend that this procedure was null and void because the lawsuit was not presented within the original time limit of two months as specified by law, and moreover the application for extension of the two month period was presented after the two months had already expired.*

(ii) *It resulted that in the said lawsuit bearing Citation Number 52/2005NC official curators, that is Dr. Vincent Galea LL.D. and Legal Procurator Louisa Tufigno, were appointed to represent me. In the relative application presented by defendant for the appointment of the said official curators banns together with a copy of the pleading were by maltese law supposed to be sent to a person most closely related to me, and where no such relative existed then the notification was supposed to have been made to a friend of mine. Where no such relative or friend existed then the banns and the pleading were supposed to have been published in the Government Gazette and in at least two daily newspapers. Nothing of the sort happened. The banns together with the copy of the pleading which is the Mediation Letter dated 9th December 2004 were notified to Legal Procurator Gerald Bonello (Vide Dok. "J" here attached). Mr. Gerald Bonello is neither a relative of mine nor my friend. In fact, I must say that I do not know him at all. I am told that he is one of the Legal Procurators who works at the Registry of the main building of the Law Courts.*

(iii) *Defendant P was supposed to have provided the official curators appointed by the Court to represent me with a contact address so that they may reach me and let me know of the pending lawsuit. In fact, it results from the records of the lawsuit decided on the 27th June 2006 the Family Court had requested defendant (plaintiff in the 27th June 2006 judgment) to provide the official curators with my official address. Instead, she made a mockery of the whole situation. She wrote to the Ministry of Internal Affairs in Moscow requesting them to enquire about me at the address 8-1-4, Str. Samora Maschela, Moscow, which address has absolutely no connection with me. The search carried out by the Russian Authorities obviously proved no result and the letter stated "Further to your inquire please be advised that Mr. Berschtein G Maksovich doesn't reside on the following address: 8-1-4, Str. Samora Maschela, Moscow" (Vide Dok "D" attached to the Retrial Application). She invented this address from the moon as we say in order to show something to the Family Court and she managed to mislead completely the Family Court.*

*I need to explain that during the very same time (2005/2006) of the pending proceedings in Malta which led to the 27th June 2006 judgment I was also involved in litigation with defendant in Moscow because defendant Muhkortova had transferred, alone and without my knowledge the residential apartment situated at 30-2-145 General Glagolev Str., Moscow, to Alexy Igorevich Shomov. In the relative contract they heavily undeclared the real value of this apartment by two times than the actual market value. By judgment delivered on the 6th September 2006, that is just two and half months after the Maltese Family Court 27th June 2006 judgement, the Higher Court in Moscow overturned the judgement of the Lower Court which had declared the transfer as null and void, and decided instead that defendant P had “violated the joint property regime of spouses” when she transferred the said apartment without my consent and signature, but since the Higher Court considered Shomov as a bona fidei acquirer the Court only ordered defendant P to pay me the amount of RUB 499,968 (Vide Dok. “E” attached to the Retrial Application). Defendant P did not however refund me any monies at all as the Moscow Court had ordered her to do. I decided to let it pass knowing that my wife was bringing up our daughter and that this should go towards the maintenance of my daughter. During the pendency of the said Moscow lawsuit I had provided the Court with my official address. From the 27th March 2003 till the 25th October 2005. I registered myself and took up residence at Mira Street, 8 Apt. 12, Town of Roshal Shatursky District Moscow region which is confirmed by the stamp of PVO Roshadlsku town police division, Shatursky Directorate of Internal Affairs (Vide Dok. “K” here attached). This address is my wife’s residence address as in the meantime I had remarried. When the Lower Moscow Court declared the transfer of the apartment in Glagolev Str as null and void, I registered myself, as I could in accordance with Russian Law, at the address of this latter apartment. This is confirmed by the stamp of Directorate of Internal Affairs, North-Western Administrative okrug. Department of Internal Affairs for the Khoroshevo-Mnevniki District, Passports and Visas Department (Vide Dok. “K” here attached). It is important to note that stamps put in our international passport by the Department of Internal Affairs are original because they are registered in the computer system of the said Department, and the previous address is verified by the same system when we obtain registration at a new address. This registration is accessible to the general public.*

*I further explain that Alexey Igorevich Shomov did not want to leave the apartment despite the Lower Court’s decision and so I could not actually take up residence at the apartment in Glagolev Street. I had explained all this to the Russian Court. The Russian Court therefore knew my actual address. I also had a Russian Advocate to represent me. Defendant P could therefore have easily given the Court and the official curators this address or at least the contact details of my Russian legal advisor, but she failed purposely to do so. She could also have contacted her own legal advisor, Sergei with whom defendant P is evidently still*

*in contact (Vide Legal Opinion from Nikolaev & Partners Dok. "B" submitted with defendant's Reply)*

*(iv) Defendant P had filed her claim for maintenance in Malta in Lawsuit Number 52/2005 notwithstanding that she had already obtained a prior judgment delivered on the 10th June 2003 by the Court of Magistrates of Juridicial Division N 154 Khoroschevo - Mhevbiki Distric of North-West Administrative Okrup of Moscow on the 10th June 2003 which had ordered me to pay defendant P as maintenance towards our minor daughter one-fourth of my salary or any other amount that I possess (Vide Dok. "H" attached to the Retrial Application). I got to know of this Court Order years later when I came to travel abroad and leave Russia. According to Russian Law there was an impediment of departure. No plea of "res judicata" was ever raised before the Maltese Family Court. I ended up paying this debt in full to the Russian Court Bailiffs by depositing in a bank account provided by defendant P to the said Court Bailiffs the amount of RUB 102,824.63c, apart from the payment of enforcement expenses in the amount of RUB 7,197.72c (Vide Dok. "G" attached with the Retrial Application. On the 15th July 2010 I paid my debt in full in the manner above stated (Vide Dok. "L" here attached). I must also add that this money was never refused by defendant and she never refunded it to me."*

**Legal Procurator Gerald Bonello** gave evidence on the 5<sup>th</sup> February 2015, whereby he confirmed that within the statutory six days he did not accept the banns notified to him. He also confirmed that he is not a friend or relative of plaintiff and does not know him.

During his cross-examination on the 5<sup>th</sup> February 2015, **plaintiff** confirms that he bought the apartment in question when he was already married to defendant and that she knew that he had to come to Malta to sign a contract. He states that he came to buy a flat in his mother's name but since she was old he signed it himself. He confirms having a serious gambling habit. He denies receiving any information about the court case being contested and that his wife ever phoned him to tell him about it.

He states that between 1999 and 2013 he never returned to Malta but he had some friends who informed him that some persons were living in the flat without permission.

He confirms that he has no connection with the address 814, Samora Maxela Street, Moscow and upon being shown Dok A which is a document issued by the Ministry of Internal Affairs of Russia, he states that this raises questions but dismissed it and claimed that in his passport there are all the stamps where he has resided over the past 15 years (Dok K).

He says that the first time that he got to know about the judgment was in 2009 when he tried to leave Russia and was stopped at the border because of his debts. He says that he never enforced the judgment against his wife because he thought the money would be used for their minor daughter. Upon being shown Dok KBI (fol 121), he reiterates that the Court and his advocates knew his address and he finds this document very strange.

He states that between 1996 and 2001 he lived in the apartment on General Gagoliv Street, but was only registered there in 2005. Between 2003 and 2010 he lived with his current wife. He states that he deposited the money owed to defendant in the Russian Court, and he also confirms that defendant never tried to pay him half the price of the apartment which she owed him as per the court's order.

**Dr Vincent Galea and PL Luisa Tufigno** gave evidence on the 23<sup>rd</sup> April 2015 whereby they both confirmed that they did not know plaintiff's address during the proceedings in question. Dr Galea exhibited a sworn reply together with a letter sent to defendant and her lawyer asking her to furnish him with her husband's address (Dok VG1), and also defendant's testimony in the aforementioned case stating that she did not know anything about his whereabouts (Dok VG2).

Respondent **L P** testifies by means of an affidavit a fol 143, whereby she states:

*"1. I am L P and I am the daughter of X P and G N. I was born on 13th September, 1990 in Moscow.*

*2. The last time I have seen my father G N was during summer in year 2000.*

*3. After my parents X P and G N divorced, I lost contact with my father. He never called, wrote or was physically present.*

*4. On 26th July 2002, at the passport check point, I was not allowed to go back to Malta because my father G N filed an application of disagreement with my departure. He had not contacted me at any point in time, when my mother filed a law suit in court to allow my departure. I was very offended at that time because I could not go back to Malta as I had to stay away from my home, school and friends. During the period of when we were awaiting for the courts decision, I had my 12th Birthday and he did not call or contacted me in any way. I was very psychologically distressed and needed help of a counselor at that time. In point of fact my father never contacts me and never wishes me a Happy Birthday or a Happy Xmas and has not contributed in any way to my upbringing.*

*5. My father G N did not maintain me financially after him and my mother X P divorced."*

Respondent **X Nikolaevna P** testifies by means of an affidavit found a fol 144, whereby she states the following:

*“1. I married plaintiff G N on the 31st of May 1985. I was 24 years of age and he was 29. Our daughter L P, holder of Maltese identity card 34766A, was bom on 13th September, 1990 in Moscow.*

*2. On the 14th December 1995 we purchased apartment 4, Veronica Flats, Perellos Street, St. Paul's Bay as per deed published by Notary Doctor John Gambin. We have been married for 10 years at that time and the apartment was bought from our family money. I was not physically present at the deed because my daughter was still very young at that time and since my mother was feeling ill, I did not have the opportunity to come to Malta at that time. However because of the 'joint spouses clause' on joint property through marriage, it had been obvious to me that whatever we acquired together as a family, belonged to both of us. Even under Russian law anything which is bought in the marriage belongs to the husband and the wife equally between them. This in terms of Article 34 of the Family Code of the Russian Federation.*

*3. My ex-husband G N had a gambling problem and on 21st November 2001, we legally divorced. From that time onwards, G N had disappeared and did not participate in the upbringing of our daughter, who at the time was eleven years old. Since he disappeared, we did not physically divide the property as per divorce decision, as he could not be found.*

*4. Even during our marriage, G N had always been registered in the following apartment: Moscow, 9, Michurinsky Avenue, apartment 100 as seen in the document A attached.*

*5. In the year 2000 (precisely on the 7th January) we moved to Malta permanently and went to live in the apartment we had at St. Paul's Bay. Before this time my daughter and I had come on holiday, normally in Summer, and we used to stay in the apartment as our summer residence.*

*6. In year 2002, when my daughter and I went back to Moscow to visit our relatives, I had gone to my apartment, which I had previously owned, flat 145, 30-building 2, General Glagolev street, I found the following documents: Contract on commercial lease of residential premise of his apartment 9, Michurinsky Avenue, apartment 100 as could be seen in annexed Doc B. I have also found Power of Attoumey dated back on 7th December, 2000, when we were still married on the same apartment, 9, Michurinsky Avenue, with which G N authorized a third party, Martynov Nikolay Anatolyevich to sell this apartment at a price of his discretion, which could be seen in the annexed Doc C. I have also found another power of*

attorney dated the 6th November, 2001, on the same apartment, apartment 9, Michurinsky Avenue, apartment 100, with which G N authorized a third party, Pertsovskiy Aron Timofeevich, to sell this apartment at a price of his discretion, which could be seen in the Doc D annexed. Also, I found the apartment purchase and sale contract on the following apartment, Moscow, 2, Petrovsko-Razumovskiy proezd, apartment 18, which G N inherited from his aunt as shown by Doc E annexed. The two power of attorneys which were given to thirds parties, I had no previous knowledge about them and they are not relatives of our family. G N did not contribute to any maintenance of L P, who was a minor at that time, even though he sold the following: apartment, Moscow, 2, Petrovsko-Razumovskiy proezd, apartment 18 and had been leasing the following apartment, 9, Michurinsky Avenue.

7. On 26th July 2002, when I was going back to Malta with our daughter L, in the passport check point, we have found out that my ex-husband G N filed an application of disagreement for departure of our minor daughter L P from Russian Federation. I have filed a legal lawsuit in return to obtain a permission for L P to come to Malta. Judgement of Nikulinskiy District court was the following: due to a riotous life which G N was leading with out repaying his debts and with his creditors threatening X and L P and X's P's parents, the application of N Aleksander Maksovich had to be adjudged as it conflicted with the rights, interests and psychological state of L P ( a minor at that time), as could be seen in the annexed Doc F. During the time when the court was proceeding, G N did not initiate any attempts to call or visit his daughter.

8. Since I was maintaining our daughter L P by myself, during the year 2003, I had no choice but to sell my apartment in Moscow, flat 145, 30- building 2, General Glagolev street. When I wanted to tell my ex-husband about the fact that I had sold my apartment, I went looking for him at apartment 9, Michurinsky Avenue, apartment 100 where he had always been registered as shown in document A attached. At that time I have found out that he is not registered there any longer and transferred his registration to Moscow region, Roshal,8,Mira street, apartment 12 on 12/03/2003 as could be seen in the same annexed Doc A. When I went looking for him in the following address Moscow region, Roshal,8,Mira street, apartment 12, I was informed by the residents in this place, that even though he was registered there, he had never resided there.

9. On 10th June 2003, Horoshovo-Mnevniki law court issued the following judgment that G N is obliged to pay maintenance of his minor daughter L P from 12th May 2003 until her being 18 years of age but I have not received anything from him. Official curators were appointed by the court to find G N's place of residence and they have filed an official enquiry to the Ministry of Internal affairs of Russia as could be seen in annexed Doc G. On 19th July, 2005, Ministry of Internal Affairs of Russia replied to the official enquiry of the court curators,



*stating that G N lives in the following address: Samora Machel street 4-1-8 as could be seen in the Doc H annexed. However when my lawyer Mr Sergey Nikolayev sent him registered correspondence, it had always been returned back. Official curators were informed about it and Ministry of Internal affairs of Moscow, that G N is not registered and does not reside in Samora Machel street 4-1-8 as seen in Doc I.*

*10. During the year 2013, G N deceived his lawyer Dr Henry Antoncich, telling him that I got to refund him a sum of Rub 499,968 together with 8% interest as ordered by the Moscow court judgment on 6th September, 2006. On 2nd July, 2013 Dr Henry Antoncich, sent me a letter requesting it on the behalf of G N as could be seen in annexed Doc J.*

*However according to the Russian Law, the timeframe of when G N could request those money had expired on 6th September, 2009 as could be seen in annexed Doc K. It is not true that G N got to know that he had to pay maintenance years after Horoshovo-Mnevniki law court issued their decision in 2003, in year 2009 as he claimed, because he was informed about it while he was initiating the civil law case about flat 145, 30-building 2, General Glagolev street in 2006 as could be seen in Document L.*

*11. In the year 2013, when I have received the file from Dr Henry Antoncich on the law suit initiated on G N's behalf, I got to know that he had paid a sum of RUB 102,824.63c on 15th July, 2010, when our daughter L P was 20 years old at that time. I have also realized that the addresses he presented to the court, were just the ones he was registered in but had never actually lived there. From years of 19/01/2007-27/08/2010, he did not have any domicile registration in Moscow as could be seen in annexed Doc M.*

*12. From years 2000- until this day, I am the one who maintains apartment 4, Veronica Flats, Perellos Street, St. Paul's Bay, which we have purchased while we were married."*

During her cross-examination, respondent **X U P** states that whereas she knew that back in 1995 her husband was travelling to Malta to purchase immovable property, she was under the impression that under Russian Law whenever a party bought immovable property during the marriage, it would belong to both parties equally no matter on which name the property was purchased. She also confirms that Mr N had a Russian lawyer Dr Alessandrovic, who was not only his lawyer but also his representative and he was thus authorised to receive all correspondence on his behalf. She also confirms that plaintiff had deposited the money he owed her as per Moscow Court judgment in 2013, but she says she could not return it as she had not been in contact with him. She saw him for the

first time on the 5<sup>th</sup> February 2015 after many years. She states that she intends to return it.

**Nikolayev Sergei Olegovich**, respondent X's legal advisor, testifies by means of an affidavit a fol 208, and states inter alia, that respondent X could not execute the legal process to obtain maintenance from plaintiff as he had concealed his place of residence, work and sources of income, refused to pay maintenance, as well as other debts to creditors. He further states that during the proceedings before the Russian Court, *“The plaintiff N personally was never present at any court session, the information about Mr N was absent, to establish his whereabouts was not possible. He went into hiding from the payment of alimony and law enforcement agencies.... Mr N A.M. deliberately concealed his place of residence, according to the Decree of the Shaturskiy Court of the Moscow Region dated July 25 2005 (document \* page 33).”*

### **Considerations of the Court**

Retrial proceedings are considered by our courts to be an extraordinary remedy. Rules governing retrials should receive a restrictive interpretation.

Reference is hereby made to a judgment of the Court of Appeal in its Superior Jurisdiction, dated 30<sup>th</sup> October 2015, in the names **Emmanuel u Rita konjugi Mallia et v. Le Terrain Limited**, wherein the Court cited further local jurisprudence on the matter:

*“Tajjed ukoll wiehed ifakkar illi; “Ir-rimedju tar-ritrattazzjoni hu ta’ indoli straordinarja, lumeggjat dan il-karattru straordinarju bl-istorja ta’ dan listitut; bil-konsegwenza logika illi r-regoli li jiggernaw dan l-istitut huma ta’ interpretazzjoni strettissima. Diversament taht il-pretest ta’ ritrattazzjoni, il-litigant sokkombent ikun jista’ jerga’ jiftah il-kawza u b’hekk indirettament jinholoq tribunal tat-tielet istanza. ... (Rev. Don Giuseppe Aquilina v. Francesco Aquilina, Appell Civili, 18 ta’ April 1958).*

*Din il-Qorti fis-sentenza taghha fil-kawza fl-ismijiet **Dottor Austin Bencini nomine v. Dottor Remigio Zammit Pace nomine** deciza fl-20 ta’ Frar 1996 qalet fost affarijiet ohra:*

*“Il-gurisprudenza taghna dejjem ghallmet li r-rimedju straordinarju in kwantu jikkostitwixxi deroga ghal principju fundamentali li l-gudikat jikkostitwixxi l-ligi bejn il-kontendenti u dan independentement mill-fatt jekk dak il-gudikat jirrispekkjax kompletament il-verita` jew il-gustizzja. Ir-Rumani kienu jesprimu dan il-kuncett bil-massina res judicata pro veritate habetur. F’dan il-kuntest tista’ ssir riferenza ghas-sentenza riportata fil-Kollezzjoni Volum XXV-I-137 fejn tant tajjed gie sottolinejat li r-rimedju tar-ritrattazzjoni;*

““Non si da’ per qualunque caso di vera o supposta ingustizia, di vero i supposto errore di fatto, ma solo in quei casi tassativamente stabiliti dala legge dovendo in ogni caso prevalere la stabilita’ dell’ giudicato che sola puo mettere fine alle liti, poiche’ l’ autorita’ della cosa giudicata importa grandemente alla sicurezza civile.”

“Minn dan ... titnissel il-konsegwenza logika li r-regoli li jirregolaw dan l-istitut tar-ritrattazzjoni huma ta’ interpretazzjoni strettissima (Vol. XXVII-I- 818). Diversament taht il-pretest ta’ ritrattazzjoni, il-litigant sokkombent jista’ jiftah il-kawza u b’hekk indirettament johloq ghalih tribuna tat-tielet istanza, (Vol. XLII-I-227) li mhix permessa mil-ligi.”

Reference is also being made to the judgment of the Court of Appeal in its Superior Jurisdiction dated 14<sup>th</sup> October 2014, in the names **Boris u Carina konjugi Arcidiacono vs Salvu Schembri u ċ-Chairman tal-Awtorita’ tal-Ippjanar u b’digriet tas-27 ta’ Settembru, 2002, ġie kjamat in kawza l-Bord tal-Appelli dwar l-Ippjanar**, whereby the Court held:

*‘Illi l-ewwel osservazzjoni li għandha ssir hija li r-ritrattazzjoni hija rimedju straordinarju mħolli li jsir biss fil-kazijiet stabiliti fil-ligi liema ċirkostanzi huma tassattivi u għandhom jingħataw tifsira ristretta u bla tiġbid jew analogija.<sup>1</sup> Huwa risaput li r-rimedju tar-ritrattazzjoni huwa wieħed straordinarju, in kwantu jikkostitwixxi deroga tal-prinċipju li sentenza li għaddiet f’gudikat għandha l-forza ta’ ligi bejn il-partijiet. Għalhekk, il-kazijiet li fihom jista’ jingħata, kif kontemplat speċifikatament mil-ligi, għandhom jiġu interpretati ristrettivament;<sup>2</sup>*

*Illi sadattant, ix-xogħol ta’ din il-Qorti, sakemm tkun għadha qegħda tqis jekk jeżistux raġunijiet tajbin biżżejjed biex thassar is-sentenza attakkata, huwa dak li tara biss jekk kemm-il darba tirriżultax imqar waħda miċ- ċirkostanzi maħsubin fl-artikolu 811 tal-Kodiċi Proċedurali. Fl-istadju in rescindente din il-Qorti m’għandhiex tgħarbel mill-ġdid dwar jekk hi taqbilx jew le mal-mod kif il-Qorti tkun waslet għall-fehmiet tagħha fis-sentenza attakkata.*

*Illi dan kollu jingabar taht ir-regola li huwa mixtieq u meħtieġ li jkun hemm iċ-ċertezza tad-dritt u fejn kawza tkun inqatgħet b’sentenza li tkun għaddiet f’gudikat din m’għandhiex titwaqqa’ kif ġieb u laħaq, imma biss għal raġunijiet serji u gravi. Dan kollu mbaġhad jissejjes fuq il-massima li res judicata pro veritate habetur;*

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1 App. Inf. 12.5.2003 fil-kawza fl-ismijiet **Mildred Ferrando vs Loris Bianchi pro et noe**

2 App. Ċiv. Ċiv. 20.5.1994 fil-kawza fl-ismijiet **Valletta vs Tanti** (Kollez. Vol: LXXVIII.ii.84) u App. Ċiv. 9.5.2005 fil-kawza fl-ismijiet **Joseph Żammit vs Carmelo Dingli** fost oħrajn

*Illi huwa wkoll prinċipju aċċettat li l-proċess ta' ritrattazzjoni ma jservix bħala t-tieni appell, b'mod li taħt l-iskuża ta' xi nuqqas proċedurali, l-Qorti tkun mistiedna biex terġa' twettaq eżerċizzju ta' ri-eżami li, fil-fatt, ma jkun xejn aktar minn skrutinju mill-ġdid tal-konsiderazzjonijiet diġa' magħmulin mill-Qorti fis-sentenza li tagħha jintalab it-tħassir u s-smiġħ mill-ġdid. Dan jgħodd għal kull waħda mill-kawżali maħsubin fl-artikolu 811 tal-Kodici.<sup>3</sup>”*

**Further considers:**

Plaintiff is hereby requestion retrial proceedings on the basis of Article 811 (a) (b) (h) and (l).

Plaintiff's main contention in this case is that he was not duly notified in accordance with the legal provisions on the matter, and that defendant had maliciously and fraudulently withheld information with the aim of impeding his involvement and consequential defence in the court case being attacked.

The fact that plaintiff was absent from Malta at the time of the disputed proceedings seems to be uncontested. The Court is also convinced of the fact that given his gambling habit and debts<sup>4</sup> the plaintiff was untraceable, and as confirmed by defendant's lawyer Nikolayev Sergei Olegovich, establishing his whereabouts was not possible.

The Court however notes that nowhere in her testimony does respondent X Mukhurtova explain why PL Gerald Bonello, whom she knew was not a friend or relative of plaintiff was notified with the banns.

**Article 929 et seq of Chapter 12 of the Laws of Malta** establish the procedure for the appointment of curators when inter alia one of the parties in a lawsuit is absent from the Maltese Islands.

*Article 929. Besides the cases where by express provision of this Code the appointment of curators is necessary, the court shall also appoint curators to appear in and defend proceedings in any of the superior courts or in the Court of Magistrates (Gozo) in its superior jurisdiction - (a) in the interest of any absent person or minor not legally represented, or person with a mental disorder or other condition, which renders him incapable of managing his own affairs, or person interdicted or any person uncertain who is entitled to succeed to an entail or to any vacant inheritance not legally represented or any person who may in future be entitled to succeed to such entail or inheritance; or (b) in the interest of any person not known to be living or presumed to be dead, where, for the*

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3 App. Ċiv. 20.2.1996 fil-kawża fl-ismijiet **Dalli vs Sare'** (Kollez. Vol: LXXX.ii.373)

4 Confirmed by plaintiff ex admissis in his cross-examination.

*purposes of any action, it is necessary judicially to call upon such person; or (c) in the interest of any person presumed to be dead, where any other person claims to succeed to the rights of such person; or Cap. 168.(d) in the interest of any commercial partnership registered or established under the Commercial Partnerships Ordinance<sup>5</sup> or any other law substituting the same Ordinance or any body of persons or other organization if the person or any of the persons vested with the representation thereof is or are absent from Malta or where there is or are no such person or persons, or enough persons vested with such representation. Appointment of curators before or in the course of proceedings.*

**Article 930.**

*(1) The curators shall be appointed by the competent court on a demand made by an application filed together with the act whereby the action is commenced; in any such case the names of the curators shall not be stated in the act whereby the action is commenced, and it shall be the duty of the registrar, upon the appointment of the curators, to insert the names of such curators in the act before giving course thereto.*

*(2) Curators may also be appointed on an application pendente lite or even on a verbal demand made during the hearing of the suit, where the appointment of curators becomes necessary after the commencement of the suit.*

*(3) The filing of any such application shall suspend the course of any time respecting the acts of procedure.*

**Article 931.**

*(1) The court, upon making an order for the appointment of curators, shall issue banns to be posted up at the entrance of the building in which the court sits.*

*(2) A copy of the banns together with a copy of the pleading or a summary thereof shall be served on one of the persons most closely related to the person to be represented or in respect of whose inheritance the appointment of curators is demanded, and where no relations are known, such copy shall be served on some other person known to be or have been a friend of the person concerned.*

*(3) Where no relation or friend as is mentioned in sub-article(2) is known to the person demanding the appointment of curators, the court may order that instead of the service mentioned in sub-article (2) a copy of the banns together with a copy of the pleading or a summary thereof be published in the Government*

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5 Repealed by Act XXV of 1995 (Cap. 386).

Gazette and in at least two daily newspapers at the expense of the applicant.  
[Court's emphasis]

**Article 932.**

*(1) The banns shall contain an indication of the demand for the appointment of curators and of the order of the court, together with an intimation that any person willing to accept the appointment is to appear, within six days in the registry and declare his acceptance by means of a note.*

*(2) There shall also be stated in the banns that, in default of any such declaration, the court shall proceed to appoint official curators.*

**Article 933.**

*Where any person appears and, by a note signed by him, offers to accept the appointment, it shall be lawful for the court, if it deems it for the benefit of the interest to be represented, to confirm as curator the person so appearing.*

**Article 934.**

*If no person appears within the said time of six days, or if the court does not confirm the person appearing, the court shall appoint as curators an advocate and a legal procurator from those on the rota mentioned in article 91.*

**Article 935.**

*The person appearing to the banns, if confirmed as curator, shall not be entitled to the reimbursement of the expenses, except where a favourable judgment is obtained with costs.*

**Article 936.**

*(1) The curators are bound to use their best diligence for the benefit of the interest which they represent. The duties of the curators shall include the following:*

*(a) to fully inquire as to the rights of the persons whom they represent and to identify these rights;*

*(b) to take all the necessary measures to safeguard the aforesaid rights;(c) to contact forthwith the person or persons whom they represent, if the address is known; if unknown, they are to take all possible measures to find out their*

*address including that of publishing, with the authority of the court, a notice in a newspaper of the place where last known;*

*(d) to inform the person or persons whom they represent of any judicial act and of the contents thereof;*

*(e) to obtain all the necessary information to defend the interests of the person or persons whom they represent;*

*(f) to continue looking after the interests of the person or persons whom they represent with regard to pending matters although the period of appointment under articles 89 or 90 may have expired; and*

*(g) to keep the court regularly informed of all actions taken in the execution of their duties.*

*(2) The curators shall be liable for damages and interest which may be occasioned by their negligence.*

**Article 931** specifically provides for instances where there is no known relative or friend of the absentee, and in such cases the law requires the plaintiff to publish a copy of the pleading or a summary thereof in the Government Gazette and in at least two daily newspapers. However it transpires from the acts of proceedings 52/05NC, that respondent X Mukhurtova (therein plaintiff) did not abide by such procedure, but chose instead to notify a person she knew was extraneous to the other party. She knew that the person whose name she inserted was not qualified according to be notified according to law since he was neither a relative or friend, nor was he an acquaintance of the absent party. No publications were done as requested by law. The practice of notifying with the banns people who clearly have no knowledge of the absent party has been considered by our Courts as tantamount to an abuse of the legal system, and aimed solely at hindering plaintiff (therein defendant) from bringing forward a defence.

Reference is made to the judgment in the names: **Eileen Vella kif rapprezentata f'Malta minn Fredrick u Josephine konjugi Gatt vs Joseph Vella** decided by the Civil Court (Family Section) on the 6<sup>th</sup> December 2012, whereby it was held:

*“Il-procedura tan-nomina ta’ kuraturi mhiex intiza sabiex attur f’kawza jiehu “walk over” a skapitu tal-konvenut. Kien ghalhekk li l-Legislatur esiga li min jaghmel talba ghan-nomina ta’ kuraturi ghall-assenti ghandu l-oneru li jinnotifika l-bandu lill-eqreb qarib tal-assenti. Il-konvenut kien jaf fejn joqghod iben l-attrici hawn Malta u ghalhekk kien fid-dmir li jinnotifikah bil-bandu. Li minflok jinnotifika lil Avukat li m’ghandu x’jaqsam xejn la f’parentela u lanqas professjonalment mal-attrici jirrapprezenta d-disprezz lejn l-awtorita’ tal-Qorti. F’certu pajjizi dan it-tip ta’ abbu mill-procedura tan-notifika huwa msejjah “sewer service”.*

*L-artikolu 811 (b) li jipprovdi d-dritt ta' ritrattazzjoni jekk ir-rikors ġuramentat ma jkunx ġie notifikat lill-parti telliefa għandu l-għerug tiegħu fin-norma tal-gustizzja naturali "audi alteram partem". [Court's emphasis]*

*Hija għalhekk il-fehma ta' din il-Qorti illi kien dover tal-konvenut li fil-kawza li intavola fis-sena 2004 jimxi rigorożament mal-ligi tal-procedura una volta kien qed jistitwixxi kawza kontra persuna li ma kenitx tirrisjedi hawn Malta."*

In the present case, given that defendant was not aware of any friend or relative of the plaintiff in Malta, she should have abided by the provisions of the law and published the banns as per Article 931 of the Code of Organisation and Civil Procedure. Not following the rule dictated by Article 931 means that the notification of the acts of case number 52/05NC was not according to law.

Regarding plaintiff's claim that the judgment was obtained by fraud of the defendant to his detriment, the Court notes that during the course of these proceedings, defendant confirmed twice on cross-examination, that Mr Alessandrovich was her husband's lawyer and representative at law, and that "...his lawyer asked that all the correspondence would be sent to the lawyer's address, since he is the official representative of Mr N." [fol 193] Upon being asked why she didn't provide the officially named curators with the name of plaintiff's representative, she simply responds that she was not asked to provide details of his representatives, but the last known address of his registration. [fol 2000].

Reference is hereby being made to the judgment **Martin Farrugia vs Joseph Gambin**, decided on the 27<sup>th</sup> February 2015, whereby the Court of Appeal in its Superior Jurisdiction held:

*"5. In tema legali jigi osservat li huwa assodat fil-gurisprudenza patria li –*

*"Is-smigh mill-gdid jista' jigi akkordat jekk is-sentenza tkun ittiehdet b'qerq. Il-qerq jew il-frodi allura ma jridux ikunu rrizultaw jew ma jkunux iridu jkunu relatati mal-meritu li pprovoka l-vertenza u li gie trattat quddiem il-qrati u minnhom deciz, imma jridu jkunu rrizultaw jew ikunu relatati mal-proceduri decizi bis-sentenza appellata u bihom inficcjata. Is-subinciz jipprovdi għal smigh mill-gdid fil-kaz fejn is-sentenza tkun ittiehdet b'qerq u mhux fejn il-pretensjoni tal-attur fit-talba tkun għal kreditu li origina minn agir allegatament delittwuz, jew qarrieqi tal-konvenut. Il-qerq allura jrid ikun qerq gudizzjarju, jigifieri inerenti mal-proceduri" [App. Carmel Borg v. Henry Thake, deciza fl-14 ta' Novembru 1997].*

*"... biex il-qerq procedurali jsejjes talba għas-smigh mill-gdid ta' kawza, jehtieg li dak il-qerq ikun jikkonsisti f'raggiri jew atti frawdolenti li minhabba fihom, il-*



*parti l-ohra titqiegħed fl-impossibilita' li tiddefendi ruhha fil-kawza kif imiss u mingħajhom il-kawza ma kienitx tinqata' kontra l-parti mgarrba... Fuq kollox biex tghodd id-dispozizzjoni tal-artikolu 811[a] tal-Kodici jehrieg li l-qerq procedurali mwettaq ikun determinanti biex il-parti l-ohra titlef il-kawza". [App.S Scicluna Enterprises v Michael Cini, deciza 9 April 2014 ara wkoll kazistika hemm citata]."* [emphasis by this Court]

The Court formed the opinion that respondent X Mukhurtova did not act in good faith when she failed to disclose plaintiff's representative contact details as known to her at the time especially since it was clear to her that the official curators could not contact Mr N personally. Respondent X Mukhurtova knew that the only means of representation he might have was through his procurator Mr Alessandrovic. In the light of her testimony of the 6<sup>th</sup> June 2006 (Dok VG2 a fol 133), the Court is even more convinced of the fact that the respondent had tried to conceal the contested proceedings from her husband. There is no other explanation to the fact that even though she knew very well that her husband had an attorney who was representing him in contemporaneous proceedings before the Russian Courts, she chose not to mention this during her testimony on oath and simply state that she does not know anything about his whereabouts.

It is the Court's opinion that respondent P acted fraudulently when she did not provide the deputy curators all the information available to her at the time.

With reference to the last two grounds on which plaintiff is seeking retrial, that is, that the judgment is conflicting with a previous judgment given in a suit on the same subject-matter and between the same parties, and constituting a res judicata, and that the judgment was the effect of an error resulting from the proceedings or documents of the cause, the Court notes that there exists insufficient evidence for the Court to order the retrial of the said case on the basis of these two grounds. Moreover, as plaintiff himself rightly submitted in his final note, these last two grounds would more pertinently form part of the second stage of retrial proceedings rather than the preliminary stage 'in rescindente'.

## **DECIDE**

The Court therefore decides this case as follows:

Rejects defendant's pleas and accedes to plaintiff's claim,

1. By virtue of Article 811 (a) and (b) of Chapter 12 of the Laws of Malta, revokes and annuls the judgment delivered by this Court as differently presided on the 27<sup>th</sup> June 2006 in the names "X U P pro et noe -vs- Doctor Vincent Galea et nomine" (Citaz nru 52/05NC) ,

2. Orders the rescission of the contract published by virtue of that judgment on the 30th March 2007 by Notary Dr Sylvana Borg Caruana, and for this purpose appoints Notary Dr Sylvana Borg Caruana to publish the relative contract of rescission within a month from today and appoints Dr L Mallia as curator to represent any contumacious party on the deed.

3. Orders the re-trial of said lawsuit.

With costs against respondent X U Mukhurtova.

**Judge**

**Deputy Registrar**