

Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR JUSTICE JOSEPH AZZOPARDI**

Sitting of Friday 27th January 2017

Number: 6

Application Number: 222/12 RM

**Luke Chetcuti in his personal capacity and on behalf of and
in the interests of his minor son Rocco Jacobo Chetcuti**

v.

Lina Maria Moriones Caicedo

This is an appeal from a judgment given by the Family Court division of the First Hall of the Civil Court on the 25th February 2016 which is being reproduced for a better understanding of the case;

“Having seen the sworn application presented by plaintiff on the 28th September 2012 which reads as follows:

“That the parties had a relationship from which Rocco Jacobo Chetcuti was born on the 15th October 2010 at Imsida, Malta;

“That the claimant and the child are both Maltese nationals whereas the defendant is Colombian;

“That since birth, the minor child has always lived in Malta;

“That the relationship between the parties broke down irretrievably so much so that the parties are living separately from one another;

“That consequentially, the parties in terms of law hold joint care and custody rights over the minor child Rocco Jacobo Chetcuti;

“That the minor is presently residing with the mother, who is receiving substantial maintenance and assistance from the applicant and his family, in connection to both those needs of the minor as well as those of the defendant;

“That the applicant, including members of his family, have regular access to the child; That the applicant is willing to undertake all those needs that the child may require eventually, including education at a privately-run school;

“That the applicant commenced mediation proceedings in order that any pending issues regarding the minor, including care and custody of the same, be regulated and a sitting is due for the 8th October 2012 at 11:00am before the mediator Connie Bonello;

“That sometime in July of this year, an argument broke out between the parties and the defendant expressed her intention to leave Malta with the child and establish her residence elsewhere;

“That she had stated that she wanted to go live in Colombia and also, to work with the airlines Emirates and live in the United Arab Emirates, and that she wanted the child to be with her;

“That therefore, the applicant has a well-founded fear that the defendant can go abroad along with the minor and not return to Malta, which action, without doubt, goes contrary to the interests of the child who has been raised since birth in Malta;

“That on the 10th September 2012, on an application of the applicant this Court issued a Warrant of Prohibitory Injunction No. 166112 prohibiting the minor leaving Malta, and it is required that such is confirmed definitely.

“Therefore, the claimant humbly requests the Honorable Court to;

“Order and declare that the child Rocco Jacobo Chetcuti above mentioned should not be allowed to leave Malta with the defendant and to prohibit the defendant or third parties from taking the said minor outside the Maltese Islands definitively;

“Order that the effects of Warrant of Prohibitory Injunction No. 166/12, including those orders given therein to the officials mentioned in the Warrant, are confirmed definitively.

“With costs, including those relative to the Warrant of Prohibitory Injunction No. 166/12 dated 10th September 2012 against the defendant who is hereby being called to make reference to the oath.

“Having seen the defendant's reply under oath, presented on the 27th May 2013, in which she stated that:

“1. Illi ghalkemm tezisti giurisprudenza illi tghid mod iehor, l-eccipjenti teccepixxi illi l-meritu ta' dan it-tip ta' mandat ma huwiex identiku ghall-meritu tal-kawza illi ghandha tigi mressqa mill-persuna illi fuq talba taghha tali mandat jkun gie mahrug b'mod illi f'din il-kawza l-attur ghad irid jidentifika l-interess guridiku illi huwa jippossjedi fis-safar ta' ibnu.

“2. Illi ma huwiex u qatt ma jista` jkun fl-interess tat-tifel minuri Rocco illi huwa ma jigix mehud barra minn Malta u jigu definitivament inibiti ommu u kull terza persuna ohra milli ssiefer bit-tifel minn Malta. It-talbiet attrici ghandhom, almenu kif prezentement impostati, jigu michuda.

“3. Illi l-mandat ta' inibizzjoni numru 166/12 gab ukoll bhala effett tieghu illi l-Awtoritajiet Maltin ma johorgux passaport lil minuri Rocco. Dan l-effett tal-mandat ma giex indirizzat fir-rikors promotur u f'kull kaz jigi eccepit illi dan ukoll m'huwiex fl-interess tal-minuri kif evidenzjat ukoll mill-fatt illi fl-imghoddi l-partijiet kienu qablu dwar il-htiega illi l-minuri jkollu passaport.

“4. Illi t-talbiet attrici jqanqlu konsiderazzjonijiet illi jmorru lil hinn mis-semplici materja tal-effetti tal-mandat ta' inibizzjoni mahsub biex jizgura illi l-access ta' genitur lil wild tieghu jkun imhares u dan billi l-esponenti, cittadina u domiciljarja Kolombjana, illi harget tqila mir-relazzjoni li kellha mal-attur illi spiccat – minhabba l-eccessi tieghu – xahrejn wara t-twelid tat-tifel minuri Rocco – ma tistax tigi mizmuma milli ssiefer u tirritorna lura f'pajjizha flimkien ma' binha, semplicement ghalix (issa) l-attur qieghed jibza` illi ma tigiex lura. Dwar daqshekk l-eccipjenti gja avvicinat lill-attur u issa bdiet proceduri ta' medjazzjoni meqjusa appunti biex din il-materja tigi diskussa u possibilment rizolta.

“5. Salv eccezzjonijiet ohra.”

“Having seen the plaintiff's affidavit presented on the 16th December 2014 (fol 90), in which he states, inter alia, that he filed these procedures due to a fear that defendant might leave Malta with the child and never come back. He states that when she was still pregnant, defendant used to tell him that her mum is a judge in Colombia and that she was surrounded by security due to the state of the country and to the fact that members of cartels would get back on members of the judiciary. She would not allow him to put any photos of the child on facebook so that no one would know that the child is her mother's grandchild.

“Plaintiff states that since Rocco was born, defendant often mentions her desire to go and live abroad for one reason or another, such as in Dubai, Sweden and Spain. He states that both defendant and their son are completely dependent on him and his family, and the child spends a lot of time with him and other family members. He spends two or three afternoons with him, takes him to school everyday, and he spends two whole weekends a month with him.

“Plaintiff states that defendant used to tell him “Rocco will call someone else daddy.” He thus felt the need to institute these proceedings for fear that defendant would leave Malta with the child and go to Colombia which is a dangerous and corrupt country, according to what defendant herself used to tell him.

“Having seen defendant's affidavit presented on the 20th January 2015 (fol 94) whereby she states, inter alia, that while she was pregnant in July 2010, she went to Colombia and returned in September of that same year. She could have stayed in Colombia and given birth there but she knew that it would be wrong unless she would have first discussed it with plaintiff, and thus came back to Malta.

“She states that whilst she was eight months pregnant, plaintiff hit her and she left the house. The next day the baby had to be induced as it was under stress and so he was born one month early. She relates that their relationship did not work out and they broke up in November or December 2010. She presents Dok LM3 which proves that she had discussed with plaintiff the possibility of taking the child to Colombia, and plaintiff had also signed the passport application for the child in January 2011. However she went to Colombia by herself since her father's health condition had deteriorated, and left the child with plaintiff's mother, who informed defendant that plaintiff had hardly seen the baby whilst she was away.

“Defendant states that she has always been Rocco's primary carer, and tended to his needs with plaintiff family's financial backing. She also clarifies that her mother is a *'Procuraduria general de la nacion'* and has been in such position since 1996 with no accidents and no bodyguards. She also points out that she never accepted the work with Emirates, and that she never had any intention of going to live in Sweden. She also clarifies that she had wanted to go and study in Spain but not live there, and that the words “Rocco will call someone else daddy” were meant as a warning since plaintiff was not spending time with his son.

“She states that during summer 2012, she asked plaintiff to go on holiday with the baby, and offered to sign a paper committing to bring the baby back or go to court to apply for a restricted passport. Plaintiff's mother and aunt also offered to go with her to Colombia but

plaintiff refused and in September of the same year he filed the warrant of prohibitory injunction.

“She also states that in September 2014, her mother expressed her wish to meet her grandchild. Since she has health issues, she asked defendant to meet her somewhere closer than Malta and defendant suggested Spain since her mother speaks Spanish. She was however refused permission to take Rocco to meet his grandmother, even accompanied by plaintiff's mother or aunt. She thus went up to Spain alone to help her mother come over to Malta to finally meet her grandson.

“Having seen the affidavit of Hugo Chetcuti, plaintiff's father, presented on the 12th February 2015 (fol 129) who inter alia, states that his son and himself cater for all of defendant's and child's financial and accommodation needs. He states that defendant often goes abroad and leaves the child with them. He also states that she describes Malta as boring and a 'prison' and speaks badly about the Maltese people. Plaintiff and himself are both worried that defendant might take the child to Colombia as it is a very dangerous country. They think it would be best for the child to be brought up in Malta.

“Having heard the plaintiff in cross-examination, on the 28th April 2015 (fol 132), state, inter alia, that Colombia is not a safe country for the child, and defendant had told him that her mother as a judge has security outside her house. He never actually verified this himself, but his fears are based on what defendant used to tell him when they were a couple. He states that he signed the passport papers as he believed it was normal procedure for everyone to have a passport but he never accepted Rocco to go with defendant to Colombia.

“He denies ever hitting defendant, even though he recalls an incident in which defendant hit him in the face and he spat at her. Regarding Dubai, he says that defendant had told his family that she wanted to go and live there but never told him directly. Regarding Sweden, he says that he never saw any tickets but defendant had mentioned that if she were to marry her Swedish boyfriend, she would not be able to take Rocco with her. However he knows nothing about this third person facing investigation in Sweden and being settled in Malta. He confirms that defendant had wanted to go to Spain to study English, but he did not know the duration of such course and he did not agree to it.

“Having heard defendant in cross-examination on the 2nd June 2015 (fol 163), where she stated, inter alia, that she did not want her son's photos to be on facebook because of his privacy and not because she was worried of any repercussions in Colombia.

“She states that they had many arguments because of the fact that, even after plaintiff stopped working at night, he still kept on going out

often and coming home in the early hours of the morning with make-up on his shirt. She also discovered that he was in contact with his ex-girlfriend again.

“She also recounts an incident where she asked him to leave as a result of him being out of control while on drugs. She says that for many months she saw cocaine on his jackets and saw him smoking marijuana, and even though he always said he would submit himself to tests, he never did. She also believes that he may have changed as people make mistakes and this was five years back.

“She also confirms that Rocco used to spend weekends at plaintiff's grandfather, but she did not go out every weekend. She states that plaintiff was always invited to see his son, unless he was aggressive or treated her badly or did something wrong in front of the child. Otherwise, he could always see him.

“She says that she never had any intention to go to Sweden but her concern was that if she were to marry her Swedish boyfriend, her son would not be able to go on holiday with them. Regarding Emirates, she explains that when she applied she knew nothing about the job but when she found out that she had to live in Dubai and travel often, she refused the job.

“Regarding Spain, she states that both plaintiff's mother and father offered to come and help her with the baby should she decide to go and study there for some time and then come back to Malta.

“She confirms that during these five years, she travelled to Sweden, to France and Sicily with plaintiff and their son, and to Colombia for family reasons.

“Asked why she never applied for a job here in Malta, she states that she was told that she needs to solve her situation in Court before she can move forward.

“Having seen the acts relative to the warrant of prohibitory injunction number 166/12AL, which were attached to the acts of the present proceedings as per court order dated 4th December 2012;

“Having seen defendant's note of submissions filed on the 30th September 2015 (fol 195).

“Having heard both parties' verbal submissions during the hearing of the 2nd December 2015 (fol 207).

“Having examined all evidence, documents and acts relative to this case.

“The case is adjourned for judgement.

“The Court considers:

“Plaintiff's claims

“By the first claim, plaintiff requests the Court to order and declare that the child Rocco Jacobo Chetcuti should not be allowed to leave Malta with the respondent and to prohibit the respondent or third parties from taking the said minor outside the Maltese Islands definitely, whilst by his second claim plaintiff requests the Court to order that the effects of the warrant of prohibitory injunction number 166/12, including those orders given therein to the officials mentioned in the warrant, are confirmed definitively.

“Warrants of prohibitory injunctions are regulated by Article 873 of the Code of Organisation and Civil Procedure:

“ (1) *The object of a warrant of prohibitory injunction is to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant.*

“ (2) *The court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to preserve any right of the person suing out the warrant, and that prima facie such person appears to possess such right.*

“In issuing such warrant the Court must be satisfied first of all that the warrant is necessary to preserve a right of the claimant, and secondly that on a *prima facie* basis, the claimant appears to have that right. It is then up to the claimant during the subsequent procedures to prove that he possesses such right and consequently attest his juridical interest in such proceedings.

“Reference to jurisprudence enunciating the principles governing precautionary warrants are in order.

“**Panorama Company Limited vs Enemalta Corporation** (PA 14/02/2013), decided by the First Hall of the Civil Court on the 14th February 2013:

“Dwar talba ta` din ix-xorta, kien deciz hekk fil-kawza “Carmela sive Lina Aquilina vs Francis X. Aquilina noe.et.” (Qorti tal-Appell - 27 ta’ Novembru 1991):

“Kull mandat kawtelatorju, min-natura tieghu stess, ghandu validita' u hajja sakemm u biex il-kreditur ikollu l-opportunita li jikkonkretizza il-kreditu tieghu b'titolu ezekuttiv - li (ukoll isem mieghu) jippermettilu jesegwixxi l-kreditu u b'hekk ma jkollux bzonn aktar ta' kawtela.” Dik il-Qorti ghalhekk ikkonkludiet li “Il-ligi ma tikkontemplax il-possibilita' ta' mandat kawtelatorju permanenti- kif timplika il-pretensjoni attrici.”

“Kien ghalhekk li saret distinzjoni bejn “id-dritt ta’ kawtela - cioe’ id-dritt procedurali - li ma huwiex id-dritt sostanzjali li jista’ jigi kawtelat. Dawn huma zewg drittijiet distinti u ma jistghux jigu ridotti u konfuzi fi dritt wiehed, kif qed tghid l-attrici.- Huwa ovvju li l-jedd imsemmi fil-mandat m’huwiex id-dritt li taghmel il-mandat imma huwa d-dritt li ghalih il-kreditur ghamel uzu mid-dritt li johrog il-mandat”.

“...omissis....

“Tajjeb irriteriet dik l-Onorabbli Qorti li ic-citazzjoni ma tissoddisfax il-vot ta’ dan l-artikolu jekk ma ssirx kawza biex tirrealizza id-drittijiet hemm kawtelati imma sempliciment issir talba biss ghall-konferma tal-mandat. [emphasis of the Court]

“Fil-kawza “Sullivan vs Stivala et” deciza mill-Qorti tal-Kummerc fis-17 ta` Marzu 1992, kienet saret talba semplicement sabiex jigi kkonfermat il-mandat kawtelatorju. Hemm il-Qorti qalet li ma hemm l-ebda fundament legali sabiex tintalab tali konferma stante li “il-ligi trid li mandati simili jigu msahhin u mwettqa b’citazzjoni, li tkun allura allaccjata mal-pretensjoni tar-rikorrenti u mhux ma rikonferma ta’ digriet qja’ moghti fil-kaz tal-mandat jew mandati.” [emphasis of the Court]

“Kull meta saru talbiet sabiex jigi kkonfermat in perpetwu mandat ta’ inibizzjoni “sic et simpliciter” il-linja traccjata mill-Qorti taghna kienet dik ta’ cahda ghar-raguni li filwaqt li l-mandat johrog ghaliex ikun jirrizulta dritt “prima facie” fil-kawza tkun trid issir talba ghall-pronunzjament gudizzjarju dwar il-mertu tad-dritt innifsu. (“**Giordmaina vs Giordmaina**” – Prim`Awla tal-Qorti Civili (GV) – 7 ta` Novembru 1995; “**Axisa vs Patiniott**” – Prim`Awla tal-Qorti Civili (M) – 21 ta` Marzu 1996; u “**Cuschieri vs Grech noe**” – Prim`Awla tal-Qorti Civili (GV) – 9 ta` Jannar 1997).

“Reference is also made to jurisprudence quoted in a previous judgment of the First Hall of the Civil Court which addresses the issue at hand and throws light on the admissibility or otherwise of plaintiff's claims.

“**Salvu Fenech et vs Malta Dairy Products Limited et: -**

“*Ill*i l-attur fl-ewwel talba tieghu qieghed jitlob lil din il-Qorti tordna li l-Mandat ta’ Inibizzjoni Numru 3080/97 fl-ismijiet “Salvatore Fenech vs Malta Dairy Products Limited” ghandu jibqa’ fis-sehh definittivament.

“*Ill*i din il-Qorti, kif preseduta, tat diversi sentenzi fuq dan il-punt. Din il-Qorti qeghda taghmel referenza ghas-sentenza minnha moghtija fl-4 ta’ Marzu, 1999 fl-ismijiet “**Anthony Abdilla et vs Emanuel Deguara**” (Cit. Nru. 1998/97) fejn qalet illi:-

“*Ill*i tali eccezzjoni hija bbazata fuq l-artikolu 843 tal-Kap 12 tal-Ligijiet ta’ Malta, li huwa applikabbli ghall-Mandat ta’ Inibizzjoni, in forza tal-Artikolu 875, li jipprovdi inter alia illi r-rikorrent ghandu jaghmel il-kawza ghall-jedd imsemmi fil-Mandat fi zmien sitt ijiem mill-kunsinna tal-avviz.....”.

“Illi dwar dan l-istess artikolu hemm diversi sentenzi li ppronunzjaw ruhhom fuq il-portata tal-istess artikolu u senjatament il-kawza fl-ismijiet **“Carmela Aquilina vs Francis X. Aquilina”** deciza mill-Qorti tal-Appell fis-27 ta’ Novembru 1991, fejn sostniet illi:-

““Kull mandat kawtelatorju min-natura tieghu stess, ghandu validita’ u hajja, sakemm u biex il-kreditur ikollu opportunita’ li jikkonkretizza l-kreditu tieghu f’titolu eżekuttiv u jippermetti jesegwixxi kreditu li b’ hekk ma jkollux bzonn ta’ aktar kawtela”.

“Illi ghalhekk l-istess Onorabbli Qorti tal-Appell fl-istess sentenza ghamlet id-differenza li tezisti bejn “id-dritt ta’ kawtela - cjoe’ id-dritt procedurali - li ma huwiex id-dritt sostanzjali li jista’ jigi kawtelat. Dawn huma zewg drittijiet distinti u ma jistghux jigu ridotti u konfuzi fi dritt wiehed..... Huwa ovvju li l-jedd imsemmi fil-mandat m’ huwiex id-dritt li taghmel il-mandat imma huwa d-dritt li ghalih il-kreditur ghamel uzu mid-dritt li johrog il-mandat”.

“Il-kwistjoni kollha hija li ma “tikkonfondi l-kuncett ta’ kawtela ma’ dik ta’ garanzija ta’ drittijiet”.

“Tal-istess portata hija s-sentenza fl-ismijiet **“Catherine Terrence Sullivan vs Adrian Stivala et”** (K.F. 17 ta’ Marzu 1992) fejn it-talba kienet sempliciment sabiex jigi kkonfermat il-Mandat kawtelatorju. Il-Qorti qalet li ma hemm ebda fundament legali li tintalab konferma tal-Mandat kawtelatorju stante li “il-ligi trid li mandati simili jigu msahhin u mwettqa b’citazzjoni, li tkun allura allaccjata mal-pretensjoni tar-rikorrenti u mhux ma rikonferma ta’ digriet gja’ moghti fil-kaz tal-mandat jew mandati. Certament ghalhekk it-talba kif maghmula hija mproponibbli ghax ma hijiex kontemplata mill-ligi”.

“Dan gie kkonfermat f’diversi sentenzi fejn saru talbiet sabiex jigi kkonfermat in perpetwu mandat ta’ inibizzjoni sic et simpliciter inkluzi fil-kawzi **“Connie mart Anthony Galea vs Joseph Gauci”** (P.A. (AJM) 4 ta’ Ottubru 1993) li sostniet illi “tali talba attrici ma hijiex permessa fil-ligi taghna billi twassal ghall-inibizzjoni perpetwa tal-konvenut milli jaghmel dak imsemmi fil-mandat minghajr ma jigi stabbilit jekk l-attur ghandux il-jedd, li irrizulta prima facie pruvat fil-proceduri tal-mandat”. Tali sentenza **“C. Galea vs J. Gauci”** giet ikkonfermata mill-Qorti tal-Appell fis-7 ta’ Ottubru 1997 anke peress li irrizulta li l-atturi ddeducew il-pretensjoni taghhom b’kawza separata, u ghalhekk ma kienx hemm bzonn konferma tal-mandat billi dan jibqa’ in vigore sakemm tigi deciza l-pretensjoni tal-atturi.

“Illi l-istess sentenzi gew ikkonfermati fil-kawzi **“George Giordmaina vs Kristinu Giordmaina”** (P.A. GV 7 ta’ Novembru 1995); **“Michael Axisa vs Grazio Patiniott”** (P.A.M. 21 ta’ Marzu 1996) u dan dejjem fuq il-bazi li “l-ligi ma tikkontemplax il-possibbilta’ ta’ mandat kawtelatorju permanenti”, **“Louis**

Cuschieri vs. Dr. John C. Grech nomine (G.V. 9 ta' Jannar 1997).

*"Illi l-kawza tal-Appell **Mary Grace Farrugia vs Stephen Farrugia et**" deciza fit-30 ta' Meju 1997, gie wkoll enuncjat illi dak li ntqal fis-sentenzi **Joseph Gasan vs Nicola Spiteri**" (App. 28 ta' Gunju - 1948 - XXXIII.i.665) u **Marco Bongailas vs John Magri et**" (P.A. 27 ta' Gunju 1995) li "id-dikjarazzjonijiet li talvolta jkunu mehtiega biex l-attur jasal ghal xi wahda mid-domandi tieghu ma hemmx bzonn li jsiru taht forma ta' domandi jimplika biss li certi dikjarazzjonijiet ma hemmx bzonn li jsiru taht forma ta' domandi. Fil-kaz odjern non si tratta ta' nuqqas ta' dikjarazzjonijiet li jwasslu ghad-domanda izda nuqqas tad-domanda stess".[emphasis of the Court]*

"----- omissis -----"

*"Illi pero' hemm sentenzi ohra fejn talbiet apparentement simili ghal dawk fuq appena kkwotati fis-sentenzi citati gew ammessi mill-Qrati nostrali, u ghas-soluzzjoni tal-kwezit odjern jehtieg ukoll li jigu ezaminati. Hekk fis-sentenza **David Camilleri nomine vs John Camilleri**" (K (A.M) 25 ta' Novembru 1994) konsegwenti ghall-hrug ta' Mandat ta' Inibizzjoni, giet milqugha talba sabiex il-konvenut jillibera permanentament il-fondi hemm indikati minn diversi molestji. Illi nonostante l-fatt li ma kienx domanda ohra hlief dik fuq indikata, il-Qorti sostniet li "l-azzjoni prezenti konsegwenza tal-mandat ta' inibizzjoni li kien ghamel l-attur, hija bbazata fuq id-dritt li wiehed ghandu li jithallas ghad-danni li jsofri fil-proprjeta' tieghu; min isofri d-danni jista' wkoll jagixxi biex igieghel lil min qed jikkaguna d-danni illi jieqaf milli jkompli jaghmel atti li jikkagunaw, skond l-allegazzjoni tieghu, id-danni".*

"Illi l-istess sentenza komplet ukoll tghid li "id-domanda (kif hemm esposta fic-citazzjoni) hija domanda giudizzjarja biex jigi stabbilit id-dritt oggett tal-mandat kawtelatorju ai termini tal-artikolu 843".

*"Illi wkoll fil-kawza **Alfred Cassar vs John Mallia**" (P.A (JF) 22 ta' Meju 1995) il-Qorti sostniet illi:-*

*"Li kieku l-attur strah u llimita ruhu ghall-ewwel talba biss (konferma b' mod definittiv tal-Mandat ta' Inibizzjoni), allura il-konvenut kien ikollu ragun li jeccepixxi n-nullita' tal-azzjoni attrici. F'dan is-sens ukoll inghataw is-sentenzi citati mill-konvenut bhal **Sullivan vs Stivala et**" (13 ta' Marzu 1992 P.A.) u **Galea vs Gauci**" (4 t'Ottubru 1993). A differenza ta' dawn id-decizjonijiet, l-attur zied talba addizzjonali li tindika kjarament li l-bazi tal-azzjoni attrici tohrog mill-fatt li x-xogholijiet de quo kienu qed isiru fuq proprjeta' komuni". (artikoli 491 - 493 tal-Kap 16).*

"Illi minn dan jidher car li sabiex wiehed iiddeciedi fuq il-premess, wiehed irid jara n-natura tal-azzjoni ttentata, u jekk bit-talbiet li jsiru, supplementati mill-premessi tal-istess citazzjoni, l-attur ikunx gieghed jitlob l-affermazzjoni u ezercitazzjoni tad-dritt sostantiv li ghandu, jew inkella ikunx merament qed jagixxi

proceduralment biss, mhux ghall-asserzjoni tal-istess dritt sostantiv, izda ghall-kawtela tieghu.[emphasis of the Court]

“Illi fl-ewwel kaz ovvjament it-talba tieghu tigi kkunsidrata bhala valida ai termini tal-artikolu 843, (salv il-prova taghha), fil-waqt li fit-tieni ipotesi tali talba ma hijiex permessa mill-ligi, ghas-semplici raguni li ma tezisti ebda azzjoni ghall-kawtela permanenti u perpetwa tad-drittijiet ut sic fl-astratt, kif lanqas tezisti ebda azzjoni sabiex mandat kawtelatorju jigi estiz permanentament jekk mhux bil-prova u asserzjoni tad-dritt sustantiv innifsu.

“Illi hekk tispjega ruhha d-differenza bejn l-insenjamenti tal-kawza fuq citata **“Carmela Aquilina vs Francis X. Aquilina”** tas-27 ta’ Novembru 1991 u dik tas-sentenza **“Alfred Cassar vs John Mallia”** tat-22 ta’ Mejju 1995, u d-diversi sentenzi fuq citati li jaqghu taht branka jew ohra tal-istess.

“Illi ghalhekk il-gurisprudenza hija kostanti f’dan ir-rigward u stabbiliet konsistentament illi:-

(a) Talba sabiex mandat t’inibizzjoni jigi kkonfermat in perpetwita’ ma hijiex ammissibbli skond il-ligi taghna [emphasis of the Court] u senjatament kontra d-dispozizzjonijiet tal-artikolu 843 tal-Kap 12.

(b) Illi wara kull mandat t’inibizzjoni, fit-terminu preskritt skond l-istess artikolu 843 tal-Kap 12 ghandha ssir citazzjoni ghall-jedd imsemmi u kawtelat fil-mandat.[emphasis of the Court]

(c) Illi t-talbiet ghal tali konsegwiment u asserzjoni tal-jedd sostantiv ivarjaw skond id-dritt li jrid jigi vantat, u jista’ jimporta talba sabiex il-konvenut jigi inibit milli jaghmel xi haga lill-attur, proprio minhabba d-dritt sostantiv tal-attur vantat u ezercitat fl-istess citazzjoni. (Vide **“Cassar vs Mallia u D. Camilleri vs J. Camilleri”** fuq citati).

“Court's considerations:

“With reference to the case-law cited above and the principles therein contained, which are applicable to the present case, this Court opines that plaintiff's claims cannot be upheld. Plaintiff failed to prove that he is seeking to enforce a substantive right which would be hindered by the possibility of his son leaving the island. In fact, these procedures are merely an attempt by plaintiff to extend permanently and definitely the effects of the warrant of prohibitory injunction, a course of action which is not allowed under our law.

“Both claims made by plaintiff aim at confirming the effects of the precautionary warrant, and neither of them refer to the interest or right which the plaintiff is attempting to warrant by permanently inhibiting his son from leaving the island. This failure necessarily leads to his claims resulting unfounded. A warrant of prohibitory injunction issued in respect to minor child it intended to prevent the removal of a child from Malta before the Court decides on parental rights, care and custody, residence, access and maintenance of the child. The Court

has no authority to decide that a minor child be permanently until he is eighteen years of age for leaving these Islands.

“During the course of these proceedings the Court on several occasions drew the parties attention to the fact that whatever the outcome of these proceedings, short of an agreement to find solution could only be achieved if the parties file a case proper to obtain a final judgement on all issues concerning the child. To date none of the parties filed a court case that would resolve once and for all the question about the care and custody of the child.

“There is thus no reason in law and in fact for the plaintiff’s claims to be upheld.

“Decide

“For all the reasons cited above, the Court hereby decides the case by upholding defendant’s pleas and rejects plaintiff’s claims.

“With costs to be borne by plaintiff”.

Plaintiff Chetcuti appealed from this judgment and is therefore asking this Court to revoke it and consequently accede to his requests. Defendant replied by requesting this Court to confirm said judgment.

The major issue in this case is whether it is possible under our law to file a law suit asking the relative Court to confirm indefinitely a warrant of prohibitory injunction already issued. It is clear from the case law mentioned by the Family Court that the vastly prevailing opinion of the Courts is that such a demand cannot be upheld because the very nature of a precautionary warrant is to preserve an alleged right until the Court finally decides whether that right exists or not.

Appellant argues that all these judgments were not given with regard to a family law case but in normal cases between creditor and debtor. He therefore makes a reference to three cases to support his claim but acknowledges that in one of them (**Vassallo v. Melfi**, given by this Court on the 30th November 1998) the claim was rejected not on legal grounds but rather on the actual merits of the case. In the second one mentioned (**A v. B, 362/ 2003**) the Court actually said that it called this demand “*hija legalment insostenibbli*”, and the demand was not upheld although it then upheld the other demands. In the other case (896/2003) the Court upheld the claim but in conjunction with the demand to have access.

In the case **Connie Gauci v. Joseph Gauci** (7th October 1997) this Court stated quite clearly that our law does not contemplate “a perpetual prohibitory injunction”; “*tali talba attrici ma hijjex permessa fil-ligi taghna billi twassal ghall-inibizzjoni perpetwa tal-konvenut milli jaghmel dak imsemmi fil-mandat minghajr ma jigi stabbilit jekk l-attur ghandux il-jedd, li irrizulta prima facie pruvat fil-proceduri tal-mandat*”. Although appellant claims in his appeal application that he is making two demands in his sworn application in reality he is asking the Court to confirm the warrant and this Court agrees with judgments quoted by the Family Court that such a demand cannot be made at least without other demands which are ancillary to it. Thus it is possible for a spouse in a

separation case to request custody or access and then request other orders by the Court to ensure that the judgment on those issues be observed. In the case **Anthony Abdilla et v. Emanuel Deguara** (Cit. Nru. 1998/97) the Court held that:

“Illi tali eccezzjoni hija bbazata fuq l-artikolu 843 tal-Kap 12 tal-Ligijiet ta’ Malta, li huwa applikabbli ghall-Mandat ta’ Inibizzjoni, in forza tal-Artikolu 875, li jipprovdi inter alia illi r-rikorrent ghandu jaghmel il-kawza ghall-jedd imsemmi fil-Mandat fi zmien sitt ijiem mill-kunsinna tal-avviz.....”.

*“Tal-istess portata hija s-sentenza fl-ismijiet “**Catherine Terrence Sullivan vs Adrian Stivala et**” (K.F. 17 ta’ Marzu 1992) fejn it-talba kienet sempliciment sabiex jigi kkonfermat il-Mandat kawtelatorju. Il-Qorti qalet li ma hemm ebda fundament legali li tintalab konferma tal-Mandat kawtelatorju stante li “il-ligi trid li mandati simili jigu msahhin u mwettqa b’citazzjoni, li tkun allura allaccjata mal-pretensjoni tar-rikorrenti u mhux ma rikonferma ta’ digriet gja’ moghti fil-kaz tal-mandat jew mandati. Certament ghalhekk it-talba kif maghmula hija mproponibbli ghax ma hijiex kontemplata mill-ligi”.*

The Court then declared that;

“Illi ghalhekk il-gurisprudenza hija kostanti f’dan ir-rigward u stabbiliet konsistentament illi:-

“(a) Talba sabiex mandat t’inibizzjoni jigi kkonfermat in perpetwita’ ma hijiex ammissibbli skond il-ligi taghna [emphasis of the Court] u senjatament kontra d-dispozizzjonijiet tal-artikolu 843 tal-Kap 12.

“(b) Illi wara kull mandat t’inibizzjoni, fit-terminu preskritt skond l-istess artikolu 843 tal-Kap 12 ghandha ssir citazzjoni ghall-jedd imsemmi u kawtelat fil-mandat.[emphasis of the Court]

“(c) Illi t-talbiet ghal tali konsegwiment u asserzjoni tal-jedd sostantiv ivarjaw skond id-dritt li jrid jigi vantat, u jista’ jimporta talba sabiex il-konvenut jigi inibit milli jaghmel xi haga lill-attur, proprio minhabba d-dritt sostantiv tal-attur vantat u ezercitat fl-istess citazzjoni”. (Vide “Cassar vs Mallia u D. Camilleri vs J. Camilleri” fuq citati).

Appellant also requests the Court to decide on the basis of Article 149 of the Civil Code which allows the Court to give any order or decision in the best interest of the child but this Court is of the view that it cannot decide in a manner which is clearly contrary to our laws of procedure.

DECISION

The Court therefore dismisses the appeal and confirms the judgment of the 25th February 2016 above mentioned; all costs to be borne by appellant.

Silvio Camilleri
Chief Justice

Tonio Mallia
Judge

Joseph Azzopardi
Judge

Deputy Registrar
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