CIVIL COURT, FIRST HALL

HON. MR JUSTICE
JOSEPH ZAMMIT MCKEON

This day, the 14th November 2018

Applic. No. 1162/2017/1 JZM

In the acts of the sworn application number 1162/17/JZM in the names :

Lydon Laudi

vs

Dolittle & Fishmore Limited
Jan Erik Pantzar

and after the precautionary garnishee order number 1749/17 in the same names

The Court :

I. Introduction

Having seen the application filed by Jan Erik Pantzar on the 11th July 2018, and documents attached therewith.

Having seen the grounds raised by applicant in his demand for the revocation of the precautionary garnishee order in question on the basis of Art 836(1)(d) of Chapter 12, and in his demand for the imposition of a penalty on respondent on the basis of Art 836(8) of Chapter 12.

Having seen its decree of the 16th July 2018.

Having seen the reply filed by respondent on the 13th September 2018.

Having seen its other decree of the 27thSeptember 2018.

Having heard oral submissions by parties` lawyers and applicants` evidence at the hearing of the 1st November 2018.

Having seen the documents filed at the same hearing.

Having seen its decree whereby the matter was adjourned for a final decree *in camera*.

II. <u>Art 836 of Chapter 12</u>

Our Courts have consistently taken the line that as proceedings of this nature are brought *ope legis* to the cognizance of the Court that is hearing the merits of the lawsuit, the Court must, in its consideration of the application, refrain from entering into the merits of the dispute itself. The Court should limit itself to a *prima facie* examination of the position of each party and any evidence submitted in the course of the hearing of the application. The reasons for this approach are in essence threefold : i) the present proceedings are separate and distinct from the lawsuit on the merits ; ii) they stem from a specific provision of law that is intended to scrutinise the legal basis for the issue of precautionary

warrants ; iii) the judge deciding the application and the lawsuit is the same and therefore when treating the application must restrict his ruling within the strict parameters of the legal provision on which the application is founded.

In the application in re "**Conrad Borg vs de La Rue** (15th July 2015) it was affirmed that :-

> *Il-Qrati ennuncjaw principji mportanti fir-rigward ta` kawzi dwar revoka ta` Mandati Kawtelatorji fejn l-ezami li hija mistennija illi taghmel il-Qorti huwa wiehed prima facie. (Vide ukoll l-kawza fl-ismijiet "**Castelli Av. Carmelo noe vs Focal Maritime Services Ltd et**" tas-26 t`April 2002 per Onor Imhallef Dr. G. Camilleri).*

Along the same lines, it was held in re "**Camilleri vs Gove et**" (10th May 2001) that :-

> *"mid-dispozizzjoni tal-istess artikolu 836 jidher li l-uniku ezami li trid taghmel din il-Qorti huwa biss dak ta` prima facie u dan ghaliex il-mertu kollu jigi nvestigat fil-kawza proprja bejn il-partijiet, u ghalhekk hemm limitazzjoni sinifikanti fl-ezami li trid taghmel il-Qorti f`dan l-istadju, u dan tenut kont li hawn si tratta dejjem ta` procedura preliminari li ghad qed tistenna l-ezitu finali tal-kawza proprja."* (ara wkoll is-sentenza fil-kawza "**Emanuel Sammut vs Josephine Sammut**" deciza fil- 5 ta` Gunju 2003).

[vide also : "**Tanya Chetcuti pro et noe vs Hugo Chetcuti**" (27th June 2002)]

In proceedings of this nature, the Court must ascertain that the requisites required at law for the issue of the precautionary warrant do actually result from the act itself. The Court must also be vigilant not to permit or condone abuse of the procedure. [vide – "**Paul Hili et vs Dr. Joselle Farrugia noe et**" : 23rd June 1994]

The legal *rationale* for precautionary warrants is that every person has a right to resort legal action and that right should not be made difficult or obstructed. Furthermore until a person`s substantive right is decided by the courts that person has the right to protect his interest should his claim be determined in his favour ("**Vincent Mercieca vs George Galea**" – 29th November 2001 ; "**Technobroadcast s.r.l vs Mediterranean Broadcasting Limited**" – 5th June 2007)

III. Art 836(1)(d) of Chapter 12

Applicant is requesting the revocation of the precautionary warrant on the basis of Art 836(1)(d) of Chapter 12 which states that the precautionary warrant may be revoked *in toto* or *in parte* :

"*if it is shown that the amount claimed is not prima facie justified or is excessive*."

Reference is made to the decision of the 29th July 2005 of this Court (otherwise presided) in the application in re "**Galea vs Stewart**" where it was explained that :-

> *"Biex ammont imsemmi f`att kawtelatorju jitqies li huwa eccessiv, jehtieg li jintwera li dan ikun ezagerat fid-dawl tat-talba li ssir jew tant grossolan li ma jistax ma jidhirx mad-daqqa t`ghajn bhala wiehed maghmul b`mod azzardat"*

(vide also : Civil Court, First Hall : "**Casino-For-Me Limited u Chartwell Games (Malta) Limited**" – 5th September 2008 ; **Steven Pace et vs. Paul Camilleri et**– 4th February 2016 ; "**Carmel Debono et vs Paul u Demanuele et**" – 13th August 2013)

Applicant argues that he is non-suited in the lawsuit. He states that he is not the proper defendant to answer respondent`s claims. Therefore the precautionary warrant should never have been filed against him personally because the claim in his regard is not justified.

The Court notes that the issue raised by applicant has no relevance for the purposes of Art 836(1)(d) as that provision deals specifically with a question of *quantum*. Whether the applicant is the lawful defendant or otherwise is a matter to be decided separately and requires a proper and thorough examination of the merits. Such scrutiny is outside the scope of the present proceedings.

Respondent Laudi contests applicant`s demand by arguing that the present proceedings are inextricably linked to other proceedings namely those pending before this Court i.e. Sworn Application No. 1089/2017 JZM in re **Frank Grisar et vs Dolittle and Fishmore et**. There respondents filed an action in terms of Art 402 of Cap 386 and are requesting that applicant be held **personally** liable for acts carried out in his own name before the incorporation of Dolittle and Fishmore Limited. Respondent argues that it is premature to accede to a request for the revocation of the precautionary warrant given that the other proceedings are still pending and evidence is still being collected. He argues that a revocation of the warrant could be tantamount to an exclusion of liability on the part of applicant..

Having weighed the arguments submitted by both sides, and having taken into account the contents of the documents present in support of each party`s stance, the Court is of the view that on a *prima facie* basis the warrant should stand as at present given that there is a *nexus* between the claim and the amount being cautioned. Whether respondent will ultimately succeed in proving his claim on the merits is a matter still to be determined. As far as the present proceedings are concerned, it was up to applicant to prove his demand on a *prima facie* basis within the framework of Art 836(d). This Court is of the considered opinion that his attempt was unsuccessful.

Applicant`s first demand is therefore dismissed.

IV. Art 836(8)

This provision grants to the court a wide discretion to impose the payment of a penalty against the person who requests and obtains the issue of a precautionary warrant in favour of the person against whom a warrant is issued provided that one of the circumstances mentioned in paragraphs (a) to (d) of Art

836 (8) is proven to prevail. The four circumstances are therefore alternative in nature.

In its decree of the 10th August 2012 in application number 688/2012 this Court as otherwise presided stated as follows :-

> *Illi dwar il-kwestjoni tal-impozizzjoni tal-penali, irid jinghad li din hija sanzjoni fakoltativa. Il-Qorti, fid-diskrezzjoni taghha, tista' taqbel li tghabbi lil min ikun hareg Mandat kawtelatorju kontra persuna, u fuq talba ta' din, b'piena ta' hlas ta' penali. Minbarra li tali impozizzjoni hija fakultativa, irid jintwera ghas-sudisfazzjon tal-Qorti li trid tkun sehhet wahda mic-cirkostanzi mahsubin mil-ligi biex tali sanzjoni tigi imposta. Erbgha (4) huma c-cirkostanzi mahsuba mil-ligi f'dan ir-rigward u, ladarba huma sanzjoni punittiva, ghandhom jitqiesu strettament bhala tassattivi izda bizzejjed li tirrizulta wahda minnhom biex il-Qorti tista' taccetta li tqis it-talba ghall-kundanna tal-hlas tal-penali. Dwar din id-diskrezzjoni nghad li l-Qorti hija tenuta li timponi l-penali fejn ikunu jirrizultaw l-estremi li l-ligi tezigi biex din tkun imposta, u l-Qorti tista' biss taghzel li ma timponix il-penali mahsuba fl-artikolu 836(8) f'kazijiet estremi fejn is-sens ta' gustizzja hekk kien jimponilha. Il-penali mahsuba fl-imsemmi artikolu 836(8) tal-Kap 12 hija wahda ta' ordni pubbliku immirata li tizgura serjeta' fil-process gudizzjarju u biex ma thallix li l-istitut tal-Mandati kawtelatorji jintuza b'abbuz ;"*

The Court observes that the mere fact that the applicant fails to provide the Court with valid arguments for the revocation even in part of the warrant (as has been in the present case) does not *a priori* exclude the imposition of a penalty, if any of the circumstances mentioned in Art 836(8) results. The need for such a provision was intended by the legislator to ensure that the judicial process is kept free from abuse especially in the case of precautionary warrants.

In this case, it is amply unequivocally clear that applicant left the question of an eventual imposition of a penalty in the entire discretion of the Court without being in any way particular.

The Court examined each of the four circumstances to which Art 836(8) refers..

<u>As regards paragraph (a)</u> :

this Court is of the view that the circumstances therein envisaged do not result given that the application relative to the merits of the case was filed shortly after the filing of the application for the precautionary warrant to be issued.

Therefore paragraph (a) does not result.

<u>As regards paragraph (b)</u> :

A request for payment in terms of this provision can be made either formally or verbally. The acts are devoid of any evidence that shows that the request for payment was actually made. It was entirely up to the applicant himself to bring proof to sustain that the request was never made. Applicant was however silent on this matter.

Therefore paragraph (b) does not result.

<u>As regards paragraph (c) :</u>

it is worth noting that the debtor failed to prove that his circumstances *qua* debtor, or potential debtor, were such "*as not to give rise to any reasonable doubt as to his solvency and as to his financial ability to meet the claims of the applicant, and such state of the debtor were notorious*".

Therefore paragraph (c) does not result.

<u>As regards paragraph (d)</u> :

Jan Erik Pantzar failed to prove the circumstances covered by this provision.

Therefore even paragraph (d) does not result.

<u>Decision</u>

For the reasons above, the Court :

REJECTS the applicants` demands.

RESERVES its decision on the costs of this procedure when it comes to a final decision on the pending lawsuit.

Hon. Mr. Justice Joseph Zammit McKeon
Presiding Judge

Amanda Cassar
Deputy Registrar