**IN THE COURT OF MAGISTRATES (MALTA)**

**MAGISTRATE**
**DR. CAROLINE FARRUGIA FRENDO**
***B.A. (Legal and Humanistic Studies), LL.D.,***
***M.Juris (International Law), Dip. Trib. Eccl. Melit***

**Application number: 74/2018 CFF**

**Zina Bader**
**VS**
**Office Solutions and Supplies Limited**

**Today 22nd June 2021**

**The Court;**

Having seen the application filed by the plaintiff whereby said plaintiff requested the Court to find and condemn the defendant company to pay the amount of €8,000 representing the balance owed by the defendant company to the applicant for the following:

1) €2,500 remaining balance from a total of €15,000 representing a lump sum payment resulting from the contract entered into on the 25th September 2017;
2) €5,000 representing the price of a Van already transferred and accepted by yourselves from the applicant;
3) €500 representing bank related expenses paid by the applicant in your names;

Together with expenses related to the Garnishee Order bearing number 436/18 and Judicial Letter bearing reference 462/18 together with all legal interests thereon till the date of effective payment, against defendants who are hereby being summoned.

Having seen the **reply by Office Solutions and Supplies Limited and Antonio Perrone** whereby they submitted that:

1. That on a preliminary note the respondent Antonio Perrone in his personal name is not the *legitimate defendant* since in his own personal name he does not have any connection with the plaintiff's claims and therefore he should be spared from observance of the judgement, with costs against the plaintiff;

2. That the plaintiff's first claim is unfounded in fact and in law and should be denied with costs against the plaintiff since the sum of two thousand five hundred Euros (€2500)claimed by the plaintiff is not due;

3. That without prejudice to the above the respondent Office Solutions and Supplies Limited had paid the sum of four hundred and ninety eight Euros as the balance of the price owed to Melita

plc for the services provided to the plaintiff and his children and therefore if it results that the exponent company owes any money to the plaintiff the above-mentioend amount has to be deducted from the said amount;

4. That the plaintiff's second claim is unfounded in fact and in law and should be denied with costs against the plaintiff since the van referred to by the plaintiff was never transferred to the respondent company since instead it was sold to third parties as can be proved during the proceedings;

5. That the plaintiff's third claim is unfounded in fact and in law and should be denied with costs against the plaintiff since the bill referred to by the plaintiff is his personal bill and therefore the banks charges should be borne by him;

Respondents reserve the right to make further pleas.

**Considered:**

**Bader Zina** in his affidavit stated that he was the owner of Office Solutions from July 2009 till September 2017. He wanted to sell the goodwill of the business and he had met Patrick Hall and Mario Bonsignore of PH Consultancy. He was informed by PH Consultancy that they had a client a certain Antonio Perrone who wanted to buy the goodwill of his business. Discussions were initiated with Antonio Perrone. He was informed by Antonio Perrone that he was incorporating a company with MFSA to take over the business. In fact a company was registered under the name of Office Solutions and Supplies Limited. He was approached by AtoZ Electronics who had shown interest in buying the company but he was assured by PH Consultancy that the deal as agreed will go ahead. In fact in September 2017, an agreement was signed and he had received three payment installments for the total value of twelve thousand Euro out of the fifty thousand Euro as agreed.

On the 25th September he signed an employment agreement with Office Solutions and Supplies Limited and a sub-lease agreement for a store in B'Kara. As the new owner has problems in opening a bank account, and in order that the company can operate, it was agreed that his personal bank account at BOV would be used. It occurred that he had issues with the Bank as some cheques that were issued for payment were not being honoured by the bank as no money was being deposited. In fact in 2018, a letter was sent by the Bank so that he will discontinue in issuing cheques. As a consequence, the company started losing clients and its reputation. The company had issues with its stock and at one point Antonio Perrone tried to buy stock from abroad but it resulted that in Malta they were far cheaper. This situation got worse as Antonio Perrone was not injecting any income to the company with the result that he had a discussion with Perrone and Bonsignore about this situation. At one time, Perrone had promised that he will send the money and promised him that he will pay him the 15,000 Euro which are owed to him. As to the van Toyota Town Ace Delivery van it was agreed that it would be sold to the company as per agreement. Although the van was used by the company and even by Perrone, no transfer could be held as the payment to the van was not honoured as per contract. Although in January 2018, Perrone had send sent some five hundred Euros and was ready to discuss the way forward. Although no meetings had materialized and he had no option to write to all parties involved about the dire situation. In the same email he explained the situation whereby stock was not being bought, he was owed a lot of money in wages and other expenses and to what was agreed in the contract. In fact a meeting was held in February 2018 whereby Antonio Perrone father had informed to take over the company back but no payments will be made. He refused as the company had been subjected to bad reputation by Antonio Perrone.

**Ibrahim Yassine** in his affidavit stated that he is a friend of Bader Zina. Bader Zina was approached by PH Consultancy for the sale of Office Solutions. He acted as a mediator between the parties and he stated that he had sent an email regarding the interest shown by AtoZ in purchasing the goodwill. The first payments as agreed in the contract were made after the 25th September 2017 but were not made in accordance with the agreed contract. Although he added that Bader was still requesting that he be paid the difference still remaining but as yet no transfer of funds were made by Perrone. In a particular meeting it was stated that Bader should be paid the sum of 45,000 Euro but they kept reducing the price until reaching an agreement of 30,000 Euro. At one point then it was suggested that they pay 6,000 Euro to Bader and leaves the whole business and this was not accepted.

**Diego Perrone** stated that they were approached to purchase a sound business and verbally they were informed that the business made profits. Although no documents were ever produced. In August 2017, they were informed that another company was willing to purchase the company from Bader. In order not to lose the deal they transferred 15,000 Euro as a deposit for the sale of the company. It was agreed in the contract that Bader will be paid a wage, they would purchase a van. Problems started to arise as Bader kept insisting to be paid and he was using different accounts which created issues to the company. He used to purchase goods with his cheques and collect the cheques from the clients. The situation was not even clear as to the relationship that existed with the owner of the store. Accordingly, Bader had the intention to make money as much as possible from a business which was not viable.

**Bader Zina** under cross-examination confirmed that the van was used by the company and declared that the van could not be transferred as he was not paid. He said that he was an employee and a contract was signed to this effect. As regards the VAT returns there was a specific date in which they had to be submitted but Antonio Perrone did not pursue his commitments.

*Plea of – Legitimate Defendant (Legittimu Kuntradittur)*

The first plea raised by the defendant Antonio Perrone that he is not the legitimate defendant in this case whereby it was stated and quoting *fil-vesti personali huwa m'ghandu x'jaqsam xejn mal-materji sollevati*. It has to be said that whether the defendant Antonio Perrone is a legitimate defendant is a fundamental one because if the Antonio Perrone is declared as not being a party to this case, then the Court cannot continue with the case in relation to him. The Court must examine and determine whether there is a juridical relationship between the defendant and plaintiff. In this case reference is being made to the case of **Frankie Refalo et vs Jason Azzopardi et** decided by the Court of Appeal on the 5th October 2001which stated the following:

> *"Din il-Qorti allura tikkonsidra illi biex tistabilixxi jekk parti in kawza kinitx jew le legittimu kontradittrici tal-parti l-ohra, l-Qorti trid bilfors tivverifika prima facie jekk il-persuna citata fil-gudizzju, kinitx materjalment parti fin-negozju li, skond l-attur, holoq ir-relazzjoni guridika li minnha twieldet l-azzjoni fit-termini proposti.*
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> *Jekk dan in-ness jigi stabbilit, il-persuna citata setghet titqies li kienet persuna idoneja biex tirrispondi ghat-talbiet attrici, inkwantu dawn ikunu jaddebitawlha obbligazzjoni li kienet mitluba tissodisfa dan inkwantu il-premessi ghaliha, jekk provati, setghu iwasslu ghall-kundanna mitluba f'kaz li jinstab li l-istess konvenut ma jkollux eccezzjonijiet validi fil-ligi x'jopponi ghaliha. Dan naturalment ma jfissirx li jekk il-Qorti tiddeciedi – kif iddecidiet korrettement f'dan il-kaz - illi l-konvenut kien gie sewwa citat inkwantu jkun stabbilit li l-interess guridiku tieghu fil-mertu kif propost mill-attur illi hu kellu necessarjament ikun finalment tenut bhala l-persuna responsabbli biex tirrispondi ghat-talbiet attrici kif proposti. Kif lanqas ifisser li l-istess konvenut ma jkollux eccezzjonijiet*

> *validi fil-mertu, fosthom dik li t-talbiet attrici kellhom fil-fatt ikunu diretti lejn haddiehor jew lejn haddiehor ukoll inkwantu dan ikun involut fl-istess negozju u li allura seta' jigi wkoll citat bhala legittimu kontradittur fil-kawza."*

Thus, from the acts of the proceedings it must be shown that the defendant Perrone was personally involved in all this issue with regards the agreements and operation with the plaintiff in the running and sale of the business. The Court notes that from the documents exhibited in this case by the plaintiff clearly shows the involvement of the plaintiff Perrone. Dok G a fol 35 clearly shows that the defendant Perrone signed as the person representing the company Office Solutions and Supplies. Even at fol 38, Antonio Perrone signed as follows '*For and on behalf of Office Solutions and Supplies Ltd*'. Even at fol 39 again the defendant Perrone signed '*for and on behalf of*' of the company which is the other defendant for a company resolution signed on the 25th September 2017. Even the contract of employment was signed by the same Perrone (fol 40 Dok H) as well as in dok K a fol 65, who signed as the Managing Director of the company. On the other hand, it is also to be noted that the defendant Perrone did not exhibit any evidence to sustain his claim that he is not the legitimate defendant in this case. On the contrary the evidence submitted by the plaintiff project a different picture. Consequently, this plea is being rejected.

**Facts of the Case**

The plaintiff Zina Bader was the owner of a company Office Solutions and wanted to sell the goodwill. He was contacted by PH Consulting as they had a client who was interested in buying his business. After the preliminary agreements on the sale a contract was signed for the transfer of the business to the defendant Antonio Perrone in September 2017 (see dok G at fol 35) and in section 3 of the contract stipulated the Payment of Terms. In this section, a number of payments had to be paid and the modalities agreed upon by the parties. In this agreement it was Antonio Perrone who signed the agreement with the plaintiff. From what the plaintiff said in his affidavit, the defendant Perrone had made a number of payments but not all that was due was paid. In fact only twelve thousand Euro (Euro 12,000) were paid from the sum agreed upon. In fact throughout the operation there were a number of issues as the new company formed by Antonio Perrone had problems in opening a bank account. Thus, it was the plaintiff who had issued the cheques to pay for the stock. Other issues arose as the defendant Perrone was not injecting money into the Company and consequently the Bank did not honour the payments made by the plaintiff.

In this case, the plaintiff is requesting the defendants pay him the sum of eight thousand Euro (8,000 Euro) which consist of the a lump sum of two thousand and five hundred Euro in accordance to the agreement signed on the 25th September 2017 as well as the sum of five thousand Euro (Eur 5000) for the price of the van. In addition there is an additional five hundred Euro (Eur 500) in connection with expenses borne by the plaintiff with the Bank on behalf of the defendant.

Having considered:

The plaintiff is requesting that the defendant pay the sum of eight thousand Euro which are owed to him after the agreement signed between the parties for the sale and transfer of the goodwill of the plaintiff's business. It is a fact that in all civil procedures that the parties in a case have to bring forward all evidence. In fact in article 559 of Chapter 12 states:

*'In all cases the court shall require the best evidence that the party may be able to produce'.*

What this article refers to is that the party in a case has to bring forward such evidence as he may be able to produce. In cases where it is impossible to bring forward such evidence the Court might take into account such secondary evidence which the party was able to bring forward if other evidence was in the impossibility to obtain. Our Courts in its jurisprudence the Court did not shy away to enforce the rule of the best evidence but with time there are instances that the strict rule was relaxed especially when the other party did not contest the evidence.

In the case of **Martina Farrugia et. v. Carmel Farrugia** (Rik. 27/14/1, 26/05/2017), the case concerned on the payment of maintenance from their father as they were studying full-time and had attained the age of eighteen years. They had testified through an affidavit and presented several documents. The first Court acceded to the request and maintenance had to be paid. In this case the defendant did not testify but appealed the decision and the grievances were the following:

> "*illi l-Ewwel Qorti injorat kompletament in-norma legali li ghandha tingieb l-ahjar prova, in kwantu kellu jirrizultalha li l-atturi naqsu milli jressqu l-ahjar prova illi huma kienu verament qeghdin jattendu kors universitarju full time."* Skond l-intimat, *"l-atturi setghu ressqu rapprezentant tal-Università ta' Malta sabiex jikkonferma li l-ahwa Farrugia kienu ghadhom isegwu kors universitarju qabel ma ghalqu t-tlieta u ghoxrin sena... Kienu l-atturi li kellhom l-oneru tal-prova tal-fatt sostnut minnhom, u huma ma tellghu ebda prova ohra sabiex jikkoroboraw id-dokumenti prezentati minnhom."* Il-Qorti tal-Appell (Superjuri) cahdet dan l-aggravju u qalet hekk:
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> *"Il-Qorti tirrileva illi ghalkemm ebda wiehed mid-dokumenti ma huwa guramentat, jibqa' l-fatt li hemm ix-xhieda mhux kontradetta tal-atturi ahwa Farrugia illi fiha bil-gurament taghhom jikkonfermaw illi huma baqghu studenti full time wara li ghalqu t-18-il sena u indikaw adirittura l-ammont li jippercepixxu fi stipendju ta' kull xahar. Id-dokumenti minnhom ipprezentati jikkonfortaw din ix-xhieda, u ghalhekk fil-fehma ta' din il-Qorti l-ewwel Qorti kellha provi sufficjenti sabiex fuq bazi ta' probabbilita` u verosimiljanza tasal ghal konkluzjoni li waslet ghaliha u din il-Qorti ma tikkonsidrax li jezistu c-cirkostanzi stabbiliti fil-gurisprudenza sabiex tiddisturba l-apprezzament tal-provi maghmul mill- ewwel Qorti fir-rigward...Il-konkluzjoni premessa ssib ukoll konfort fil-fatt li mill-atti jirrizulta li, minkejja diversi differimenti moghtija lill-konvenut mill-ewwel Qorti sabiex dan iressaq il-provi tieghu jew jikkontroezamina x-xhieda tal-atturi dan baqa' passiv u ma ressaq ebda prova diretta biex tikkontrasta l-provi tal-atturi, u dan minkejja li fl-udjenza tas-16 ta' April 2015 l-kawza kienet giet differita 'ghall-ahhar darba ghall-provi tal-konvenut u jekk jibqa' ma isir xejn il-Qorti ser tghaddi ghas-sentenza fuq il-provi li ghandha.' Ghaldaqstant dan l-aggravju mhuwiex gustifikat u qed jigi michud"*

The same court in the case of **Simone Eve Collette Sammut et. v. Adam Sammut et.** (Rik. 1047/2014/1, 17/03/2021) the appellants contested the fact that a number of documents that were exhibited in front of the first Court were not sworn upon by the plaintiff. Thus they had to be considered as not being the best evidence. The Court of Appeal stated the following:

> *"l-principju ewlieni li jirregola l-piz probatorju jibqa' dejjem li min jallega jrid jipprova, jigifieri onus probandi incumbit ei qui dicit non ei qui negat. Huwa obbligu ta' min iressaq kawza quddiem il-Qorti sabiex jesebixxi d-dokumenti kollha relevanti ghall-kaz tieghu. Inoltre l-Artikolu 559 tal-Kap. 12 tal-Ligijiet ta' Malta, jipprovdi li ghandha tingieb quddiem il-Qorti l-ahjar prova, obbligu tal-partijiet fil-kawza. Huwa minnu, li fl-istess dispozizzjoni jinghad li, il-Qorti ghandha dritt tesigi li titressaq l-ahjar prova, izda l-fatt li l-ewwel Qorti accettat il-*

*produzzjoni ta' numru ta' dokumenti li m'humiex guramentati, ma jfissirx li l-ewwel Qorti kellha xi obbligu li tikkonduci l-provi tal-partijiet hija stess (ara sentenza ta' din il-Qorti tat-30 ta' April, 2009, fil-kawza fl-ismijiet Nicola Ciantar & Sons Limited v. General Provisions Company Limited.) Madankollu jigi osservat ukoll li l-konvenut appellant qatt ma kkontesta l-validita` tad-dokumenti jew l-awtenticita` tal-istess dokumenti mressqa mill-atturi appellati, hlief fl-istadju tal-appell.... Kwindi ghalkemm din il-Qorti tqis li huwa minnu li kien ikun ahjar li l-atturi appellati jikkonfermaw bil-gurament id-dokumenti kollha esebiti minnhom, u li jressqu ricerki testamentarji li jixhdu li t-testment in atti kien l-ahhar wiehed ta' ommhom, din il-Qorti ma tistax twarrab l-istess dokumenti mressqa minnhom, minkejja n-nuqqas li dawn jigu debitament guramentati, u li jitressqu r-ricerki testamentarji, daqs li kieku ma tressqu provi ta' xejn."*

In this case the plaintiff had exhibited several documents showing the agreement signed between the parties, payments and other transactions especially cheques issued by third parties. In his affidavit the plaintiff had mentioned the fact that he was not paid in full and still he was owed money. From such documentary evidence they show that in fact there was an agreement and the defendant had failed to pay the whole sum agreed upon. Thus on a balance of probabilities the Court is certain that the sum paid to the plaintiff was part of total amount agreed upon and which was still due.

**The Van**

According to the contract of the sale and transfer of the business, it included also the sale of the van which belonged to the plaintiff. The price agreed upon was for the sum of five thousand Euro. In fact in section 3 of the contract (a fol 38), shows clearly that a one-time payment had to be paid on signing of the contract with regards the Toyota van. According to what the plaintiff said in his affidavit, the van in question was not transferred to the company as he was not paid. In fact, he added that until the 25th January 2018, the said vehicle was still in his possession. When he was cross-examined, he confirmed once again that the van was still in his possession. According to the contract, the defendant had to transfer the sum of five thousand Euro for the purchase of the said van. This was signed and agreed upon by the parties involved. There were no other agreements which signed after this date whereby the defendant had agreed not to purchase the said van. It was true that the van was not transferred to the defendant because no payments were effected as agreed as per contract. It is also a fact that the van is still in the possession of the plaintiff. Although, the defendants in their reply stated that the van was sold to third parties. No evidence was brought forward by the defendant to substantiate their claim. No other evidence was brought forward to show that the agreement signed between the parties with regards the van was illicit. No evidence in this regard was brought forward to show that the plaintiff was asking for the transfer of the van to the company when in fact this vehicle was sold to third parties. In this regard reference is being made by a decision by the Court of Appeal in its judgement dated 6th October 1999 in the names of Julia Borg et v. Carmel Brignone where it was stated that:

*"**Gie anzi kostantament ritenut illi f'dawn ic-cirkostanzi n-nullita' ta' l-obbligazzioni setghet tigi sollevata mill-istess Qorti ex officio. "Hija bla effett kwalunkwe obbligazzjoni maghmula fuq kawza illecita' u l-kawza hija llecita meta hija projbita mil-ligi jew kuntrarju ghall-ghemil xieraq jew ghall-ordni pubbliku. U konvenzjoni hija kontra l-ordni pubbliku' meta hija kontra l-interess generali. Il-kwistjoni tal-legalita' jew le tal-konvinzjoni minhabba kawza llecita tista' tigi sollevata ex officcio**." (Vol XLID.p.684 deciza minn din il-Qorti fl-ismijiet Charles Pace et -vs- Philip Agius et).*

*'Illi 'rebus sic stantibus', kif logikament jikkonkludi Pacifici Mazzoni:- "Il giudice non puo' accogliere la domanda diretta ad ottonere l'adempimento di una convenzione fondata sopra causa illecita, o che abbia un oggetto turpe o contrario alla legge, benche' il debitore*

> *non apponga eccezione di sorta" (Istituzioni, Vol. II. para 167) u ghalhekk il-Qorti thoss li ghandha tissolleva 'ex officio' n-nullita' tal-kondizzjoni fuq migjuba u maghha n-nullita' tal-konvenzjoni relattiva." (Vol. XLIIIC.ii.646)".*

As stated, the defendant had agreed to purchase the van and signed a contract to this effect, and the Court accedes to the request of the plaintiff that the price of the van is owed to him by the defendant.

**Bank Expenses**
The plaintiff further argues in his application that he had incurred expenses amounting to five hundred Euro which he had to pay to the Bank in the name of defendants. In his affidavit he stated that because of insufficient funds in his account, the cheques could not be cashed in by the suppliers. In the document which he had exhibited as dok M, it shows that in several transactions he was being charged by the Bank for insufficient funds. In fact, according to dok L (a fol 66) he was advised by the Bank not to issue further cheques as they were not covered by any funds. He had had mentioned in his affidavit that the defendant Perrone had informed that he was going to transfer funds which in effect was never done. The Plaintiff knew that his account had no money but still insisted of issuing cheques even though there were insufficient funds. On another note, he claims that such expenses were made on behalf of the defendants, but no evidence was shown that such cheques were issued in the name of the company. The Court finds it strange that plaintiff was still issuing cheques after he had received a letter from the Bank informing him not to issue anymore cheques up until April 2018. To this effect reference is being made to Dok N, whereby plaintiff in his email sent to several people including the defendant Perrone, claimed that no funds were being sent and this was in January 2018. Thus, again the Court finds no reason to believe that the plaintiff had incurred penalties because of the defendant when he was advised by the Bank, and he knew that no funds were available in his account. The Court cannot uphold this claim by the plaintiff.

**Claim made by Defendants on arrears**.
Defendants claim that plaintiff owes the Company the amount of 498 Euros representing the balance paid to Melita plc for services rendered. The defendants did not bring forth any evidence showing that plaintiff had made use of any service and was paid by the defendants. No documents were exhibited, or witnesses summoned in Court to testify on the plea made by the defendants. In view of this fact the Court cannot uphold this plea by the defendants.

**Decide**

**For the above reasons** and considerations, the Court hereby:

**Acceeds to the first demand of the Plaintiff** and condemns the Respondents to pay to the Plaintiffs the sum of €2,500 along with interest according to law from today until effective payment is made.

**Acceeds to the second demand of the Plaintiff** and condemns the Respondent to pay the sum of €5,000 representing the price agreed upon in the contract of the vehicle Toyota Town Ace. In addition, orders the respondents within thirty (30) days from the payment of such amount to repossess the vehicle from the plaintiff and failure to do so, the Court gives the faculty to the plaintiff to deposit such vehicle with a consignee appointed by the Court and all expenses borne by the respondent.

**Denies the third demand of the Plaintiff.**

**Denies all the pleas of the Respondent**.

All expenses of these procedures, including those of the garnishee order 436/18 and Judicial Letter 462/18 to be borne by the Respondent along with interest according to law from today until effective payment is made.

**Dr. Caroline Farrugia Frendo**
**Magistrate**

**Nadia Ciappara**
**Deputy Registrar**