



Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR. JUSTICE JOSEPH R MICALLEF
THE HON. MR JUSTICE ANNA FELICE**

Sitting of Wednesday, 29th March, 2023.

Number: 2

Application Number: 200/19/3 AGV

Cosimo Marziano and Rosanna Bruzzese

v.

Silvia Marziano and Michael Magri

The Court:

1. This decision concerns an application for a retrial which has been filed by the defendants from a judgement of this Court which was delivered on the 28th of January, 2021;

2. By means of said judgement this Court had, for the reasons set forth therein, rejected an appeal filed by the defendants from a preliminary judgement of the Civil Court (Family Section) whereby all of their first four preliminary pleas were dismissed. By means of that judgement this Court had also ordered the Registrar *“to ensure that the records of the proceedings are sent back to the Civil Court, Family Section”*, and this so as the case would continue to be heard on its merits;

3. By means of an application filed on the 23rd of April, 2021, the defendants submitted that there are enough grounds at law for a retrial ‘of the case’, and for the reasons put forward therein, this Court has been requested to:

“i. Annul and Revoke the judgement given by this Honourable Court of Appeal in the names of Cosimo Marziano v. Silvia Marziano et, Application Number 200/2019/2AGV decided partially on the 28th of January 2021.

ii. Orders the retrial of the case in the names of Cosimo Marziano v. Silvia Marziano et. Application Number 200/2019/2 AGV decided partially on the 28th of January 2021, on the basis of Article 811(e) & Article 811(k) of Chapter 12 of the Laws of Malta.

With costs against the plaintiffs defendants of this application, who are being called upon from now with reference to their oath.”

4. By means of a reply filed on the 11th May 2021, the plaintiffs Cosimo Marziano and Rosanna Bruzzese provided various reasons as to

why the defendants' demands for a retrial ought to be dismissed. The plaintiffs then concluded by requesting this Court to:

“dismiss the retrial application in its entirety, and to confirm and uphold the partial judgement delivered by this Honourable Court of Appeal on the 28th January 2021, and consequently to confirm that the case may proceed with the determination on the merits before the Honourable Civil Court (Family Section).

With costs against the appellants, who are being called upon with reference to their oath.”

5. During a sitting held on the 15th of February 2022, this Court as currently composed addressed counsel for the parties and invited them to make oral submissions regarding a procedural issue which has been brought forward by the Court ‘*ex officio*’ and this **“*as to weather (recte: whether) a retrial could be filed in the case of a partial judgement albeit delivered by the Court of Appeal*”**;

6. After hearing oral submissions on the procedural issue in question, these proceedings were put off for a judgement on the same procedural issue which has been raised by the Court ‘*ex officio*’;

7. Having seen all the acts of the case and after taking into consideration the submissions of the parties on the procedural matter in issue, this Court is now in a position to deliver its decision;

Considerations

8. This decision is limited to a procedural technicality, namely as to whether the defendants could file a retrial from a partial judgement which has been delivered by this appellate Court serving as the court of last instance in Malta;

9. As an introductory note, the institute of retrial has always been considered as ‘an exceptional remedy’ which ought to be allowed only in those limited situations as contemplated by law.¹ It is also an established principle that the legal provisions which admit the possibility of a retrial are to be interpreted in a strict and narrow manner.² Indeed, our Courts have made it clear on numerous occasions that the interpretation of the legal provisions governing the institute of retrial cannot be interpreted by way of analogy;³

10. Under our law, the instances wherein a retrial can be requested from a decision given by a court of second instance such as this Court

¹ See the judgment in the case of: **Josette Camilleri v. The Malta Union Club**, decided by this Court on the 2nd of February, 2022 (Appl. No. 1164/2009);

² See the judgment in the case of: **Daniel Farrugia noe. V. BNF Bank plc.**, decided by this Court on the 4th of May, 2022 (Appl. No. 410/2019/1);

³ See the judgement in the case of: **H.S.B.C. Bank Malta p.l.c. v. Tal Barrani Company Limited et.**, decided by this Court on the 14th of December, 2022. (Appl. No. 530/2002/3)

are listed under Article 811 of Chapter 12 of the Laws of Malta. The introductory part of this article goes on to read as follows: “A new trial of a cause decided by a judgement given in second instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgement being first set aside, in any of the following cases: ...”.⁴

11. In this context, this Court has already had the opportunity to make it clear on multiple occasions that the latter article cannot be interpreted in a wide sense so as to imply the possibility of a retrial from any ‘final judgement’ be it partial or otherwise, but rather is to be strictly interpreted to admit only the possibility of a retrial in those instances whereby “a cause has been decided by a judgement given in second instance”.⁵ The rationale behind this reasoning was clearly explained by this Court in the case of **James Buttigieg et. noe. v. Dr. Michael Caruana et.**, which has been decided on the 8th of March, 2016, and wherein it was held that: “L-argument li l-ispirtu tal-liġi hu li kull sentenza li hi ta’ natura finali hija ritrattabbli ma jreġix, peress li din ma hijjex diċitura li użat il-liġi. Meta dañal fil-liġi l-istitut ta’ ritrattazzjoni, kien ġià possibbli għall-qrati li jagħtu sentenzi in parte, ċiononostante il-Legislatur ried u hekk illegiżla li r-

⁴ Emphasis added by this Court.

⁵ See the judgment in the names of **Dr. Patrick Spiteri v. Sylvana Spiteri**, decided by this Court on the 31st of May, 2013. (Appl. No. 55/2009/2).

*rimedju jkun disponibbli biss meta l-kawża tiġi deċiża u mhux meta tingħata sentenza parzjali, anke jekk finali”;*⁶

12. In this respect, it is also an established principle that for “a cause” to be considered to be “*decided by a judgement*” within the meaning of Article 811 of Chapter 12 of the Laws of Malta, the judgement of the court of second instance must necessarily lead to the termination of “*the whole suit between the parties*”;⁷

13. Putting all of the above into context, it is therefore sufficiently clear that a retrial from a partial judgement of the Court of Appeal is only admissible ‘*quando terminat negotium de quo agitur*’, that is, when such a judgement has led to the termination of the whole suit between the parties;

14. In this context, in order to determine whether the demand of the defendants for a retrial of the decision of this Court of the 28th January 2021, is admissible or otherwise, this Court must therefore necessarily

⁶ Appl. No. 77/2010, decided on the 8th of March, 2016.

⁷ See the judgement in the names **Isabella Zananian Desira v. Kunsill Mediku**, decided by this Court on the 31st of May, 2019. (Appl. No. 740/2011).

examine whether the judgement in question has led to the termination of the whole suit between the parties;

15. Following an analysis of the judgement of the 28th January 2021, this Court notes that that judgement was solely limited as to determine whether the Civil Court (Family Section) was legally correct in rejecting the first four preliminary pleas raised by the defendants, in which it was being claimed that the plaintiffs' action is legally inadmissible. By rejecting the appeal of the defendants, this Court was therefore only confirming the first Court's decision as regards the dismissal of the first four preliminary pleas and, consequently, by no stretch of imagination can it be argued that the impugned judgement of the 28th January 2021 has led to the 'decision of the cause' and the termination of the whole suit between the parties. Indeed, in a corresponding scenario to this case, this Court had observed that: *"Dak li ġie deċiż hija eċċezzjoni fil-kawża u mhux il-kawża. Kien, naturalment, ikun mod ieħor kieku ġiet deċiża eċċezzjoni u anke il-kawża. Hemm distinzjoni proċedurali fundamentali bejn deċiżjoni ta' eċċezzjoni imma mhux tal-kawża u decizjoni ta' eċċezzjoni u anki tal-kawża. Ir-ritrattazzjoni hija tal-kawża u meta l-kawża għadha qed tiġi trattata ma tistax tiġi ritrattata"*;⁸

⁸ Extract taken from the judgement in the case in the names of: **Karmenu Mifsud Bonnici noe et. v. John Scicluna noe et.**, decided by this Court on the 26th of April 1993. (Kollez Vol. LXXVII. II. i. p.276.)

16. Similarly, in the case in the names of **Avukat Dottor Henry sive Eric Mamo noe. et. v. Michael Axisa et.**, this Court, also held that: “*Hu evidenti li fil-każ de quo ma ġiet deċiża ebda kawża; dak li ġie deċiż kienet biss eċċezzjoni preliminari, tant li din il-Qorti, fis-sentenza tagħha tal-5 ta’ Ottubru, 1994 ordnat li l-atti jiġu rinvjati quddiem l-ewwel Qorti “għall-kontinwazzjoni tal-kawża skond il-liġi”*”. On this basis this Court had considered that demand for a retrial as null and void;

17. This Court sees no distinction from the circumstances of the latter two cited cases, and since from the judgement of the 28th January 2021 it is amply clear that the Civil Court Family Section has yet to decide on the merits of the case (so much so it ordered the Registrar “*to ensure that the records of the proceedings are sent back to the Civil Court, Family Section*”) this Court has no other alternative than to conclude that a retrial at this stage is clearly inadmissible;

Decide

In view of these considerations, this Court decides that the request for a retrial of the judgement of this Court of the 28th January 2021 is at this stage inadmissible at law and is therefore being dismissed with costs against the defendants.

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In this respect, the Court orders the Registrar to send back the records of the proceedings to the Civil Court, Family Section, for the continuation of the cause.

Mark Chetcuti
Chief Justice

Joseph R Micallef
Judge

Anna Felice
Judge

Deputy Registrar
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