COURT OF MAGISTRATES (MALTA)

MAGISTRATE DR MARSE-ANN FARRUGIA LL.D.

Sitting held to-day Wednesday, 8th May 2024

Application Number: 55/2023 MLF

In the records of judicial letter number 2632/2022, in the names:

Simon Balzan

vs

Rahman Mostafijur

The Court

1. Having seen the application of Rahman Mostafijur in terms of Article 166A(5) of Cap. 12 of the Laws of Malta, wherein he submitted as follows:

    1. that the applicant was notified of the judicial letter in terms of Article 166A of Cap.12 of the Laws of Malta in the aforementioned names on 8 November 2022, which letter was notified to the applicant on 9 December 2022

    2. that this judicial letter was rendered executive because the applicant did not present the note of opposition within thirty (30) days from notice and this because on the day following the notice, the applicant travelled to America and had no time to reply

3. that subsequently, the respondent Simon Balzan proceeded with an executive garnishee order numbered 252/2023 in the aforementioned names, that is Simon Balzan vs Rahman Mostafijur based on the same judicial letter.

4. that the applicant has not yet been officially notified of the garnishee order abovementioned but was made aware of it by his employer and bank as they were notified of such as garnishees.

5. that although sub-article (5) of Article 166A requires these proceedings to be filed within twenty (20) days from the first notice of any executive warrant or any executive act attached to that executive title, our Courts have, on several occasions, held that where such notice has not yet been effected, this delay should not limit the action of the applicant.

6. that however, the applicant is prevailing of the faculty given to him in terms of Article 166A(5) of Cap. 12 of the Laws of Malta where the law provides him with the possibility of requesting that the title is rescinded and declared null if the judicial letter does not contain the requisites contemplated by sub-articles (1),(2) and (3) of Article 166A of Cap. 12

7. that the applicant is presenting this application for the following reasons:

1. Lack of a declaration that the debt is certain, liquid and due

That the judicial letter abovementioned does not contain any declaration from the respondent that the amount therein stipulated is a debt which is certain, liquid and due and thus, it is not complaint with the requisites of sub-article (1) of Article 166A, that is that the debt has to be certain, liquid and due.

That there exists no "concession agreement" between the parties to which a reference is made in the letter in question and therefore, the amount that is being claimed is not reflected in any agreement; so much so, that the applicant was not informed of any agreement between the parties that required payments allegedly due and was not

presented with a copy of the Agreement, with that, the amount claimed in the judicial letter is nothing but an amount invented by the respondent unilaterally.

2. Lack of cause of the claim, including a statement of facts

That the judicial letter abovementioned is null and void since it does not contain the requisites stipulated in sub-article (2) of Article 166A of Cap.12 of the Laws of Malta, which sub-article states:

"The creditor shall proceed by filling a judicial letter which shall be drawn up in the form established by legal notice by the Minister responsible for Justice and the content of which shall be confirmed on oath by the creditor, either before the registrar of legal procurator appointed as Commissioner for Oaths under the Commissioners for Oaths Ordinance, to be served upon the debtor ***wherein shall be stated clearly, under pain of nullity, the cause of the claim, the reasons why the claim should be upheld and a statement of facts in support of the claim****"*

That the judicial letter is missing a clear statement of the cause on which the respondent's claim is based, reasons as to why the claim should be accepted, and a statement of facts in support of the claim is required, under pain of nullity, in sub-article (2) just quoted.

That due to the nature of these proceedings, our Court's jurisprudence has stated on several occasions that the letter must be detailed and must provide as much information as possible on the debt and therefore these requirements are categorised as *ad validatem*, imposed in order to provide sufficient information to the receiver of the letter, with which information, the receiver would be made aware in a very clear manner of what the debt consists of, and consequently, he will be in a position to decide if he should accept the claim or oppose it, even if in part.

That although the judicial letter in question makes reference to a concession agreement, the respondent does not provide any addition detail on the agreement, including not making reference to the date of the agreement and not even presenting a copy of the same agreement from where it is alleged that his right to receive

payments from the applicant in terms of the letter arises and therefore, clearly, form such a short sentence in the judicial letter, the applicant did not have sufficient information to be in a position to defend himself for the request made.

That even if the Court is of the opinion that the judicial letter contained sufficient reasons sustaining the claim, the letter is missing completely a statement of facts in support of the claim, which statement of facts is necessary in terms of sub-article (2) of Article 166A, above quoted.

3. Lack of intimation in terms of sub-article (3) of Article 166A

That sub-article (3) of Article 166A of Cap.12 of the Laws of Malta states that:

"the judicial letter shall also on pain of nullity contain ***an intimation of the debtor that if he does not reply within thirty days form service upon him of the said judicial letter by presenting a*** note ***in the record of the said judicial letter rebutting the claim and which note may be signed and presented in court by the debtor himself without the signature of an Advocate or of a Legal Procurator being required, such official letter shall, constitute an executive title****"*

That it is quite clear that the judicial letter merit of this application does not contain this important intimation that provides a clear indication to the receiver that in default of opposition, it will be rendered executive.

That this requirement is and ad validatem requirement and the absence of the requirement leads to the nullity of the judicial letter in terms of sub-article (5) of Article 166A.

That additionally, the respondent requested the issue of an executive garnishee order numbered 252/2023 in the above-mentioned names, based on the executive title obtained from the judicial letter, which executive title is being opposed by this application. If the Court declares the executive title to be null and void in terms of Article 166A(5) of Cap.12 of the Laws of Malta, then the executive garnishee order

above mentioned should also be revoked because there cannot be an executive warrant if there is not executive title to be executed.

That although the law provides a remedy in terms of Article 281 of Cap.12 of the Laws of Malta for the revocation of an executive acts by an application, the Courts have always retained that it is not in the interest of judicial economy to require that the proceedings to revoke an executive title obtained in terms of Article 166A is instituted separately from the proceedings to revoke an executive warrant in terms of Article 281 (see judgement of Court of Magistrates (Malta) preside over differently, dated 24 October 2022 in the names Joseph Lautier vs Maria Fenech Attard numbered 275/2019).

Therefore, the applicant requested this Court to:

1. Appoint this application for hearing in terms of sub-article (5) of Article 166A of Chapter 12 of the Laws of Malta;

2. Declare and decide that the judicial letter number 2632/22 in the names Simon Balzan vs Rahman Mostafijur presented in terms of Article 166A of Cap.12 of the Laws of Malta is null and consequently declare that the executive title obtained in terms of the same judicial letter is null and void at Law since the judicial letter did not contain the requisites required by Law in Article 166A (1), (2) and (3) of the Laws of Malta, and this under those dispositions that this Court deems appropriated to order, and

3. Revoke the executive garnishee order number 252/2023 in the names Simon Balzan vs Rahman Mostafijur in terms of Article 218 [sic] of Cap.12 of the Laws of Malta since the executive title upon which the executive act is based is null and void.

With costs against the respondent Simon Balzan.

2. Having seen that the respondent Simon Balzan presented a reply drafted in the Maltese language, but failed to present a translation of his reply in the English language as ordered in the sitting of the 23rd. March 2023.

3. Having seen all the documents exhibited and all the records of the case.

Considerations of the Court

4. The facts which gave rise to these proceedings have been stated in the application cited above, and hence the Court is making reference thereto. The applicant is challenging the executive title obtained in terms of Article 166A of the Code of Civil Procedure on the basis that the judicial letter did not satisfy the requirements of subarticles (1), (2) and (3) of Article 166A of the said Code.

5. The judicial letter in question was confirmed on oath by Simon Balzan, and stated as follows:

"Simon Balzan … … whilst referring to the concession agreement entered into between you concerning the canteen of the American Ambassy, hereby calls upon you to pay within two days, the global sum of four thousand two hundred sixty nine euro and ten cents (€4,269.10) representing the amount owned for the months of May to October and part of the month of April of the current year."

6. In the first place, the applicant submits that this judicial letter did not satisfy the requirements of Article 166A(1) since the letter did not state that the debt was certain liquid and due. The relevant part of Article 166A(1) provides that:

" In actions for the recovery of a debt certain, liquidated and due not consisting in the performance of an act, and where the amount of the debt does not exceed twenty-five thousandeuro (€25,000), … … it shall be lawful for the creditor to proceed in accordance with the following sub-articles of this article: … …"

7. Article 166A(1) does not state that in the letter there has to be an express declaration that the debt is certain, liquid and due. If the creditor is claiming the payment of a specified amount of money, it is obvious that at least in his opinion, the debt which he is claiming is certain liquid and due. Consequently, this submission of the applicant is legally unfounded.

8. The applicant also submits that the letter does not satisfy the requirements imposed in Article 166A(2), which states as follows:

"The creditor shall proceed by filing a judicial letter which shall be drawn up in the form established by legal notice by the Minister responsible for Justice and the content of which shall be confirmed on oath by the creditor, ... to be served upon the debtor wherein shall be stated clearly, under pain of nullity, the cause of the claim, the reasons why the claim should be upheld, and a statement of facts in support of the claim: ... ..."

9. The judgement **Noel Sultana vs Andrew Mercieca** decided on the 15th February 2010 by the Court of Magistrates (Gozo) in its inferior jurisdiction delved into the procedure envisaged in Article 166A and requistes prescribed in Article 166A (2). In this judgement it was stated as follows:

"Permezz tal-procedura kontemplata fl-Artikolu 166A tal-Kap.12 il-legislatur kellu l-hsieb li jnaqqas l-ammont ta' kawzi li jsiru billi introduca din il-procedura specjali. Bl-Att VII tal-2007 zied ghas-somma ta' €23,293.73 l-ammont li ghalih tista' tintuza din il-procedura. Il-qorti hi tal-fehma li l-ittra ufficjali hi xotta hafna u ma jistax jinghad li fiha ***"dikjarazzjoni tal-fatt b'sostenn tat-talba"****. Il-kliem* ***"ghal xoghol u parts"*** *m'humiex bizzejjed sabiex jissodisfa l-htiega li l-ittra ufficjali jkun fiha "dikjarazzjoni tal-fatti". Wiehed ghandu jiftakar li fejn qabel persuna kellha taghmel kawza ghaliex ma jkollhiex titolu ezekuttiv, wara l-introduzzjoni tal-Artikolu 166A kreditur jista' jottjeni titolu ezekuttiv b'semplici ittra ufficjali. Hu minnu li d-debitur ghandu l-opportunità kollha li f'kaz ta' dubju jipprezenta nota fit-terminu ta' 30 gurnata min-notifika u jopponi t-talba u b'hekk igieghel lill-kreditur jkun kostrett jaghmel kawza, madanakollu l-htiega li l-ittra ufficjali jkollha* ***"dikjarazzjoni tal-fatti b'sostenn tat-talba"****. Mandanakollu dan ir-rekwizit hu ad validitatem u s-sanzjoni hi n-nullità tal-ittra ufficjali ghal finijiet tal-Artikolu 166A. Il-kreditur ghandu l-obbligu li fl-ittra ufficjali jaghti bizzejjed taghrif*

sabiex id-debitur ikun jaf dwar x'hiex jittratta d-dejn u fl-istess hin ipoggih f'posizzjoni li jista' jiddeciedi jekk ghandux jammetti t-talba jew jopponiha f'parti minnha biss. Bla dubju f'dan il-kaz Sultana kellu jsemmi fl-ittra ufficjali n-natura tax-xoghol li qieghed jintalab il-hlas tieghu, il-vettura li fuqha sar ix-xoghol, meta sar ix-xoghol, u spiega tal-ammont li qieghed jitlob fis-sens li jaghti taghrif dwar spejjez ta' parts u x-xoghol li sar u li tieghu qieghed jippretendi l-hlas. Informazzjoni li suppost kienet tirrizulta wkoll mill-kont li normalment johrog il-kreditur, u li f'dan il-kaz ma gietx annessa kopja tieghu mal-ittra ufficjali. Taghrif li m'hemm l-ebda accenn ghalih fl-ittra ufficjali in kwistjoni. Setgha kien hemm fatti ohra rilevanti, ezempju li d-debitur jiffirma l-kont. Ovvjament dawn ikunu jvarjaw minn kaz ghall-iehor. Fic-cirkostanzi partikolari ta' dan il-kaz l-ilment ta' Mercieca hu gustifikat." (enfasi ta' dik il-Qorti).

10. This legal reasoning was confirmed by the Court of Appeal (in its inferior jurisdiction) in the judgement **Gouder et vs Zammit** delivered on the 6th October 2010. After referring to the judgment **Sultana vs Mercieca** and the principles established in it, the Court of Appeal went on to add that from this judgement:

"Wiehed jifhem ahjar x'ghandu jkun l-element kostituttiv tal-ittra ufficjali ghall-espressjoni legislattiva tad-dikjarazzjoni tal-fatti b'sostenn tat-talba. Dan mhux minghajr raguni gjaladarba l-uzu tal-att gudizzjarji innovattiv introdott fil-ligi procedurali, ex-Artikolu 166A, hu intiz bl-iskop li jevita l-procediment gudizzjarju tal-kawza (Artikolu 154 et sequitur) u l-hela ta' energija u spejjez zejda, fl-istess waqt li johloq t-titolu ezekuttiv. Mhux allura bizzejjed li fl-ittra ufficjali wiehed jillimita ruhu ghar-raguni li fuqha tkun imsejsa t-talba – f'dan il-kaz, 'appalt ta' injam' – imma ghandu wkoll skond ir-regola normattiva u, ghaliex le, il-bon sens, jiccertifika l-elementi kollha fattwali ghax minn dawn tiddependi, ghat-tutela tad-difiza tad-debitur, l-interess legittimu u manifest li hu jkun xjenti tad-dikjarazzjonijiet kollha ta' fatt ghal liema qed jintalab il-hlas u b'hekk ikun fi grad ahjar li jammetti jew jirripella, il-kaz, il-pretiza tal-kreditur reklamanti. Ukoll fil-fehma ta' din il-Qorti l-kliem 'appalt fuq l-injam", ma jikkostitwixxux dikjarazzjoni certa u cara tal-fatti. Inter alia, meta saret il-kontrattazzjoni, il-kontenut tal-appalt u t-termini tieghu, l-ezekuzzjoni tieghu, il-pattijiet dwar il-hlas tieghu etcetera. Wiehed ma jistax ma jfakkarx f'dik il-gurisprudenza li tirritjeni nulla u mhux meritevoli ta' konsiderazzjoni, meta kien ghadu jvigi r-rit tac-citazzjoni, fejn il-kawzali taghha tkun espressa bhala 'ghal ragunijiet ohra validi fil-ligi'

*(**Fortunata Mizzi*** [recte Maggi] ***v. Rosina Coleiro**, Appell Civili, 14 ta' Dicembru 1949), jew 'ghal ragunijiet ohra li jigu esposti tul it-trattazzjoni tal-kawza' (**Carmelo Darmenia*** [recte Darmanin] ***v. Avukat Dottor Charles Moore nomine**, Prim' Awla, Qorti Civili, 14 ta' April, 1964). B'egwal forza magguri dan huwa hekk ukoll il-kaz hawnhekk trattasi li hi l-ittra ufficjali li tikkreja per saltum titolu ezekuttiv. Irid jinghad imbaghad b'rabta ghall-proviso tal-Artikolu 789 fuq riferit illi ghall-ittra ufficjali de quo lanqas ma hi akkonsentita jew permissibbli d-debita korrezzjoni gjaladarba mhux possibbli li jsir dan una volta l-materja ghaddiet fil-fazi ezekuttiva taghha."*

11. In this case, the judicial letter simply refers to an existing concession agreement between the parties in connection with the canteen of the American Embassy and that the amount due is for the months of May to October and part of the month of April in terms of the same agreement. The judicial letter does contain a statement of facts which describe the salient circumstances which gave raise to the claim being made, like the date of the agreement, the nature of the agreement, the obligations of the applicant, the terms of payment, and mode of execution of the agreement. Neither was this agreement attached to the judicial letter, to enable a better understanding of what is being claimed in the judicial letter. The letter in question simply gives the reason why the request of payment is being made, but does not specify the facts on which that reason is based.

12. In view of the case-law cited above, this submission of the applicant is justified, and the judicial letter does not satisfy the requisites imposed in Article 166A(2) of Code of Civil Procedure.

13. In the third place, the applicant submits that the judicial letter did not satisy the requirements of Article 166A(3) since it did not include the intimation to the debtor that should he fail to oppose the claim, the said letter will become an executive title.

14. Article 166A(3) prescribes as follows:

"The judicial letter shall also on pain of nullity contain an intimation to the debtor that if he does not reply within thirty days from service upon him of the said judicial letter by presenting a note in the record of the said judicial letter rebutting the claim and which note may be signed and presented in court by the debtor himself without the signature of

an Advocate or of a Legal Procurator being required, such official letter shall, constitute an executive title ... ..."

15. The judicial letter contained the following intimation: *"This judicial letter is being sent in terms of article 166A of Chapter 12, and should you fail to reply within thirty (30) days, this will be considered as an executive title. Consequently, it is in your interest to contact a lawyer or a legal procurator."*

16. This intimation does not satisfy all the requirements set out in Article 166A(3), because although it warns the recipient that failure to reply within 30 days will render the letter an executive title, it does inform him that this has to be done by a note presented in the records of the judicial letter, and that this note may be signed and presented in court by the debtor himself without the need of an advocate or a legal procurator.

17. The law itself expressly prescribes that failure to abide by the requisites of Article 166A(2) and (3) will render the judicial letter null. Consequently, the executive title obtained in virtue of this letter should be revoked, since this is a natural consequence arising from the nullity of the judicial letter, as stipulated in Article 166A(5) of the Code of Organisation and Civil Procedure.

18. The Court is going to abstain from taking further cognisance of the first request in the application, since this request was acceded to since this application was duly appointed for hearing in terms Article 166A(5) of the Code of Organisation and Civil Procedure

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Conclusion

17. In view of the above considerations, the Court decides as follows:

    1. Abstains from taking further cognisance of the first request of the applicant;

    2. Accepts the first plea of the defendant and consequently rejects that part of the second request of the applicant where he submits that the judicial letter does not

comply with the requirements imposed in Article 166A(1) of the Code of Organisation and Civil Procedure.

3. Rejects all the other pleas of the defendant, and hence accedes to the remaining part of the second request of the applicant and declares that the judicial letter number 2632/2022 in the names above cited issued on the 8th November 2022, is null and void since the requirements imposed in Articles 166A(2) and (3) of the Code of Organisation and Civil Procedure were not duly observed;

4. Acceds to the third request, in the sense that it orders the revocation of the executive garnishee order number 252/2023 in the names *'Simon Balzan vs Rahman Mostafijur'* in terms of Article 166A(5) of the Code of Organisation and Civil Procedure.

19. Taking into account all the circumstances of the case, all expenses in connection with these proceedings are to be borne by the defendant Saviour Balzan.

Magistrate

Doreen Pickard
Deputy Registrar