MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tas-6 ta' Ottubru, 2010

Appell Civili Numru. 505/2009/1

Daniela Zwack-Wandrey

vs

Messrs. In-Sight Ltd

Il-Qorti,

Fl-24 ta' Frar, 2010, il-Qorti Civili tal-Magistrati (Malta) ippronunzjat is-segwenti sentenza fl-ismijiet premessi:-

> **"**The Court,
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> Having seen the application filed, under oath, by Daniela Zwack-Wandrey, wherein she, having promised:-
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> 1. pleaded to the Honourable Court to accept this application in English language;

2. also pleaded to the Honourable Court to already accept this application, although no executive warrant or any other judicial act based on the title in question was served upon her;
3. and pleaded to the Honourable Court to rescind and declare null and void the executive title to the record of the Judicial Letter in terms of Art 2. 166A COCP having file number 2384/09 obtained by the Respondent against the Applicant by end of 8th November 2009 in its original language and its translation into English.

Ad 1.
According to Section 5(1) of Cap. 189 of the Laws of Malta the Applicant is entitled to be notified with any act in the English language, because she is not a Maltese-speaking person.
According to Art. 166A (3) COCP she may file any note of opposition herself.
From afore-mentioned regulations of Law the Respondent therefore by systematic application of that Law is entitled to register any note of opposition in English language.
The debtor in the meaning of Art. 166A COCP may not experience any change in quality, obligation or determination for his appearance in the procedure according to Art. 166A (5) COCP.
Therefore the debtor in the meaning of Art. 166A (5) COCP is identical to the debtor in the meaning of Art. 166A (3) COCP.
This identicality leads to the Applicant’s right to file this application in English.

Ad 2.
The Application has not yet been served with any executive warrant or any other judicial act based on the title in the record of the Judicial Letter in terms of Art2, 166A COCP having file number 2384/09.
But she is aware of such warrant or act issued by the Honourable Court and served on her bank, because the Applicant’s bank has informed her

that she may not dispose of an amount of €3.662,60, representing the amount of the title, interest, expenses and VAT.
A strict verbal interpretation of Art. 166A (5) results in the Applicant's restriction to file this application, before any executive warrant or any other judicial act based on the title was served upon her.
A systematical as well as teleological interpretation of Art. 166A (5) COCP as well as the application of national constitutional and human rights regulations however require to read '… within twenty days …' in Art. 166A (5) COCP as '… not later than twenty days …'
A restriction to file this application only after service of an enforcement act would give the Respondent the opportunity to restrain the Applicant from executing any dispository powers of the amount of €3.622,60 for an indefinite period, if the Respondent would not apply for the transfer of the arrested funds.
Such doing would result in effecting an unjustified loan to the bank, only.
Such result was certainly not intended by the Legislator.
Further, the legal consequence of nullity in Art. 166A (2) COCP takes place '*ex officio*', whenever the Honourable Court detects that the requirements laid down by law have not been met.
Only after the judicial letter is constituting an executive title the Honourable Courts' decision to declare the title null and void is dependent on an application of the debtor. But this does not change the public interest in the declaration of nullity of the judicial letter or rescind it from being an executive title, because the application according to Art. 166A (5) COCP does not have to meet any requirement of reasoning, but the judicial letter in its appearance as an executive title will be examined for the simple reason that the respective application has been filed.

Ad 3.

Due to the absence of any hearing within the procedure acc. to Art. 166A the regulations in Art. 166A (1) and Art. 166A (2) COCP compose a strict requirements for the claim's presentation in the judicial letter according to Art. 166A (2) COCP. In one judicial letter the interpellant must clearly forward to the Honourable Court the cause, the reasons for upholding, and the supporting facts of a claim consisting of a debt certain, liquidated and due.

The claim's presentation must therefore be conclusive and substantial.
In case of a contractual relationship the claim's presentation in the judicial letter must then consequently and at least contain all '*essentialia negotii'*.

The claim's presentation in the judicial letter dated 28.4.2009 having file number 2384/09 neither is conclusive nor is it substantial.

a.
The judicial letter's contents indeed clarifies that the Respondent cannot have any claim as indicated against the Applicant.
The term used by the Respondent '… as operators of …' states the presence of a triangulated relationship. In a triangulated relationship it is essential to clarity, who has effected a claim against whom. Such information is entirely missing within the judicial letter in question. The Respondent is calling for payment. But this call alone does not indicate the existence of any claim. Further, Maltese law does not cater for a corporate body to effect any relationship resulting in any kind of obligations for a natural person through a label – although in the judicial letter in question it has not been stated what or who 'Propertyline' is.

b.

The amount requested shall represent brokerage fees.
Although no statement in the judicial letter can be found that brokers' services might have been rendered, the demand to be paid brokerage fees however indicates the existence of a bilateral relationship. This request therefore stands in contradiction to the existence of a triangulated relationship. Contradiction always abolishes conclusiveness.

c.
Stating the existence of brokerage fees does not implicate any cause of a claim, or gives any reasons for upholding a claim. Stating the existence of brokerage fees is a conclusion. Who reads that brokerage fees are due simply concludes that brokers' services must have been rendered. Such conclusion only implicates that someone rendered services of a certain kind to another. But a corporate body cannot render services. Services can only be rendered by natural persons, who may be acting on behalf of a corporate body. Because no act of a natural person is mentioned in the judicial letter in question no cause of any claim could have been stated.
Further, brokerage fees may become due to an agent by a lessor, a lessee, a purchaser or a vendor of moveable or immoveable property. Neither has been stated, who and what kind of agent shall be subject to the right for receiving any remuneration, nor has been stated, how the Applicant qualifies for any passiv-legitimation. The reason stated for the Applicant's alleged passiv-legitimation is indeed extraordinarily strange: fees shall be due to the Respondent for the actual motion of one person renting premises from another person. Such circumstance – even with investment of the reader's creativity – does not correspond with any request for brokerage fees.

d.
In the judicial letter dated 28.4.2009 it has not been stated, if the Respondent is a company registered in Malta. Neither is the address of the Respondent clearly stated, because the reader of the Times of Malta has learnt that 'Propertyline' operates from that address. It also has not been stated any natural person, who may act on behalf of the company and empower any advocate to act on behalf of the Board of Directors in case of a company duly registered in Malta. In the judicial letter dated 28.4.2009 therefore the Respondent is not sufficiently determined. An insufficiently determined person in a judicial letter according to Art. 166A COCP can never meet the requirements laid down in Art. 166A (1), (2) and (3) COCP. A clear statement demands that the person forwarding such statement is doubtlessly determined.

e.
No debt has been liquidated between the parties. And the circumstances of any liquidation has not at all been stated in the judicial letter in question.
The Applicant has never been received an invoice from the Respondent.

f.
In the judicial letter in question not even the debt stated is certain.
In the judicial letter in question the Respondent called for payment of €3.229,00
In a legal letter dated 3.4.2008 the Respondent called for payment of €4.307,00
Evidence: Letter of Attorneys Busuttil & Busuttil dated 3.4.2009, copy of which is attached and marked as doc 'A';
In the judicial letter there is no explanation how the sum called for accrued.
Because prior actions of the Respondent collide with the sum stated in the judicial letter in

question, it was essential for the Respondent to state the facts leading to the change of figures, or at least state how the sum called for in that judicial letter may be justified. The deliberate omission of stating relevant facts under oath leads to perjury. And an act of perjury never will meet the requirements laid down in Art. 166A (1), (2) and (3) COCP.

g.
The absence of any temporal information in a judicial letter according to Art. 166A COCP always implies the nullity of that judicial letter according to Art 166A (2) COCP.
Apart from prescription a claim may also be subject to forfeiture. Long periods of inactivity to protect one's interests or rights imply such forfeiture to have taken place, resulting into the abolishment of any claim. The judicial letter in question is lacking every information in respect of a period of time involved. The period involved is an essential reason for upholding a claim. If the author of a judicial letter according to Art 166A COCP did not inform of 'who did what and when' the requirements laid down in Art 166A (1), (2) and (3) COCP cannot be met.

Under appliance of appropriate associative abilities and sufficient knowledge of the Maltese Estate-market it may transpire to the reader of the judicial letter in question that the Applicant is renting premises from a certain Halim Wannous, and that a property negotiator of the label 'Propertyline' feels involved in the success of any contract having been concluded to justify the Applicant's possession of those otherwise undetermined premises. But even taking aforementioned creative reader's investment into consideration no transparency of any claim's cause or some reason for any claim to be upheld is clearly stated. Supporting facts explaining who did what and when have not been stated at all.

The requirements laid down in Art 166A (1), (2) and (3) COCP demand that a claim subject to the procedure in Art 166A is presented conclusively and substantially, and leave no room for any good-will within the judicial examination.

Assuring accurate mandate given by the Applicant, and for all intents and purposes according to Law, Kai Jochimsen, Rechtsanwalt (German Advocate) (ID No 19290A) on behalf of the Applicant.

With costs and interest.

Having seen the documents filed together with the same application (pg 6 to pg 8 ibid).

Having seen the preliminary decree delivered on the 16th of December 2009 (pg 9 ibid).

Having seen the reply filed by respondent company (pg 13 and pg 31 et seq ibid) both in Maltese and English, by means of which it submitted with respect that:-

1. In the first instance the nullity of the Application filed in these proceedings as the Application was filed in the English Language, when the Maltese Language is the language which is to be used in the Maltese Courts (Art. 21 of Chapter 12 of the Laws of Malta) and also in the second instance because the Act was filed by a person who cannot exercise as a lawyer without a warrant issued by the President of Malta as is stipulated by law (Art 79 Kap 12) – in this case it was a certain Kai Jochimsen who signed this judicial act and who appeared at the sitting before this court on the 22nd December 2009 on behalf of Daniela Zwack-Wandrey, and he does not hold a warrant to be able to exercise the profession of a lawyer.

2. On the merits of the case and without prejudice to the above, it is pointed out that on the 28th April 2009 a Judicial Letter No 2384/2009 was filed in court in terms of Art. 166a of Chapter 12 of the Laws of Malta against Daniela Zwack-Wandrey, which judicial letter was translated into English at her own request and which was subsequently notified to her on the 8th October 2009 both in the Maltese and English language as results from the confirmation of notification.
3. After 30 days had elapsed from the date of notification on the 8th October 2009, and within which date Daniela Zwack-Wandrey failed to file any reply as is required by law, this judicial letter became an executive title with the result that In-Sight Limited could proceed against Daniela Zwack-Wandrey for the execution of the title as in fact happened.
4. On the 14th November 2009 a legal letter in the English language was sent to Daniela Zwack-Wandrey requesting payment of the amount and interest due and also for the legal costs, however she failed to pay and on the 20th November 2009 and executive garnishee Order No. 2584/2009 was issued against her a copy of which is filed in this proceedings.
5. For all intents and purposes it is to be noted that the judicial letter and the issue of the Executive Garnishee Order were in complete compliance with the law and that if Daniela Zwack-Wandrey had any objections she should have raised these within the time limit laid down by the law. As she failed to do so, the judicial letter of the 28th April 2009 is an executive title and therefore In Sight Limited had every right to issue the Garnishee Order in order to compel her to pay the amount due to them.

Having seen the garnishee order (pg 15 ibid) as well as the official letter involved (pg 16 ibid).

Having seen all the acts of the case.

Having heard to oral pleadings.

Having considered

That this decision refers exclusively to the preliminary plea submitted by defendant company, which, in short, states that the application is null since it was filed in the English Language and because it was filed by a person who cannot exercise as a lawyer in Malta.

Having considered

That article 21 of Chapter 12 of the Laws of Malta clearly states that the Maltese Language is the one to be used in the Law Courts and all proceedings are to be held in this language. The same article states that if one of the parties does not understand the Maltese Language. And this in regard to the oral proceedings, these are to be interpreted either by the Court Itself or through and by means of an interpreter. Finally in the third subarticle, the question of evidence by means of an affidavit is dealt with.

That, in this case, it appears from the application that it was filed in the English Language without the prior consent of the Court by means of an application 'ad hoc' filed, separately, by means of the appropriate judicial act. Deference is being made to this point due to the fact that, in the same application under examination, applicant, in fact, requested this Court '… to accept this application in English Language'. However, the Court could not decide this due to the simple fact that the application was, already filed when it was brought to the attention of the same Court. Therefore the same application was incorrectly filed and should not have been accepted prior to the appropriate decision by the Court in this point through the application of the article mentioned above.

Having considered

That article 79 of the same Chapter states that no person can exercise the profession of Advocate in the Maltese Courts of Justice without the authority of the President of Malta by means of the warrant issued under the Public Seal of Malta together with the oath under article 80 ibid. From the same application (page 5 of the acts) it appears and results that the same application was filed in the Registry of the Court by 'Kai Jochimsen' on behalf of a third party, a foreigner having residence in Malta. It clearly results (v pg 33 ibid) that Kai Jochimsen does not have a warrant to exercise the profession of Advocate in Malta. This refers to both the filing of Judicial acts as well as pleading in front of the Maltese Courts.

In this regard, article 178 ibid says that 'Written pleadings and the applications whether sworn or not shall be signed by the Advocate and also by the Legal procurator if any'. In this case, the application was signed by Kai Jochimsin and a legal procurator. In view of the fact that this article makes it a 'sine qua non' for the act to be signed by an advocate, having the warrant to exercise this profession under Maltese law, it appears that the same application is to be considered as null in regard to its filing. In this regard it is not sufficient that the same act was filed by a legal procurator, having a warrant to practice as such under Maltese Law, (vide article 79 and article 81 ibid in regard to the warrant to be issued by the President of Malta to enable a person to exercise this profession).

Having considered

That it would also be necessary to refer to article 7(3) of 'the mutual recognition of qualification of legal profession regulations' (subordinary

> legislation 12.17) issued by means of legal notice 273 of 2002 as subsequently amended by legal notices 55, 170 and 248 of 2004 and legal notice 28 of 2008 where it is stated that '… the designated authority (ie the President of Malta) shall require legal professionals practicing under their home-country professional titles to work in conjunction with legal professionals who practice before the Maltese Courts ….'.
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> Having considered
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> That in view of what has been stated and specified above, the application is to be considered as being null and void therefore and for all the reasons stated above, the Court declares the application as being null and void and therefore accedes to the what is stated in the preliminary plea submitted by respondent Company.
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> All expenses in connection with these proceedings are to be borne by applicant.**"**

Minn din is-sentenza appellat ir-rikorrenti bl-aggravji illi l-istess sentenza hi nulla u bla effett in kwantu ir-rikors promotur taghha ma giex appuntat ghas-smigh zmien erbatax-il gurnata mid-data ta' l-introduzzjoni tieghu;

Is-socjeta` intimata opponiet dan l-appell bis-sottomissjoni illi l-istess hu irritwali in kwantu *fuori termine*. Dan apparti li kkontestat ukoll il-mertu tieghu;

Fuq din il-pregudizzjali jibda biex jigi registrat illi huwa fil-generalita` tar-riti processwali taht id-diversi ligijiet u ghal liema hu konsentit appell, illi t-termini fihom preskritti ghall-appell jinkwadraw ruhhom fl-istitut tad-dekadenza. Dan huwa hekk ghas-semplici fatt materjali u oggettiv tad-dekorrenza taz-zmien. Ara "**Caterina Tabone -vs-**

Nobbli Gio Carlo Mallia *et*", Appell Civili, 3 ta' Ottubru, 1927;

Il-kwestjoni hawnhekk sollevata giet proprju minn din il-Qorti diversi drabi ezaminata. Hekk inghad illi t-termini ghall-appell minn sentenzi "huma termini perentorji u dwarhom, di regola, ma hemmx possibilita` la ta' proroga, u lanqas ta' sospensjoni jew interuzzjoni, jekk mhux fil-kazijiet eccezzjonalment mil-ligi prevvisti. Ad ezempju, fejn il-gurnata ta' l-iskadenza tat-terminu tahbat nhar ta' Sibt jew il-Hadd jew xi gurnata festiva. Din in-natura inderogabbli tat-termini processwali ggib b'konsegwenza illi dwarhom ma jistghux jigu applikati provvedimenti sanatorji jew ta' rimessjoni, ankorke d-dekors inutili taghhom ma jkunx imputabbli lil parti interessata. Dan ghal motiv illi dik l-improrogabilita hi hekk necessarju ghal raguni ta' certezza u, ukoll, ta' uniformita`. Sewwa hafna gie ritenut minn din il-Qorti diversament presjeduta illi «l-osservanza tat-termini stabbiliti fil-Kodici ta' Organizzazzjoni u Procedura Civili u f'ligijiet ohra specjali li jirregolaw il-kondotta tal-proceduri quddiem il-Qrati u quddiem it-Tribunali huma ta' ordni pubbliku u ma jistghux jigu bl-ebda mod injorati u lanqas bil-kunsens tal-partijiet rinunzjati jew mibdula» ("**Giuseppi Caruana -vs- Charles Psaila**", Appell mill-Bord li Jirregola l-Kera, 21 ta' Marzu, 1997)". Ara "**Salina Wharf Marketing Limited -vs- Malta Tourism Authority**", Appell Inferjuri, 12 ta' Dicembru, 2007;

Issa fid-dibattitu orali quddiem dina l-Qorti, id-difensur ta' l-appellanti ssottometta b'argoment illi t-trapass taz-zmien ghall-appell jibda ghaddej mid-data tal-pubblikazzjoni u notifikazzjoni tas-sentenza. Dan mhux dak li tghid il-ligi Maltija in kwantu din mhix assimilabbli ghall-Artikolu 326 tal-Kodici ta' Procedura Civili Taljan li proprju jirrikjedi l-forma tan-notifikazzjoni tas-sentenza ghall-iskop tad-dekorrenza tat-terminu ghall-appell. Diversament, hu testwalment provvdut bl-Artikolu 226 (1) tal-Kapitolu 12 illi "l-appell isir b'rikors li jigi prezentat fir-Registru tal-Qorti ta' l-Appell fi zmien ghoxrin jum <u>mid-data tas-sentenza</u>". Fil-

kaz partikolari l-provvediment tal-Qorti tal-Magistrati nghata fl-24 ta' Frar, 2010 mentri, invece, l-appell minnu gie pprezentat fit-18 ta' Marzu, 2010. LI jfisser tnejn u ghoxrin (22) jum fuq l-ghoti tal-provvediment. Manifestament allura l-appell huwa wiehed *fuori termine* u ghaldaqstant mhux ritwalment ammissibbli;

Issa, ankorke, *exempli gratia*, din il-Qorti kellha tokkupa ruhha mill-mertu ta' l-appell, l-istess mhux sostenibbli. Jirrizulta illi r-rikors promotur gie mill-appellanti intavolat quddiem l-ewwel Qorti fil-15 ta' Dicembru, 2009 u b'digriet ta' dik l-istess Qorti appuntat ghat-22 ta' Dicembru 2009. Effettivament, jidher mill-verbal ta' din l-udjenza (fol. 20) illi, kif dikjarat, fiha dehru l-Avukati difensuri tal-partijiet u billi sa dik id-data l-istess rikors promotur kien ghadu ma giex notifikat lill-kontro-parti, il-Qorti ddifferiet il-kaz ghall-11 ta' Jannar, 2010. Dan ghamlitu biex taghti opportunita lill-parti avversarja tintroduci r-risposta taghha, kif hekk difatti sehh. Ara r-risposta relattiva introdotta fid-29 ta' Dicembru, 2009 (fol. 13);

Minn din l-esposizzjoni huwa lampantement car illi l-ewwel Qorti ma naqsetx milli tirrispetta d-disposizzjoni ta' l-Artikolu 166A (5) tal-Kodici ritwali billi, kuntrarjament ghal dak dedott mill-appellanti, ir-rikors taghha gie, kif kellu jkun, appuntat ghas-smigh entro t-terminu ta' gimghatejn kif mill-istess artikolu prefiss. Anke minn dan huwa sew intwittiv illi l-Qorti Inferjuri ma kkommettiet ebda vizzju procedurali;

Rigwardat dan l-appell mill-vizjoni tal-pregudizzjali sollevata kif ukoll mill-perspettiva tal-mertu tieghu, ma tezisti ebda ombra ta' dubju illi l-appell devolut hu wiehed ghal kollox frivolu u vessatorju u ghandu jigi skartat.

Ghall-motivi predetti l-Qorti qeghda tirrigetta dan l-appell billi tqisu *fuori termini* u wkoll insostenibbli fil-mertu tieghu, u stante li l-istess appell hu hekk fieragh u vessatorju, bl-

applikazzjoni ta’ l-Artikolu 223 (4) tal-Kapitolu 12 tikkundanna lill-appellanti jhallas l-ispejjez tieghu ghal darbtejn.

< Sentenza Finali >

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