



**CIVIL COURT
FIRST HALL**

**THE HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO**

Sitting of the 30 th June, 2011

Citation Number. 480/2009

Antonius Kok

Versus

Josephine *sive* Josette Faure

1. This case concerns the interpretation of a private writing incorporating an agreement between the parties. Plaintiff says that the writing is a loan agreement whereas defendant contends that it is a simulated donation. Plaintiff is therefore seeking the repayment of the loan whereas defendant by means of a counter-claim is seeking a declaration that there was no loan but a donation.

2. Plaintiff premised that by virtue of a private writing dated 25 October 2004 he advanced to defendant an interest-free loan of three hundred and sixty-five thousand Liri (Lm365,000) – equivalent to eight hundred and fifty thousand, two hundred and twenty-one euro and twenty-nine cents (€850,221.29). This loan was meant to cover

the cost of an apartment in Rabat, which defendant purchased by virtue of a deed of 26 October 2004 in the records of Notary Remigio Zammit Pace.

3. Since there was no mention of a time for repayment, the loan, being interest-free, must be paid back within two years, in terms of art. 1078(a) of the Civil Code. Notwithstanding the fact that it is now more than two years since the date of the loan, defendant failed to repay the loan and is now refusing to do so. Plaintiff therefore filed this action whereby he is asking that the court:

i. declare that plaintiff had given on loan to defendant the sum of eight hundred and fifty thousand, two hundred and twenty-one euro and twenty-nine cents (€850,221.29);

ii. declare that the loan is now due for repayment in terms of art. 1078(a) of the Civil Code; and

iii. order that defendant pay plaintiff the sum of eight hundred and fifty thousand, two hundred and twenty-one euro and twenty-nine cents (€850,221.29), with costs, including those of prohibitory injunction n^o 708/2009, and interests.

4. Defendant filed the following pleas:

i. the money advanced by plaintiff for defendant to purchase property was never meant as a loan but as a donation because it was never meant to be repaid;

ii. sometime in the year 2009 plaintiff forced defendant to sign the private writing mentioned in plaintiff's sworn application, to which writing plaintiff added the date of 24 October 2004, which is false;

iii. for this reason defendant by means of a counter-claim is asking the court to declare that the money advanced by plaintiff for defendant to purchase property was by title of donation;

iv. without prejudice to the other pleas, the action is premature for the following reasons:

a. the money was to be repaid only if the property is sold, which event did not take place;

b. the writing does not mention a date for repayment and, since the writing was made in the year 2009, the time mentioned in art. 1078 of the Civil Code has not yet lapsed; and

c. the debt is not due and enforceable since plaintiff did not request payment by a judicial act, thereby placing defendant *in mora* as required by law; and

v. also without prejudice to the other pleas, the price shown in the contract of sale is two hundred and eighty thousand Liri (Lm280,000) and not three hundred and sixty-five thousand Liri (Lm365,000), as claimed by plaintiff.

5. Defendant filed a counter-claim. She stated that they parties were in a close personal relationship. On her part she gave up her employment and divorced her first husband in order to be able to marry plaintiff who, on his part, wished to ensure that she would lack nothing. It was for this reason that he paid for defendant to purchase an apartment and garage in Rabat by a deed of 26 October 2004 in the records of Notary Remigio Zammit Pace. The money advanced by plaintiff was meant to be a donation.

6. After some time the relationship between the parties turned sour and plaintiff changed his mind. Some time in 2009, during an argument, he forced defendant to sign a writing on which he put the false date of 25 October 2004. The intention of the parties in signing that writing was that plaintiff would take his money back in the event that defendant sold the property.

7. For these reasons defendant is asking by way of counter-claim that the court:

i. declare that the money advanced by plaintiff for defendant to acquire property in Rabat was meant as a donation;

ii. declare that the so-called "*loan contract*" dated 25 October 2004 is in substance a donation disguised as a loan; and

iii. declare that the writing is invalid as a loan contract but valid as a donation.

8. Defendant is also claiming costs.

9. Plaintiff filed the following pleas against the counter-claim:

i. it is not true that the money was advanced for defendant's personal well-being or as a donation. The money was advanced so that the tenement could be acquired in defendant's name since plaintiff already had

property in Malta and, being a non-national, he could not at that time hold other immovable property in Malta. He therefore decided to make an investment in property by advancing the money for the property to be acquired in defendant's name with the intention that, when the property will eventually be resold, he will take his money back;

ii. [the second plea is substantially the same as the first one];

iii. defendant knew that the money was not being given to her as a donation but to be invested in property in the interest, ultimately, of plaintiff;

iv. even if the money was meant as a donation, such donation is not valid because it was not made by public deed in terms of art. 1753 of the Civil Code;

v. it is not true that defendant was forced to sign the writing; defendant signed freely and in full knowledge of the purport of the writing which reflected the agreement between the parties; and

vi. the agreement incorporated in the writing is not a simulated agreement, nor was consent obtained by violence.

10. Although defendant states that she was forced to sign the writing dated 25 October 2004, she is not asking for a rescission of the agreement because of a defect of consent in terms of artt. 974 u 977 *et seqq.* of the Civil Code; she is only seeking a judicial declaration that the agreement is simulated. The question before the court therefore is whether the agreement was really a loan, as claimed by plaintiff, or whether it was a disguised donation, as claimed by defendant, or some other disguised agreement.

11. The writing, which was evidently not drafted professionally, runs as follows:

Loan Contract

Entered today October 25th 2004.

In order to purchase the apartment in Verdala Mansions known under the name *Porta Vilhena* number 34 (thirty four) with lock-up garage under number 40 (forty), inclusive AC system and kitchen, Ms. Josette Faure
... wishes to take a loan of Lm 365,000- (three hundred

sixty five thousand Maltese Liri) from Ing. Antonius Maria Jozef Kok

Abovementioned Mr Antonius Kok declares that he will provide the Lm 365,000- to Ms Josette Faure under the following conditions:

1. The property will be fully insured against fire, water damages *etc.*;
2. The property will not be rented out without permission of the Loan provider;
3. The property will be managed and cleaned in a proper way;
4. The loan will be free of interest under the condition that in case of sale the loan and the entire profit will go to Mr Antonius Kok, without any delay; however, the loan can never exceed the selling price of the said apartment;
5. In case Ms Josette Faure dies, the ownership of the abovementioned property will be immediately handed over to Mr Antonius Kok without any delay. The property will not form part of the inheritance of Ms. Josette Faure.

Signed for mutual acceptance

12. The events which led to this writing were as follows: The parties entered into a personal relationship after they met at defendant's place of work, when defendant was an employee of a concern of which plaintiff was a client. After some time defendant gave up her employment, in view of her forthcoming marriage to plaintiff, according to defendant, or because of problems with her superior, according to plaintiff. When defendant became unemployed, plaintiff supported her financially.

13. Defendant further alleges that, in contemplation of marriage, plaintiff gave her money by way of donation for her to buy property in Rabat. Plaintiff denies this. He says that his intention was to invest in property, but, since he already owned property in Malta and, not being a Maltese national, he could not acquire any more property, he acquired the property in defendant's name. Plaintiff was, however, to be the real beneficial owner. On this matter, defendant had this to say in his sworn reply to defendant's counter-claim:

«... ..ir-raguni għall-għotja tal-flus sabiex tinx tara dar f'isem Faure kien proprju għaliex l-esponent għa kellu proprjetà oħra għewwa Malta u bħala ċittadin

esteru ma setax jakkwista proprjetà oħra. Għal din ir-raġuni, peress li l-esponent kien jafda lil Faure, għazel li jagħmel l-investment tiegħu billi javvanza l-prezz neċessarju għall-akkwist tal-proprjetà lil Faure bil-ghan li meta eventwalment l-istess proprjetà tinbigħ, ir-rikavat jerga' jghaddi favur l-esponent.»¹

14. Plaintiff's version is corroborated by the evidence of Notary Remigio Zammit Pace, who was familiar with plaintiff's affairs.²

15. The property was purchased by virtue of a deed of 26 October 2004. The agreement between plaintiff and defendant was not, at the time, set down in writing. Defendant says that the private writing was drafted and signed in 2009 whereas plaintiff says that it was signed "sometime in October 2008"³ although it carries the date of 25 October 2004.

16. On the interpretation of contracts art. 1003 of the Civil Code requires that the court consider not so much the technical meaning of the words used by the parties but rather their true intention, "as clearly evidenced by the whole of the agreement". This is even more so in the present case where the writing was not professionally drafted.

17. Defendant's claim that the true purport of the agreement was a donation is to be dismissed outright. It can never be said – as asserted by defendant in her third counter-claim – that a private writing can constitute a donation when the law in art. 1753 of the Civil Code expressly requires a public deed. Nor can it reasonably be said that, having regard to the condition of the parties and to other relevant circumstances, a sum in excess of eight hundred and fifty thousand euro can be considered a sum of moderate value, so as to avoid the requirement of a public deed in terms of art. 1753(2)(a) of the Civil Code.

18. Moreover, defendant herself implicitly admits that there was no agreement on a donation and that her true intention was to leave matters in the hands of plaintiff:

¹ *Fol.* 35.

² *Affidavit* of Notary Remigio Zammit Pace, *fol.* 51.

³ *Affidavit* of plaintiff, *fol.* 52.

«We never spoke about any loan or any money: I left the financial side in his hands. He knew I had given up my job and was now totally financially dependent on him. I felt I could trust him. He had the money to do this easily and he was very generous with his money. Ton [plaintiff] assured me that he could handle our financial situation together. He was a good businessman who had done very well in life financially and I felt I could leave these financial issues in his hands.»⁴

19. In other words, it was only pure conjecture on the part of defendant: because she knew that plaintiff was a very rich and generous man, and that he knew that she depended on him financially, she assumed that he was making a donation. Although this might have led her to believe that plaintiff was donating the money, her true intention was to leave matters in plaintiff's hands, and that whatever plaintiff did would be fine for her. In this regard, the following extract from defendant's statement is particularly revealing:

«Ton and I both knew that he could not put any more property in his name, as he had already two other properties in Malta in his name. Ton and I agreed that I would leave all financial negotiations and tax problems in his hands and that he would put this apartment in my name.»⁵

20. Therefore, since it appears clear that defendant's intention was to abide by plaintiff's wishes in financial matters because she trusted in his financial know-how, what is really relevant is plaintiff's intention, because that intention was implicitly adhered to by defendant.

21. Plaintiff's evidence, however, also makes it explicitly clear that the true intention was not that of making an interest-free loan to defendant, repayable in two years in terms of art. 1078(a) of the Civil Code, but, rather, that defendant should be a front, a so-called *prestanome*, so that plaintiff may avail himself of her name to acquire property which he could not acquire in his own name. This is evident also from the terms of the agreement, as plaintiff himself admits when explaining the reason for the

⁴ *Affidavit* of defendant, fol. 61.

⁵ *Ibid.* fol. 61.

inclusion in the agreement of certain clauses such as the obligation to insure the property, the prohibition of letting, and the obligation to maintain the property in a good state of repair⁶. The stipulation that, in case the property is sold, any capital gain or loss is to go to plaintiff also shows that the beneficial owner was to be plaintiff. Likewise, the agreement on the transmission of the property in the case of death of defendant, although devoid of legal effect, shows that the parties considered that the property in truth belonged to plaintiff.

22. Defendant's obligation as a front or *prestanome* is that of holding the property on behalf of plaintiff and, eventually, of transferring it to him, and not that of repaying the money advanced for its purpose, which, after all, was not spent in her interest but in the interest of plaintiff. For this reason plaintiff's contention that the transaction is to be treated as a money-loan which has to be repaid is not correct, and the same must be said of defendant's counter-claim that the agreement be treated as a donation.

23. The court therefore dismisses both plaintiff's claims and defendant's counter-claims. The costs of the principal action are to be paid by plaintiff; those of the counter-claims are to be paid by defendant.

< Final Judgement >

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⁶ *Affidavit of plaintiff, fol. 53.*