MALTA

CIVIL COURT
FIRST HALL

THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON

Sitting of the 30 th May, 2013

Citation Number. 122/2009

Joseph Chetcuti Bonavita
(I.D. 178148M)

vs

Anna Bonisch
(I.D. 14589M)

THE COURT :

I. The matter

Having seen the **sworn application** which plaintiff filed on 12 February 2009 and states as follows –

That for a period of time he cohabited with respondent in the apartment 232, Flat 15, Belgravia Court, Tower Road, Sliema between 1994 and 2002.

That plaintiff, as he no longer lived at his residence, brought his moveable effects to respondent`s property – items of considerable value, mainly inherited from his parents.

These items are listed in the annexed list marked Dok A and apart from their sentimental value, are worth Lm7,830 i.e. €18,239 (eighteen thousand two hundred thirty nine Euro).

That their relationship terminated definitely in 2002, and although various attempts have been made so that these items are returned to plaintiff, and also after various promises of restitution even through the respective lawyers, the items were in fact never returned to their legitimate owner i.e. the plaintiff.

Now therefore, plaintiff respectfully requests this Court, that it condemns defendant :

1. To return to plaintiff the items listed in Dok A, items that plaintiff left in defendant`s possession ; and this within a peremptory time period established by Court ;

2. In default, that defendant be condemned to pay plaintiff the value of the items in the amount of €18,239 (eighteen thousand two hundred thirty nine Euro).

With costs, including those of the precautionary warrants of seizure and garnishee order, filed together

with this application, with legal interest in case plaintiff is paid in terms of the second claim ; defendant is being subpoenaed so that a reference to her oath can be made.

Having seen plaintiff`s list of witnesses and list of documents.

Having seen the **sworn reply** that was filed by defendant on 12 May 2009 whereby she rejected as unfounded at law and on fact plaintiff`s demands by affirming that no amount was due to plaintiff, that the only objects listed in Doc A and which were in her possession are now deposited in a safety deposit box held at HSBC Bank Malta plc Sliema, that following the termination of their relationship, that defendant had requested plaintiff to take his belongings which were at her residence but as he ignored her call the items were placed in the said safety deposit box, that by placing the items in question in the safety deposit box she incurred unnecessary costs and therefore she has a right of set-off, and finally that plaintiff`s claim is time-barred by virtue of Sec 2156(f) of Chap 16. Having seen defendant`s list of witnesses and list of documents.

Having seen the **counter-claim** whereby defendant requested the Court :

1) To declare that plaintiff was her debtor for the expenses which she incurred to place the items in question in a bank safety deposit box ;

2) To declare that plaintiff was her debtor for the amount of €2329.38 (equivalent to Lm1000) which she gave on loan *brevi manu* to plaintiff to purchase a car ;

3) To order set-off thereby cancelling her claim ;

4) To declare that plaintiff is not her debtor.

5) With costs and interest at law.

Having seen defendant`s list of witnesses for the purposes of the counter-claim.

Having seen plaintiff`s **sworn reply** to the counter-claim that was filed on the 1 June 2009 wherein he pleaded that the plea of prescription in unfounded at law for reasons that result in Sec 1899 till 1917 and in Sec 2118 of Chap 16, that plaintiff filed the suit because defendant did not return the items listed in Doc A, that defendant`s second demand is time-barred in terms of Sec 2156(e) of Chap 16, that as defendant is not plaintiff`s debtor there cannot be set-off, and that plaintiff rendered services to defendant in connection to her business.

Having seen plaintiff`s list of witnesses and list of documents for the purposes of the counter-claim.

Having seen the note filed by defendant on the 25 September 2009 (fol 32).

Having seen the evidence by affidavit of plaintiff (fol 36 -37), of David Cassar (fol 38), of Kurt Chetcuti Bonavita (fol 59).at fol 38 ;

Having heard the evidence given by Karl Chetcuti Bonavita at the hearing of the 18 February 2010 (fol 41 – 57).

Having seen the evidence by affidavit of defendant and document attached (fol 65 et seq).

Having heard defendant testify on two occasions at the hearing of the 22 February 2011 (fol 72 et seq) and seen the document which she exhibited.

Having heard the evidence of witness Joseph Bonnici at that same hearing (fol 82 et seq).

Having seen the evidence by affidavit of Marika Micallef (fol 99).

Having heard the evidence of Consultant Psychiatrist Dr Etienne Muscat at the hearing of the 12 April 2012 (fol 116 et seq).

Having seen the decree given by the Court at the hearing of the 28 June 2012.

Having seen the decree given at the hearing of the 9 October 2012 wherein the Court adjourned the cause for judgement with both parties being given time-limits to file notes of submissions.

Having noted that the parties did file any notes of submissions.

Having seen all the acts of the proceedings.

II. The Evidence

Plaintiff states in his affidavit that he lived with defendant at her flat 232 Flat 15, Belgravia Court, Tower Road, Sliema, for eight years. He had inherited from his parents a number of items which he listed in Doc A. He

had decided to keep those items at defendant`s flat where he lived rather than in the place where his two teenage sons resided He had also taken there a number of valuable oil paintings which were later taken away when defendant decided to paint her apartment. The list in Doc A was valued by C Azzopardi & Sons Limited. That valuation was the same one which he had used for the notice of succession of his mother following her demise. The intrinsic value of the items increased over the years apart from the fact that for him the articles in question had considerable sentimental value. During the relationship with defendant, he carried out extensive works to render the apartment habitable as the flat was originally purchased in shell form. All items for use at the flat were purchased at a discount through his intervention. In July 2002, his relationship with defendant came to end. Defendant informed plaintiff that she would be sending his belongings to him as she had changed the locks of her flat. His clothing was packed in cartoon boxes and sent to him. His office briefcase which contained important documents was returned to him months later through the lawyers. Plaintiff states that tried to contact defendant but she refused to answer his calls by putting the phone down. He therefore instructed his lawyer to write to defendant to return the items listed. Despite making promises, the items were never returned.

With regard to the note filed by defendant on the 24 September 2009, plaintiff stated that the four items were very small in size and occupied very limited space whereas the items which he listed were much larger in size ; in fact a standard bank safety deposit box was too small to hold them. He points out that none of the items listed in Doc A were returned to him and because of that he filed this suit. He insisted that his lawyer had on several occasions written to defendant. An appointment was also scheduled but defendant did not attend.

David Cassar testified that he has known plaintiff for more than twenty years. He trades in watches, silver,

fold jewellery and other precious articles. He recalled that on a particular occasion, plaintiff had shown him various items that he had inherited from his mother and which were situated in defendant' s flat in Tower Road, Sliema. He confirmed that he viewed the items in question at defendant`s flat. They are listed in Doc A. He confirmed the valuations made by C Azzopardi & Sons. He added that the items had a particular sentimental value for plaintiff as they constituted practically his entire share of his mother`s estate. He was aware that the parties had an affair which however ended and in fact plaintiff was actually locked by defendant out of her apartment. Plaintiff had told him that his clothes and personal belongings including the precious items were still at defendant's residence.

Karl Chetcuti Bonavita plaintiff`s son stated that he lived at 25, Flat 5, Mrabat Street, Sliema. At one point, when he was sixteen, his father went to live with defendant at her flat in Tower Road, Sliema. He lived there for five years. He visited his father every week regularly. Witness stated that when his paternal grandmother died, his father inherited various precious items. He took those items with him when he went to live with defendant. His father was of the view that since he was 17 at the time and his elder brother was 21, he thought it would be safer to take the items in question with him. Witness pointed out that the items were never taken to 25 Flat 5, Mrabat Street, Sliema, but directly to defendant`s flat in Tower Road, Sliema. The items were relatively large objects and they were taken out to be cleaned. There were gold items, jewellery, silverware including tea sets and table candlesticks.

Witness stated that one day, his father went to defendant's place and found that the lock of the main door had been changed. Following that event, his father decided to go back with them i.e. his brother and himself. His father had brought nothing with him. He therefore tried to contact defendant but she refused to speak to him. Three days later, a number of boxes were delivered with his father`s clothing but the precious items were not

returned. He personally verified their absence. They contacted their lawyer. At first it seemed that the items had not been sent back because as they were items of value there was insistence on the part of defendant that a lawyer had to be present when they were returned. Despite this, his father went to meet defendant`s lawyers but defendant did not turn up and the items were not returned.

Witness also confirmed that defendant`s place was purchased in shell form. When his father moved in with defendant, he helped her out with the purchase of accessories and carried out works to make the place habitable.

On **cross-examination**, witness confirmed the items listed in Doc A. Most of the items were at defendant's place, when his father was living there. The larger objects were on display while the smaller objects were kept in small pouches and were not on display. He had seen all the items prior to their being taken to defendant's premises. Even the oil paintings were taken but they did not remain at defendant`s when defendant decided to redecorate the walls of her flat. He confirmed that every single item on the list were at defendant's place. He explained that his brother and himself helped their father carry the oil paintings. Witness confirmed that his father was lent money by defendant to purchase a car. The loan was for two thousand pounds. He gave back a thousand. He could not say whether the balance was ever paid back.

Kurt Chetcuti Bonavita stated that his parents separated in 1979-1980. He resided with plaintiff and his brother Karl at his father`s house in Mrabat Street, Sliema. When his father started a relationship with defendant in 1994-1995 he went to live with her. His father had inherited various precious articles consisting of silverware, gold articles and items of jewellery. He took

those items with him when he went to live with defendant. His father built a skylight, kitchen units, bed and various other items of furniture for use at defendant's apartment. When he used to visit his father at defendant`s flat, he used to see the items in question. He also confirmed that he used to live at defendant`s flat when the parties were together abroad. When the relationship between his father and defendant ended, the precious items were not returned. The oil paintings had been transferred by his father had transferred to their place in Mrabat Street, Sliema, at an earlier date.

Defendant testified that when plaintiff went to live with her at her apartment in Tower Road, Sliema, he brought along with him a number of items which he said he had inherited. She explained that he was afraid that his sons or their friends would break them or steal them and so he felt that those items would be safer at her apartment. She stated that she did not want these items at her flat and after much insistence, plaintiff took away the oil paintings. When their relationship ended, she did not want to be responsible for the remaining items that had been left at her apartment. She explained that before she went to Austria, she gave the pair of candlesticks to Karl, plaintiff's son. Plaintiff was present when the candlesticks were being packed and carried out of her house. She also stated that her cleaner Joseph Bonnici told her that he had been to plaintiff's apartment and that he had seen these two candlesticks at his place.

Defendant stated that she was in Austria between 21 April 2002 and 8 June 2002. During that period, she spoke to Marika Micallef, her maid, on the phone and asked her about a wooden box. Her maid confirmed that the wooden box was still in the apartment. A week later, she spoke to plaintiff on the phone and he confirmed that he had taken the wooden box. She claimed that the box contained plaintiff's silver items, which were a silver oil lamp, a silver tea and coffee set and silver plates and candlesticks. On the 26 July 2002, she phoned plaintiff to

inform him that she was packing all his belongings in cardboard boxes and that David Cauchi would be delivering the boxes. On the outside of the boxes, which contained the porcelain items, she wrote the word 'PORCELAIN' so that the boxes would be handled with care. David made three or four trips to plaintiff`s apartment. She listed all the items that had been placed in the boxes.

On the 29 July 2002, plaintiff phoned her to enquire about his personal gold items. She told him that she had placed the gold items in a safe deposit box at HSBC. This deposit box contained a gold necklace and cross, gola watch, gold cufflinks and a gold pendant. Defendant stated that she does not know why plaintiff is claiming that there are certain items which are still in her apartment. Furthermore defendant added that plaintiff still owed her a Lm1,000 which she had given him on loan to purchase a car. Defendant also claimed that plaintiff never returned her dehumidifier nor the remote control of her garage.

Defendant pointed out that when plaintiff phoned her about his gold items, she informed him that she had found the items which she described but was only willing to return them if plaintiff gave her back the Lm1,000 she had lent him. Plaintiff did not confirm or admit that he owed her Lm1000. The gold items belonging to plaintiff were still held in the safe deposit box at HSBC. To keep the items there, she had incurred costs.

As part of her evidence, defendant exhibited a photo showing a silver candlestick. She had taken that photo herself at her apartment. She confirmed that the candlestick was one of two which plaintiff owned. Both were placed in black plastic bags and taken away by Karl.

Joseph Bonnici testified that he knew defendant and he had met plaintiff on two occasions. While he was

carrying out works at defendant's house, plaintiff had asked him for his details so that he would contact him for other works which he required at his own place. In fact plaintiff did get in touch with him. Witness insisted that while he carrying out work at plaintiff`s place in 2002, he noticed a candlestick. He had never seen that candlestick at defendant's house. Upon being asked by the Court how come he remembered that particular candlestick after so many years, witness stated that he simply remembered it. Witness continued to state that on another occasion when he was at defendant's house, he found her crying and she explained to him that plaintiff was insisting that she returns a candlestick which was not in her possession. It was at that point that he informed defendant that he had seen the candlestick at plaintiff's house. He insisted that he saw only one candlestick.

On **cross-examination**, witness admitted that defendant had told him about the chandeliers about a year and a half ago before being called to testify.

Marika Micallef testified that he had been working for defendant for two and a half years. She was aware that defendant had a relationship with plaintiff who used to reside at defendant's apartment. When defendant was abroad, she used to go and check her home once a week as defendant had given her the key to her flat When defendant was away, she sometimes met plaintiff at the apartment. Around May 2002 when defendant was abroad, she telephoned witness and asked her if there was a wooden box in the spare bedroom. Marika Micallef replied in the affirmative. Defendant was angry because she had told plaintiff several times to take his possessions out of her apartment. Witness confirmed that she did not open the box and therefore was not aware of the contents except that defendant had told her that it contained a silver tea set belonging to plaintiff. Some time after the phone call, when defendant was still abroad, the wooden box was removed from the flat. To her knowledge, only defendant and herself had the keys of defendant`s flat.

III. Defendant`s fourth plea (Prescription - Art. 2156(f) of Chapter 16)

Sec 2156(f) of Chapter 16 states as follows –

The following actions are barred by the lapse of five years …
actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed ;

First and foremost, the Court cannot see the relevance of this provision with regard to plaintiff`s principal demand. In fact defendant cannot raise the plea of five-year prescription with regard to that principal demand. As the second demand is clearly ancillary or accessory to the principal demand, the plea cannot be raised against that second demand since its effect would only come out if defendant fails to abide by the first demand.

This Court in its judgement of the 30 October 2003 in re "**Stencil Pave (Malta) Ltd vs Dr. Maria Deguara noe**" held that –

"hija regola ewlenija fil-procedura li l-prova li l-azzjoni hija preskritta trid issir minn min iqanqal l-eccezzjoni, u ghalkemm il-parti attrici tista` tressaq provi biex tittanta xxejjen dawk tal-parti mharrka billi tmeri li ghadda z-zmien jew billi ggib `il quddiem provi li juru li l-preskrizzjoni kienet sospiza jew interrotta, il-piz jaqa` principalment fuq min jallega l-preskrizzjoni. Hi l-parti mharrka li trid tipprova li l-parti attrici ghaddhielha z-zmien utli biex tressaq il-kawza, u dan minn zmien minn meta dik il-kawza setghet titressaq".

(see also "**Holland noe vs Chetcuti**" – Court of Appeal – 25 ta` Frar 2000 ; "**Vella vs Cefai**" – Court of Appeal - 5 ta` Ottubru 2001 ; "**Portelli vs Psaila**" - First Hall Civil Court - 29 ta` Mejju 2003 ; "**Causon noe vs Sheibani**" – Commercial Court – 4 ta` Dicembru 1987 ; "**Camilleri vs Frendo**" (Kollezz. Vol. XII.144) ; "**Borg vs Testaferrata Bonici**" – Court of Appeal – 24 ta` Marzu 1958).

In particular in the judgement "**Causon vs Sheibani noe**" the Court stated as follows –

"Illi min jeccepixxi l-preskrizzjoni hu obbligat li jaghmel prova sodisfacenti tad-data meta l-perijodu tal-preskrizzjoni jibda jiddekorri ghaliex diversament il-Qorti qatt ma tkun f'posizzjoni li tikkonstata jekk il-perijodu applikabbli tal-preskrizzjoni jkunx iddekorra jew le".

It is a point of law that prescription should be interpreted restrictively, and therefore where doubt prevails on its application, that should militate against the party that raises the plea. (see "**Alf Mizzi & Sons (Marketing) Limited vs Dismar Company Limited**" – First Hall Civil Court – 12 October 2004 and "**Ellul noe vs Vella noe**" – Court of Appeal – 8 May 2001). Prescription is to be applied within the strict limits established by law not to upset the quest for justice on the merits.

Secondly, the Court considers as legally tenable the line taken by plaintiff against the plea of prescription by referring to Sec 2118 of Chapter 16 which states as follows –

Persons who hold a thing in the name of others or the heirs of such persons, cannot prescribe in their own favour : such are tenants, depositaries, usufructuaries, and, generally, persons who hold the thing not as their own.

In this case, defendant does not allege that the items claimed by plaintiff were her property or that she was holding them in her own right. She acknowledged the fact that the items which she deposited in a safe deposit box at HSBC were the property of plaintiff. Defendant therefore cannot plead prescription on items which she was holding not as her own.

Thirdly, in the third plea of her sworn reply, defendant claims that there should be a set off between the amounts due to plaintiff and some amounts which were allegedly due to her. However, such a plea runs counter and is inconsistent with any plea of prescription. In a judgement of the 22 November 2001 given by the Court of Appeal in its Inferior Jurisdiction in re '**Raymond Vella vs Moby Rentals Limited'** it was stated that –

L-eccezzjoni tat-tpacija hija inkompatibbli mal-eccezzjoni tal-preskrizzjoni. Meta tnejn min-nies huma debituri lejn xulxin, isir bejniethom it-tpacija ipso jure. Din it-tpacija ssir minghajr ma jkunu jafu d-debituri hekk kif ikunu jezistu zewgt idjun fi zmien wiehed, u d-djun jinqatlu wiehed bl-iehor sa fejn ikunu indaqs. It-tpacija ssir biss bejn zewgt idjun li jkollhom it-tnejn bhala oggett somma ta' flus li jkunu t-tnejn likwidi u li jistghu jintalbu. Minn dan naraw illi l-eccezzjoni tat-tpacija fiha nfisha tammonta ghall-ammissjoni tad-debitu u li dan id-debitu huwa dovut, biss m'ghandux jithallas ghax huwa pacut minn ammont iehor dovut mill-kredituri. Ghalhekk l-eccezzjoni tat-tpacija xxejjen l-eccezzjoni tal-preskrizzjoni billi ma jistax ikun hemm tpacija kemm-il darba l-kreditu mhux dovut ghax dan huwa preskritt.

Defendant`s fourth plea is therefore being dismissed.

IV. Plaintiff`s demands

The Court is faced with two opposing and conflicting versions of events. For such situations, our Courts have elicited principles to be applied for the proper evaluation of evidence.

In its judgement of the 24 March 2004 in re '**Maria Xuereb et vs Clement Gauci et'** the Court of Appeal stated as follows –

"Huwa pacifiku f'materja ta' konflitt ta' versjonijiet illi l-Qorti kellha tkun gwidata minn zewg principji fl-evalwazzjoni tal-provi quddiemha :

1. Li taghraf tislet minn dawn il-provi korroborazzjoni li tista' tikkonforta xi wahda miz-zewg verzjonijiet bhala li tkun aktar kredibbli u attendibbli minn ohra ;

2) Fin-nuqqas, li tigi applikata l-massima "actore non probante reus absolvitur".

*Ara a propozitu sentenza fl-ismijiet "**Fogg Insurance Agencies Limited noe vs Maryanne Theuma**", Appell, Sede Inferjuri, 22 ta' Novembru, 2001.*

*Fi kliem iehor il-Qorti ghandha tezamina jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita` u specjalment dawk tal-konsistenza u verosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant (**Kollez. Vol L pII p440**)."*

Likewise in the judgement by this Court (**PA/TM**) of the 30 October 2003 in re "**George Bugeja vs Joseph Meilak"** it was stated that :

*"Jinsab ravvisat fid-decizjoni fl-ismijiet **"Farrugia vs Farrugia",** deciza minn din il-Qorti fl-24 ta' Novembru, 1966, li –*

"il-konflitt fil-provi huwa haga li l-Qrati jridu minn dejjem ikunu lesti ghaliha. Il-Qorti ghandha tezamina jekk xi wahda miz-zewg versjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita' u specjalment dawk tal-konsistenza u verosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet, u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant".

*Fil-kamp civili ghal dak li hu apprezzament tal-provi, il-kriterju ma huwiex dak jekk il-gudikant assolutament jemminx l-ispjegazzjonijet forniti lilu, imma jekk dawn l-istess spjegazzjonijiet humiex, fic-cirkostanzi zvarjati tal-hajja, verosimili. Dan fuq il-bilanc tal-probabilitajiet, sostrat baziku ta' azzjoni civili, in kwantu huma dawn, flimkien mal-proponderanza tal-provi, generalment bastanti ghallkonvinciment. Ghax kif inhu pacifikament akkolt, ic-certezza morali hi ndotta mill-preponderanza tal-probabilitajiet. Dan ghad-differenza ta' dak li japplika fil-kamp kriminali fejn il-htija trid tirrizulta minghajr ma thalli dubju ragjonevoi. Kif kompla jinghad fl-imsemmija kawza "**Farrugia vs Farrugia**", "mhux kwalunkwe tip ta' konflitt ghandu jhalli lill-Qorti f'dak l-istat ta' perplessita' li minhabba fih ma tkunx tista' tiddeciedi b'kuxjenza kwieta u jkollha taqa' fuq ir-regola ta' in dubio pro reo".*

In another judgement of the 28 April 2003 in re "**Emanuel Ciantar vs David Curmi noe"** this Court (**PA/PS**) stated as follows –

"Huwa ben maghruf f'materja konsimili illi mhux kwalunkwe konflitt, kontradizzjonijiet jew inezattezzi fil-provi ghandhom ihallu lill-Qorti f'dak l-istat ta' perplessita` li minhabba fihom ma tkunx tista' tiddeciedi b'kuxjenza kwieta jew jkollha b'konsegwenza taqa' fuq ir-regola ta' in dubio pro reo."

In its judgement of the 17 March 2003 in re "**Enrico Camilleri vs Martin Borg** the Court of Appeal in its Inferior Jurisdiction had this to state :

" … kif pacifikament akkolt fil-gurisprudenza taghna "l-gudikant, fil-kamp civili, ghandu jiddeciedi fuq il-provi li jkollu quddiemu, meta dawn jinducu fih dik ic-certezza morali li kull tribunal ghandu jfittex, u mhux fuq semplici possibilitajiet ; imma dik ic-certezza morali hija bizzejjed, bhala li hija bazata fuq il-preponderanza tal-probabilitajiet".

*("**Eucaristico Zammit –vs- Eustrachio Petrococchino**", Appell Kummerc, 25 ta' Frar 1952; "**Paul Vassallo –vs- Carmelo Pace**", Appell Civili, 5 ta' Marzu 1986).*

Il-Qorti allura jehtiegilha tara jekk il-versjoni l-wahda ghandhiex teskludi lill-ohra fuq il-bilanc tal-probabilitajiet …"

In this case, we have on the one hand, the version of plaintiff who states that after defendant locked him out of her flat, the latter returned his clothes through a third party but not the precious items which were at her flat prior to his lockout and which he listed in Doc A. This version is corraborated by plaintiff`s sons who insist that the precious items were actually at defendant's house and that they were never returned. On the other hand, defendant in her version alleges that the only objects left in her possession and pertaining to plaintiff were those which she placed in a safety deposit box at HSBC and that all others were returned. The only witnesses in support of defendant`s claim were Joseph Bonnici who testified that he saw a candlestick at plaintiff's apartment, and Marika Micallef who stated that at defendant`s flat there was a wooden box (contents of which were unknown to her) which was removed by someone unknown to her when defendant was abroad.

After having assessed and weighed all facts, circumstances and evidence, this Court is of the view that plaintiff's version of events is more credible and likely on a balance of probabilities than that of defendant.

Defendant states that she packed plaintiff's clothing in boxes and kept a list of their contents. Nonetheless for no plausible reason she did not make a list of the items in the wooden box. Nor did she take details of the candlesticks. It is not veritable that for belongings of a moderate or insignificant value defendant keeps a detailed list but not for items of considerable value. The fact that defendant brought Marika Micallef as witness supposedly to prove that the wooden box had been removed in her absence does not prove in any safe or sufficient manner that the wooden box was indeed removed by plaintiff. This Court considers the other witness Joseph Bonnici as an unreliable witness as it is highly improbable that for no particular reason whatsoever during the course of his work in various premises he managed to identity in a particular place a particular candlestick that he had seen elsewhere and was able to recall such a detail of no particular relevance or importance to him, years later when interviewed before this Court. Everything is possible but this Court considers Mr Bonnici`s account as unlikely and improbable.

Defendant produced at fol 94 a photograph in order to show that a candlestick of plaintiff was displayed at her house. She also confirmed that there was silverware situated in her own house allegedly in a wooden box and that she still possessed gold objects belonging to plaintiff. This Court is not convinced of defendant`s good intentions. Her design was clearly motivated by her desire to put undue pressure on plaintiff rather than to preserve her rights. If defendant wanted to protect her interests, there was absolutely no reason whatsoever on her part to place the gold items belonging to plaintiff in a bank safe deposit box rather than presenting them by schedule of deposit in court. If her true intention was to protect her rights while acknowledging the ownership of plaintiff on those gold items, the only way forward for her at law was to deposit the items in court. Defendant cannot therefore claim reimbursement of expenses for a

procedure which she followed without reason at law. This Court notes that during the course of the suit, not once did defendant show any willingness on her part to release in favour of plaintiff the contents of the safe deposit box despite her acknowledgement that plaintiff was the rightful owner and despite the fact that she had placed the items in that deposit box without plaintiff`s consent.

Defendant does not contest plaintiff`s statement that prior to the filing of the suit, he had made contact with defendant`s lawyer and an appointment was scheduled for the parties to meet with regard to the issue of the return of the items belonging to plaintiff and despite the scheduled appointment, defendant never turned up. One must also note that defendant`s declaration that she was not willing to give back any objects belonging to plaintiff unless the latter paid her back the Lm1000 which he had received from her on loan.

In the circumstances, this Court rejects defendant`s pleas on the merits, accedes to plaintiff`s first demand as it is well-founded at law and in fact. This Court also accedes to plaintiff`s second demand. The estimates of the items listed in Doc A were not contested by defendant and this Court considers the valuations as fair and reasonable.

V. The counter-claim

Plaintiff`s third plea – Prescription : Sec 2156(e) of Chap 16

The provision in question states as follows :

The following actions are barred by the lapse of five years …(e) actions for the return of money given on loan, if the loan does not result from a public deed ;

In the third paragraph of his reply to the counter-claim, plaintiff states that he did not take money on loan from defendant and insists that the funds that he received from her were an act of liberality not a loan. The plea involves a claim alleging the inexistence of a credit. Such a plea does however run counter to the plea of prescription.

In a judgement of the 5 October 2001 in re `**AIC Guido Vella vs Dr Emanuel Cefai**` the Court of Appeal held that –

`*Ghalhekk filwaqt li gie ritenut illi l-eccezzjoni tal-pagament ma kienitx inkompatibbli ma' dik tal-preskrizzjoni, gie minn dejjem sostnut illi hija inkompatibbli mal-eccezzjoni tal-preskrizzjoni, dik tal-inezistenza assoluta tal-kreditu jew dik tal-kompensazzjoni.*`

Furthermore in paragraphs 4 and 6 of his reply, plaintiff pleaded that he had rendered services to defendant and by so doing he had most certainly reimbursed defendant any moneys which she may have given him.

This Court is of the view that a plea of this nature is inconsistent with any plea of prescription. In a judgement of the 22 November 2001 in re `**Raymond Vella vs Moby Rentals Limited**` the Court of Appeal in its Inferior Jurisdiction stated as follows –

`*L-eccezzjoni tal-kompensazzjoni timporta r-rikonjizzjoni tad-dejn u tali rikonoxximent jinterrompi l-preskrizzzjoni u jimporta wkoll rinunzja ghall-preskrizzjoni li tkun gja' kompjuta.*

L-eccezzjoni tal-pagament mhix inkompatibbli ma' dik tal-preskrizzjoni. Hija inkompatibbli mal-eccezzjoni tal-preskrizzjoni, dik tal-inezistenza assoluta tal-kreditu jew tal-kompensazzjoni.

L-eccezzjoni tal-kompensazzjoni, jekk tinghata wara li jkun ghadda z-zmien tal-preskrizzjoni tikkostitwixxi rinunzja tacita ghall-istess preskrizzjoni. Il-preskrizzjoni hija inkompatibbli mal-eccezzjoni tal-kompensazzjoni. Xejn ma jiswa illi l-kompensazzjoni tigi opposta in subordine u bla pregudizzju tal-preskrizzjoni ghax bil-fatt tieghu stess il-konvenut li jeccepixxi l-kompensazzjoni jigi li jirinunzja ghall-preskrizzjoni li hu ma jistax isalva b'semplici riserva.

Ghaldaqstant l-eccezzjoni tal-preskrizzjoni mhix aktar ammissibbli jekk il-konvenut in segwitu ghaliha jopponi l-kompensazzjoni.`

Plaintiff`s third plea is therefore being dismissed.

VI. Defendant`s demands in the counter-claim

1) First demand

This Court rejects defendant`s claim that plaintiff should be held responsible to compensate her for the costs which she allegedly incurred with HSBC. Firstly, as previously noted, defendant was duty bound to minimise costs. To relieve herself from any liability, she should have effected a deposit in court of any items belonging to plaintiff and in her possession. Secondly, defendant failed to prove her allegation that the items were actually placed in a safe deposit box : no documents of any nature relating directly or indirectly to this banking operation were presented as evidence. The onus of proof was thrust on plaintiff and she failed to discharge that burden of proof by producing the best evidence. Defendant`s first demand is therefore being dismissed.

2) Second demand

Defendant requested this Court to declare that plaintiff was her debtor for the amount of Lm1,000 to satisfy a loan she had given him to purchase a car.

Plaintiff did not testify specifically on this particular point although in his reply to this he stated that although defendant did give him Lm1000 to purchase a case he qualifies the transfer of funds as a grant or an act of liberality but not a loan.

Plaintiff`s son Karl in his testimony acknowledged the fact that defendant gave plaintiff Lm2000 by way of loan of which Lm1,000 were refunded. As for the rest, he stated that he did not know whether the other Lm1000 had being given back.

This Court finds that there is sufficient evidence to prove that an amount of Lm1000 is still due by plaintiff to defendant.

In his reply to the counter-claim, plaintiff alleged that he had rendered services. Apart from generic statements from plaintiff`s sons, that are privy of detail and fair corraboration, this Court finds that plaintiff`s claims were not only not duly substantiated but not even quantified. Plaintiff`s defence on that count is therefore being rejected.

3) <u>Third demand</u>

This Court cannot accede to the defendant’s claim of set-off.

In the judgement `**Raymond Vella vs Moby Rentals Limited**` **(op. cit.)** it was stated that –

`*L-eccezzjoni tat-tpacija ex lege u ipso jure tista` biss issir bejn zewgt idjun li jkollhom it-tnejn bhala oggett somma ta' flus u li jkunu t-tnejn likwidi u li jistghu jintalbu. Hu ghalhekk qed jigi ritenut illi l-kompensazzjoni ma tistax tigi invokata bhala li operat ruhha ipso jure ghar-rigward ta' krediti li ma kienux ammessi mill-parti l-ohra. Fi kliem iehor il-kompensazzjoni ma tistax issir jekk mhux bejn zewg debiti ugwalment likwidi u certi.*`

Set-off arises only when two debts which are of the same pecuniary nature, and are liquidated and due.

Sec 1197(1) of Chap 16 states that –

Set-off shall only take place between two debts both of which have for their subject-matter a sum of money or a determinate quantity of fungibles of the same kind, and which are both for a liquidated amount and exigible.

In this case, plaintiff`s principal demand is an order for the return for the return of his belongings. This is therefore not a case of two debts for sums of money. No set-off can thus take place.

Moreover **Sec 1199 of Chap 16** states that –

`*Set-off takes place whatever may be the consideration of either of the debts, except in the following cases:(a) when a demand is made for the restoration of a thing of which the owner was unjustly deprived; (b) when a demand is made for the return of a deposit, or of a loan for use or commodatum; (c) in the case of a debt in respect of maintenance not subject to attachment.*`

4) Fourth demand

This is a demand consequential. It is being dismissed as well.

Decision

For the reasons above, this Court is hereby deciding the cause between the parties as follows –

Rejects defendant`s fourth plea, that of prescription according to Sec 2156(f) of Chapter 16.

Rejects all the rest of defendant`s pleas to plaintiff`s demands.

Accedes to plaintiff`s first demand. Orders defendant to return to plaintiff, within thirty (30) days from today, all items listed in Doc A (at folio 5) that were in her possession.

Accedes to plaintiff`s second demand. In case of default, orders defendant to pay plaintiff the sum of eighteen thousand two hundred thirty nine Euro (€18,239) being the value of the items listed in Doc A (at folio 5) with legal interest that shall accrue from today until the date of final payment.

Rejects plaintiff`s third plea to the counter-claim, that of prescription according to Sec 2156(e) of Chapter 16.

Rejects plaintiff`s fourth, fifth and sixth pleas to the counter-claim.

Accepts plaintiff`s first and second pleas to the counter-claim.

Rejects defendant`s first demand in the counter-claim.

Accedes to defendant`s second demand in the counter-claim.

Rejects defendant`s third and fourth demands in the counter-claim.

Orders defendant to bear all costs relating to the sworn application and the sworn reply, including the costs of all precautionary warrants filed by plaintiff against defendant.

Orders plaintiff and defendant to bear in equal shares, that is fifty per cent (50%) each, all costs relating to the counter-claim and the sworn reply to the counter-claim.

< Final Judgement >

----------END----------