MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE
SILVIO CAMILLERI

THE HON. MR. JUSTICE
TONIO MALLIA

THE HON. MR. JUSTICE
JOSEPH AZZOPARDI

Sitting of the 29 th November, 2013

Civil Appeal Number. 118/2012/1

Antonius Kok

v.

Josephine sive Josette Faure

The Court;

Having seen the sworn application which was filed by plaintiff on the 6th of February 2012 and which reads as follows:

"Illi fis-26 ta' Ottubru 2004, l-intimata Josette Faure akkwistat minghand is-socjeta` Verdala Mansions Limited,

proprieta` immobiljari fir-Rabat Malta u cioe` l-appartament internament enumerat 34, fit-tieni sular, formanti parti minn korp ta' appartmenti bl-isem Verdala Mansions, tal-kejl ta' circa 366.10 metri kwadri kif ukoll "lock up garage" ghal zewg karozzi, bin-numru 40, fil-livel bin-numru 0 tal-kejl ta' circa 30 metri kwadri, bil-prezz komplessiv miftiehem ta' mitejn u tmenin elf lira maltin (Lm280,000) ekwivalenti llum ghal Euro 652,400 approssimativament, taht il-kondizzjonijiet kollha naxxenti mill-att pubbliku fl-atti tan-Nutar Remigio Zammit Pace tas-26 ta' Ottubru 2004 (kopja hawn annessa u mmarkata Dok A);
"Illi l-awwist ta' din il-proprieta`, kif ukoll l-ispejjez kollha relattivi ghall-kuntratt ta' akkwist, kienu ffinanzjati intierament mir-rikorrent;

"Illi fil-30 Gunju 2011, inghatat sentenza mill-Prim Awla tal-Qorti Civili ta' Malta fil-kawza fl-ismijiet Antonius Kok v Josephine sive Josette Faure (Rikors 480/09 - kopja hawn annessa u mmarkata Dok B) li biha din il-Qorti, inter alia, iddecidiet konklussivament li fl-akkwist tal-proprieta immobiljari fuq imsemmija, l-intimata kienet qed tagixxi fil-kapacita` ta' prestanome tar-rikorrent. Il-Qorti kkonkludiet hekk:

""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 of repaying the money advance for its purpose, which after all, was not spent in her interest but in the interest of plaintiff."

"Illi din is-sentenza ma gietx appellata u ghalhekk tikkostitwixxi "res gudikata".

"Illi wara s-sentenza, u cioe' fid-29 Lulju 2011, ir-rikorrent irregistra l-interess patrimonjali tieghu emergenti mid-decizjoni tal-Qorti permezz ta' att pubbliku fl-atti tan-Nutar Henri Vassallo, liema att gie debitament registrat fir-Registru Pubbliku ta' Malta u jinsab hawn anness u mmarkat Dok C.

“Illi, konsegwentement ghas-sentenza moghtija minn din il-Qorti, ir-rikorrenti ukoll sejjah lill-intimata tersaq ghall-ezekuzzjoni tal-formalitajiet necessarji sabiex ir-registrazzjoni tal-proprieta` tieghu tigi trasferita ghal fuq ismu;

“Illi minkejja li l-intimata accettat permezz ta' emails li l-proprieta` mhix taghha in virtu tas-sentenza tal-Qorti, din baqghet ma resqitx ghat-trasferiment tar-registrazzjoni tal-proprieta fuq imsemmija lir-rikorrent li ghalhekk kellu jipprocedi b'din il-kawza.

“Ghaldaqstant u a bazi tas-suespost, ir-rikorrent umilment jitlob illi dina l-Onorabbli Qorti, prevja kwalunkwe dikjarazzjoni ohra opportuna, joghgobha:

“1. Tordna u tikkundanna lill-intimata tersaq ghat-trasferiment tar-registrazzjoni tal-Proprieta, li skond id-decizjoni mhux appellata ta' din il-Qorti giet akkwistata mill-intimata bhala prestanome fl-interess tar-rikorrent, ghal fuq isem ir-rikorrent taht dawk il-provvedimenti kollha li jidhrilha xierqa u opportuni.

“2. Tiffissa data, hin u lok ghall-pubblikazzjoni tal-att ta' transferiment opportun.

“3. Tinnomina Nutar pubbliku sabiex jippubblika l-att ta' transferiment tar-registrazzjoni tal-proprieta immobiljari lir-rikorrent u sabiex jiehu hsieb il-formalitajiet kollha rikjesti mil-ligi ghall-istess skop.

“4. Tinnomina kuratur deputat sabiex, fil-kontumacja taghha, jirrapprezenta lill-intimata fuq l-atti kollha necessarji ghat-trasferiment tar-registrazzjoni tal-proprieta immobjarji fuq imsemmija ghal fuq isem ir-rikorrent.

“5. Tordna lill-intimata thallas kwalunkwe taxxi u spejjez konnessi mat-transferiment tar-registrazzjoni tal-proprieta immobiljari lir-rikorrenti li l-Qorti jidhrilha xierqa.

"Bl-ispejjez kontra l-intimata illi hija minn issa ngunta ghas-subizzjoni."

Having seen the sworn reply of the defendant in which she pleads as follows:

"1. Illi l-fatti dikjarati fl-ewwel paragrafu tar-rikors guramentat tal-attur mhumiex ikkontestati.

"2. Illi I-fatti dikjarati fit-tieni paragrafu tar-rikors guramentat tal-attur mhumiex ikkontestati ghalkemm il-kuntest li fih sar dan il-kuntratt ta' akkwist kien ferm aktar kompless u partikolari bejn il-partijiet. In fatti kif jigi ampjament ippruvat fil-kors ta' dawn il-proceduri, din il-proprjeta giet akkwistata fi zmien fejn il-partijiet kellhom relazzjoni personali u intima bejniethom, l-attur ried jispekula u jinvesti f'proprjeta ohra li ma setax skond il-ligi jakkwistaha f'ismu, ghalkemm din l-istess proprjeta kelha sservi bhala r-residenza tal-konvenuta, li l-konvenuta telqet I-impjieg taghha u ssagrifikat beneficcji ghal pensjoni bil-ghan u bit-tama li tghix u tkun mantnuta mill-attur u li ghalhekk l-konvenuta kellu jkollha s-serhan tal-mohh li tkun f'qaghda li tgawdi din il-proprjeta matul hajjitha. Dawn u aspetti ohra tar-relazzjoni bejn il-kontendenti jigu ampjament ippruvati u elaborati fil-kors ta' dawn il-proceduri. Illi ghalhekk dan ma kienx semplici kaz ta' mandat prestanome moghti mill-attur lill-konvenuta f'kuntest astratt kif donnu qed jallega l-attur.

"3. Illi l-fatti dikjarati fit-tielet paragrafu tar-rikors guramentat tal-attur huma kkontestati billi kuntrarjament ghal dak premess, is-sentenza moghtija minn dina I-Qorti kif diversament presjeduta fit-30 ta' Gunju 2011 ma tikkostitwixxi l-ebda stat bejn il-kontendenti dwar l-allegat prestanome jew dwar xi obbligi fiducjarji li seta' kien hemm bejn il-partijiet. Permezz ta' dina s-sentenza il-Qorti cahdet it-talba tal-attur ghar-restituzzjoni ta' I-prezz li skond l-istess attur huwa kien avvanza lill-konvenuta b'self u f'ebda stadju ma qatt allega jew avvanza pretensjonijiet dwar xi mandat prestanome.

"4. Illi ghalhekk is-sentenza tikkostiwixxi biss u limitatament "res gudikata" ghal dak li gie deciz fid-decide tal-imsemmija sentenza u xejn aktar.

"5. Illi dwar l-att pubblikat fl-atti tan-Nutar Henri Vassallo fid-29 ta' Lulju 2011, dan l-att sar mill-attur unilaterlament u ma jbiddel xejn mill-effetti guridici tas-sentenza in kwistjoni u/jew dwar ir-rapport giuridiku bejn il-partijiet. Dan l-att ma jista' jkollu l-ebda effett fug il-mertu ta' din il-kawza jew dwar id-drittijiet tal-konvenuta.

Eccezzjonijiet

"1. Illi preliminarjament, l-ewwel talba hija proceduralment u giuridikament insostenibbli u ghandha tigi michuda bl-ispejjez ghaliex is-sentenza moghtija minn dina l-Qorti tid-29 ta' Lulju 2011 ma tikkreja l-ebda stat bejn il-kontendenti dwar il-kwistjoni ta' prestanome u li konsegwentement ma ghandhiex titqies bhala res gudikata fil-konfront tal-eccippjenti. Fic-cirkostanzi dina l-Onorabbli Qorti hija prekluza milli taghti ordni kif qed tintalab taghmel a tenur tal-ewwel domanda attrici minghajr ma tigi espressament mitluba tiddikjara u tiddeciedi jekk l-eccipjenti verament kenitx qed tagixxi bhala l-prestanome tal-attur jew fl-alternativ kienux vigenti bejn il-partijiet xi modalitajiet ta' dan l-allegat mandat prestanome jew ta' xi obbligi fiducjarji bejn il-partijiet.

"2. Illi subordinatament u anke jekk jigi dikjarat u deciz illi l-proprjeta mertu ta' dina l-vertenza giet akkwistata mill-eccippjenti bhala prestanome fl-interess tal-attur, huwa evidenti illi l-oggett ta' dan l-allegat mandat prestanome kien illecitu ghaliex kontra l-ligi u li kieku l-Qorti kellha tilqa' din it-talba kif proposta tkun qed tissanzjona illegalita u tippermetti lill-attur jevadi l-ligijiet vigenti dwar akkwist ta' proprjeta immobbli minn barranin f'Malta.

"3. Illi subordinatament u fil-mertu, jekk b'xi mod il-Qorti tkun propensa illi tilqa' t-talbiet attrici, huwa mehtieg li jigi stabbilit u deciz n-natura u l-modalitajiet ta' dan il-mandat prestanome u tal-obbligi fiducjarji kollha ezisenti bejn il-kontendenti, inkluz l-effett tar-revoka jew terminazzjoni ta' kwalunkwe mandat prestanome, b'dan illi l-eccippjenti tigi protetta fl-okkupazzjoni tal-proprjeta in

kwistjoni in vista tac-cirkostanzi kollha li wasslu sabiex l-attur jinnominaha bhala l-prestanome tieghu.

"4. Illi ghalhekk l-esponenti qeghda tipprevalixxi ruhha mill-azzjoni ttentata mill-attur u tressaq talbiet rikonvenzjonali sabiex tirrikonvenzjona lill-attur sabiex dikjarat illi hija ghandha dritt tokkupa din il-proprjeta."

Having seen the counter-claim of defendant and the sworn reply of plaintiff to the counter-claim, which, however, are not pertinent to the appeal now before this Court;

Having seen the judgement delivered by the First Hall, Civil Court on the 22nd October 2012 by virtue of which the Court dismissed the first two pleas of defendant;

The Court gave its judgement after having made the following observations:

"On the 6th February 2012 plaintiff filed a sworn application requesting the court to condemn the defendant to transfer in his name apartment 34, Verdala Mansion together with a lock up garage, purchased by contract dated 26th October 2004 published by Notar Remigio Zammit Pace. Plaintiff's request is based on a judgment delivered by this court in the case **Antonius Kok vs Josephine sive Josette Faure** (480/2009) on the 30th June 2011 wherein the court stated:-

""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.".

"The judgment was not appealed, and therefore it is final[1].

"In her first plea, the defendant claims that the judgment delivered on the 30th June 2011 is not a *res judicata*[2]. The court does not agree. It is true that the last paragraph of the judgment states:-

""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.".

"However the court concluded that Faure bought the apartament at Verdala Mansions as a fiduciary of the plaintiff. It is not permissible for this court to delve on this matter any futher. The principle of legal certainty must prevail, and therefore this court is precluded from reconsidering the matter. The judgment delivered on the 30th June 2011 is extremely clear. The court declared that there was no loan or donation, but merely a *prestanome* agreement since at the time plaintiff could not purchase another property since he was a foreigner and already owned property in Malta[3]. If the court were to reconsider the matter afresh there is a potential risk that a conflicting decision is reached. The scope of the principle of *res judicata* is to avoid such a scenario.

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[1] On the 27th July 2011 the Registrar issued a declaration confirming that no appeal was filed (fol. 34).

[2]

[3] The court stated: *"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 himslef admits when explaining the reason for the 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 repair.". 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."* (fol. 33).

"In the case **Cassar Airconditioning Systems Ltd vs Norman Zammit, the Court of Appeal[4] highlighted**:

*""per riconoscere il vero portata di una sentenza, occorre indagare quale fosse stata la questione sulla quale il giudice fu chiamato a pronunciarsi e la discussione che precedette il suo giudizio, ed esaminare il dispositivo nel suo complesso, raffrontandolo, mettendolo in armonia colla motivazione la quale è anche essa parte della sentenza, sebbene dalla stessa non ne sorga il giudicato" ("**Filippo Farrugia Guy et -vs- Sac. Angelo Farrugia**", Appell Civili, 12 ta' Novembru 1919). L-istess haga intqal fis-sentenza "**Salvatore Debono -vs- Ernest Royston Matthew et** Kopja Informali ta' Sentenza **nomine**", Appell Civili, 24 ta' Ottobru 1966, u, cjoe, li "ddispositiv ma jistax ma jinqarax fid-dawl tal-premessi".*

"Similarly in **Joseph Camilleri vs Lilian Mallia** the Court of Appeal held[5]:

""Jista' jigri li decizjoni ma tkunx intierament fil-parti dizpozittiva tas-sentenza izda anke fil-parti razzjonali taghha meta fil-motivazzjoni tigi definita u rizoluta xi vera kwistjoni b'mod li dik il-parti tkun il-premessa logika u necessarja mad-dipozittiv u allura dik il-parti tifforma parti mid-dispozittiv li kollha flimkien jiffurmaw il-gudikat.".

"The defendant claims that she was surprised with the contents of the judgment. The court cannot agree. During the compilation of evidence the plaintiff was very clear in stating that the property was bought in his name for the simple reason that he already owned property in Malta. The court had a right to reach its own conclusions based on the evidence, and had no legal obligation to uphold either party's contention. In any case, the defendant had the opportunity to file an appeal and contest thereby contest the judgment.

[4] 1st March 2006 – Judge P. Sciberras.
[5] 5th October 1998.

"As regards to the **second plea**, defendant is claiming that in any case the agreement of *prestanome* is illicit as it is contrary to law. She contends that if plaintiff's request is upheld, the court would be sanctioning an illegality and permitting the defendant to evade the applicable law with regards to acquisition of immovable property by foreigners in Malta. In paragraph 22 of the judgment the court held:-

""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 the plaintiff.".

"According to Article 4 of the *Immovable Property (Acquisition by Non-Residents) Act* (Chapter 246)[6]:-

""4. (1) Save as hereinafter provided, with effect from 30th May, 1974, a non-resident person[7] may not acquire immovable property by or under any title, and in any manner, whatsoever, whether by act inter vivos or causa mortis, and including prescription, occupancy or accession; and any deed, will or other act purporting to transfer or transmit any immovable property to a non-resident person, and any devolution or other event having the effect of transmitting immovable property and which but for the provisions of this Act would have transmitted such property in favour of a non-resident person, shall be null and void and be without effect for all purposes of law and in regard to all persons; and any transfer, payment or other thing made or done or given as part or in consequence of, or as ancillary to, anything which is prohibited as aforesaid shall likewise be null and without effect and, as and where appropriate, the subject matter thereof shall be returned, restored, refunded, cancelled or otherwise dealt with accordingly.".

[6] Vide also Article 3.
[7] Vide definition in Article 2 of the Act.

"It is not contested that according to Maltese law plaintiff could not at the time of purchase, acquire property in his name. In this respect Notary Remigio Zammit Pace confirmed: *"I am aware that, at the time of the sale of the property, Mr Kok already owned an immovable property in Malta and could not therefore acquire another property in his name."*[8]. The plaintiff confirmed that he did not purchase the property in his personal name because he had been advised that: *"as Maltese law stood at the time, it was not possible for a foreigner like myself to purchase several properties even though I had the necessary finances to do so."*[9]. The court considered that defendant acted as mandatary for plaintiff so that he could purchase property in Malta since at the time he was precluded from acquiring property in his own name. Therefore, it is not essential for the court to assess whether at the time of the purchase he was a resident or non-resident for the purposes of Chapter 246 and whether he could purchase property in Malta without the need to ask for a permit. It is evident that the court's reasoning, in the judgment dated 30th June 2011, is based on these facts.

"In the judgment delivered on the 30th June 2011 the court confirmed that a *prestanome* relationship existed between the parties, and that defendant's obligation is to hold the property on behalf of the plaintiff and eventually transfer it to him. From a reading of the judgment it is clear that the court did not consider whether or not the prestanome agreement between the parties was legal or not.

"Article 987 of the Civil Code states:-

""An obligation without a consideration, or founded on a false or an unlawful consideration, shall have no effect.".

"A consideration is unlawful if *"prohibited by law or contrary to morality or to public policy."* (Article 990 Civil Code).

[8] Fol. 51 of the case 480/09GCD.
[9] Fol. 52 of the case 480/2009.

"Although contracts have the force of law between parties (Article 992), they must be "legally" concluded. The so called law made by the parties must give way to the general law. Agreements cannot derogate from laws which concern the public interest. Therefore contracting parties can freely enter into contracts as long as they are not contrary to law, public policy or to morality.

"Mandate is a contract whereby *"a person gives to another the power to do something for him."* (Article 1856 of the Civil Code).

"According to Article 1871A of the Civil Code persons who hold property for the benefit of others are regulated by the provisions of the Law of Mandate and those relating to fiduciary obligations.

"In terms of Article 1857(1) of the Civil Code:-

""Every mandate must have for its object ***something lawful which the mandator might have done himself.****"*.

"Based on the judgment delivered on the 30th June 2011, it is evident that the agreement concluded by the parties at the time of the purchase of the property was solely intended to bypass the restriction imposed by Article 4 of Chapter 246. The court commented:

""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.****"*.

"An agreement that was eventually transposed in writing between October 2008 and 2009, wherein the parties agreed:-

"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, born 25-01-1940), holder… of identity card number 026286A……..

“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.”.

“According to plaintiff:-

““Sometime in October 2008, I asked Ms Josette Faure to sign the loan agreement whose contents I had discussed with her soon after the deed of sale was concluded, and

Ms Faure did this..... I did this as I needed to safeguard my investment due to the amount of monies involved."[10].

"The agreement which the parties undertook in 2004 prior to the purchase of the premises is illegal and against public policy as its sole purpose was to avoid the general prohibition imposed by law that non-residents cannot acquire property in Malta[11]. Parties that take part in illegal contracts are denied the remedies available under contract law to ensure that the other party performs his/her obligation. Therefore the mandate is null. In a judgment delivered in the case **Rev. Sac. Don Vincenzo Borg vs Giuseppe Caruana et** on the 5th October 1950[12], the court held that once the mandate was illegal, the plaintiff had no right of action for the performance of the obligation by the mandatary; *"In tutti questi casi il mandato non produce verun'azione, ne' da parte del mandante, ne' da parte del mandatario. Quegli non e' ammesso a chiedere conto al mandatario; questi non e' ammesso in giudizio a farsi indennizzare dal mandante..... (Troplong, loc. Cit., para 31)."*[13].

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[10] Fol. 52 of the case 480/2009GCD.

[11] Vide judgment delivered on the 3rd December 2004 by the Court of Appeal in the case **Judith Lucchesi nomine vs Rita Sultana proprio et nomine et**.

[12] (Vol. XXXIV.ii.632). The case concerned the delivery of money to the defendant who had to pass them on to another man. The plaintiff, who was on a boat about to disembark, had been informed that custom officials were going to search him. He therefore passed on the money to the defendant to evade the law.

[13] The court referred to the following referred to Article 1857 (at the time 1959), and cofirmed that the law applied the principle that *"Il mandato bisogna che non sia contrario ne alle leggi, ne alla morale. Sebbene non fosse considerato tale in se' stesso, basterebbe, perche' divenisse illecito, che lo fosse nelle circostanze particolari del mandato" (Pothier, Mandato, para. 231). "L'oggetto del mandato deve essere lecito. Quando il fatto e' illecito, la legge non riconosce alcun effetto alla convenzione; e' una obbligazione fondata su causa illecita, poiche' la causa si confonde coll'oggetto dei contratti; e quando la causa e' illecita, l'obbligazione e' inesistente e non puo' avere alcun effetto" (Laurent, Vol. XXVIII, para. 402). "Il mandato non puo' avere per oggetto un fatto illecito" (Baudry, Del Mandato, Vol. XXIV, para. 444). "E' d'uopo che la cosa che si assume l'incarico di fare sia lecita; giacche', se fosse contraria alla legge o al buon costume, l'accettazzione di un tale incarico non sarebbe obbligatoria; e percio' a chi l'avesse dato non competerebbe alcuna azione contro chi l'avesse accettato, per non essersi dal medesimo fatta la cosa di cui era stato incombenzato, e questi dal canto suo, lungi dall'avere una azione contro colui dal quale fosse di cio' incaricato, sarebbe generalmente punibile se vi avesse adempito. Lo stesso mandante potrebbe in generale essere pur anche perseguitato e punito come complice del fatto..... E' mestieri che il mandatario possa fare la cosa di cui viene incaricato, cioe' che non*

"Both parties knew that the contract was to be peformed illegally, and therefore the law should not help the plaintiff in any way in enforcing his rights under the contract.

"This notwithstanding the judgment delivered on the 30th June 2011 is a *res judicata*. The court confirmed that:-

"1. Defendant signed the contract of purchase as a *prestanome* of the plaintiff.

"2. Defendant's obligation as a *prestanome* is to transfer the property in plaintiff's name.

"The purpose of this lawsuit is to enforce the findings of the court in the judgment delivered on the 30th June 2011, so that the defendant, as plaintiff's fiduciary, transfers the premises in his name. It is true that in the first case the court did not deal with the issue on whether the contract of mandate was based on an illicit cause. However, the defendant could have appealed the judgment and claimed that if the court was to confirm the conclusion reached by the first court, this nothwithstanding the mandate was based on an illicit cause and therefore null and unenforceable. The court is not of the opinion that at this stage it should delve on this matter, once there is a judgment confirming that the defendant signed the contract of sale as a prestanome of the plaintiff and was obliged to transfer the property into his name. As a fiduciary, one of her obligations is:

""to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law." (Article 1124A(4) of the Civil Code).

"Obviously defendant's obligation to transfer the apartment into plaintiff's name is subject to the condition that a permit is issued in terms of Chapter 246 of the

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siavi in lui impedimento per natura o per legge a farla." (Duranton, Vol. XVIII.Del Mandato, para. [92.194].".

Laws of Malta or the competent authorities confirm in writing that no such permit is required in this case."

Having seen that by a decree of the First Hall, Civil Court, delivered in open court on the 16th November 2012, defendant was granted leave to appeal from the said decision at that stage of the proceedings;

Having seen the appeal application of defendant by virtue of which, for reasons submitted, she requests that this court:

"… … revokes the judgment delivered by the First Hall of the Civil Court on the 22nd October 2012 in the case in the names "Antonius Kok vs Josephine sive Josette Faure" accedes to the first and the second defence pleas raised by the appellant in her sworn reply and hence dismisses the action of the plaintiff, with costs of both the Court of First Instance and of this Court to be borne by the plaintiff."

Having seen the reply filed by the plaintiff by virtue of which, for reasons submitted, he requests that the appeal be dismissed and rejected with costs of all proceedings;

Having heard defence counsel;

Having seen the evidence put forward and all the acts of the case;

Considers:

This Court notes that this case refers to a private writing dated 25th October 2004, incorporating an agreement between the parties. There was between the parties disagreement regarding the interpretation of this agreement. Plaintiff Kok said that the writing is a loan agreement, whereas defendant Faure contended that it is a simulated donation. Plaintiff, therefore, filed a law suit (writ no. 480/2009) against defendant seeking the repayment of the loan, whereas defendant filed a counter

claim seeking a declaration that there was no loan but a donation.

The First Hall of the Civil Court in its judgment of the 30th June 2011 (from which no appeal was filed) disagreed with both parties, concluding that what was agreed between the parties was neither a loan nor a donation but a "front" so that plaintiff may avail himself of her name to acquire property which he could not acquire in his own name (a mandate *prestanome*). The Court, therefore, dismissed both plaintiff's claim and defendant's counter-claims.

Following this judgment, plaintiff instituted these new proceedings in which he is requesting that defendant transfers onto his name, the said property in Rabat, Malta. The defendant raised two preliminary pleas, namely that the judgment of the Court of the 30th June 2011, is not a *res judicata*, and that, in any case, the agreement of *prestanome* – as said to be by the Court – is illicit as it is contrary to law. The first Court dismissed both pleas.

The First Court, in dismissing the first plea, noted that to determine the *raison d'être* of a judgment one should not only read the dispositive part thereof but also the reasoning which led the Court to reach its decision. There is no doubt, the Court said, that the other Court had concluded that the property was bought in defendant's name for the simple reason that plaintiff already had property in Malta and was thus, at the time, in the impossibility of acquiring further property in Malta.

As to the second plea, also dismissed by the first Court, the Court did note that the purpose of the agreement was to by-pass the restriction imposed by Article 4 of the Immovable Property (Acquisition by Non-Residents) Act (chapter 246 of the Laws of Malta) which considers as null and void the acquisition of immovable property by a non-resident person as defined in the Act. The first Court in this case noted that while the agreement may be tainted with illegality the purpose of this law suit is simply to "enforce" the findings of the Court as outlined in its

judgment delivered on the 30th June, 2011, namely, to order defendant, as plaintiff's fiduciary, to transfer the premises onto plaintiff's name. It, therefore, said that it could not delve into the matter of illicit cause once there is a judgment confirming that defendant signed the contract of sale as *prestanome* of plaintiff and was obliged to transfer the property into his name.

Defendant appealed from the decision dismissing her two pleas.
As to the first plea, this Court agrees with the decision of the first Court that the judgment of June 2011 is now binding on the parties. It has constantly been observed by our Courts that the "decision" of a particular case can be derived from the motivations leading to the final *decide*, which, therefore, would also be binding on the parties. In the case **Camilleri v. Mallia**, decided by this Court on the 5th October 1998, it was stated that:

"Jista' jigri li decizjoni ma tkunx intierament fil-parti dispozittiva tas-sentenza izda anke fil-parti razzjonali taghha meta fil-motivazzjoni tigi definita u rizoluta xi vera kwistjoni b'mod li dik il-parti tkun il-premessa logika u necessarja mad-dispositttiv u allura dik il-parti tifforma parti mid-dispositttiv li kollha flimkien jiffurmaw il-gudikat."

Again, this Court in the case **Farrugia et v. Farrugia et**, decided on the 23rd April 2012, pointed out that:

"Il-gudikat ta' kawza ghandu jittiehed mhux biss mid-decide, izda wiehed jista' jasal ghal spjegazzjoni tal-istess mehud kont il-konsiderazzjonijiet li wasslu lill-Qorti ghad-decizjoni taghha."

It is true that the fiduciary arrangements which existed or otherwise between the parties were never raised as specific issues by the parties, but the Court was asked to interpret the agreement signed by the parties, and in saying that it is neither a loan agreement nor a donation, it had to express an opinion as to the correct nature of the agreement. The parties, as noted, did not appeal from the judgment, and so they are bound by the decision that

there existed no loan or donation between them. Similarly, that the agreement was of the nature of a mandate *prestanome*, is now binding on the parties, but, and here the Court passes on to the second plea of defendant, that Court did not express itself as to the legality or otherwise of the agreement. All that the Court said is that defendant's obligation as a front or *prestanome* is that of eventually transferring the property to plaintiff, but it did not go into the issue as to whether the obligation is licit or otherwise. This it did not do, for the simple reason that the issue was never brought up or discussed, nor could it have been brought up, at that stage.

To dismiss the parties' claims that the agreement was a loan or a donation the Court had to determine the true nature of the agreement but it did not go beyond that. It noted that the agreement was not a loan, as stated by plaintiff, but a mandate *prestanome*, and so the consequence was a transfer of property and not a money refund as requested by plaintiff. The said Court was explaining the consequences of the nature of the agreement and not expressing an opinion on the existing rights and obligations of the parties.

Parts of a decision should not be read out of context and given a meaning or effect independent from the scope of the judgment. It was not the purpose of the judgment to enforce the rights and obligations of the parties once it decided that no party was correct in its interpretation of the agreement. All that the judgment said was that, in the light of what the agreement appears to be (a mandate *prestanome*), it did not give rise to a loan or a donation as stated by the parties. Nothing more should be inferred from the judgment.

Plaintiff's claims in that case to get his money back were dismissed as the Court said that the agreement was not a loan but a mandate *prestanome*, and what follows from this contract is not a refund of the money disbursed, but an effective transfer. There is, therefore, nothing to "enforce" from that judgment.

In the light of the above, while it is now established that the agreement between the parties is a mandate *prestanome*, it is still open for defendant to contest the validity or licitness of that agreement. Once this issue was effectively raised, it is the duty of the Court to examine it and determine whether the mandate was based on an illicit cause, and the effects that flow from its decision. As this matter was not discussed by the first Court, it is fair that the records of the proceedings be transmitted back to the said Court for it to discuss and decide on this second plea of defendant, and thus give the parties the benefit of a *doppio esame* of its arguments.

Hence, for the above reasons, the appeal of defendant Faure is accepted in part, in that it dismisses the appeal in so far as was requested acceptance of her first plea, but accepts the appeal in so far as the first Court dismissed her second defence plea, and orders the acts of the case to be sent back to the first Court for it to decide on the merits of the second defence plea and, if necessary, on defendant's other pleas.

The costs of the case so far, including those of first instance, are to be borne equally by the parties.

< Final Judgement >

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