



MALTA

**CONSTITUTIONAL COURT
THE HON. MR. JUSTICE -- ACTING
PRESIDENT
GIANNINO CARUANA DEMAJO**

**THE HON. MR. JUSTICE
NOEL CUSCHIERI**

**THE HON. MR. JUSTICE
JOSEPH ZAMMIT MC KEON**

Sitting of the 10 th March, 2014
Civil Appeal Number. 57/2010/1

**Gernot Knoess and *M. Architecture
Limited***

versus

**The Attorney General, the
Commissioner of Police and the
Registrar of Courts**

1. This is an appeal in terms of art. 229(3) of the Code of Organisation and Civil Procedure [“the Code”] entered by the Attorney General and the Commissioner of Police [“the Appellants”] from a decree delivered by the First Hall of the Civil Court on the 25 April 2013 rejecting the Appellants’ motion for a declaration of the desertion of the case in terms of art. 964 of the Code.

2. The facts relevant to this appeal are as follows:
3. On the 28 September 2010 Gernot Knoess and *M. Architecture Limited* ["Plaintiffs"] filed an application before the First Hall of the Civil Court in its constitutional jurisdiction seeking redress for alleged violations of fundamental rights protected under the Constitution and the European Convention Act. After Plaintiffs failed to appear for the first two sittings in the case, the first court by decree of the 26 October 2010 adjourned the case to an unspecified date (*sine die*).
4. On the 2 November 2010 Plaintiffs filed an application in terms of art. 964(2) of the Code for the re-appointment of the case. On the 19 November 2010 the first court decreed that it will re-appoint the case only after Plaintiffs will have filed *affidavits* of their evidence.
5. It was only on the 28 January 2013 – more than two years later – that Plaintiffs complied with the condition set out in the decree of 19 November 2010, whereupon the court by decree of the 30 January 2013 again set the case for hearing on the 14 February 2013.
6. By application dated 12 February 2013 Appellants requested the first court to revoke its decree of the 30 January 2013 (the decree of re-appointment of the case) in view of the fact that the case was to be deemed deserted in terms of art. 964(1) of the Code. By decree of the 25 April 2013 the first court rejected the application for reasons which, in

so far as they are relevant for the purposes of the present appeal, were stated as follows:

“Huwa risaput illi kawża ma taqax deżerta kemm-il darba r-rikors għar-riappuntament isir *entro* t-terminu ta’ sitt xhur u dan anki jekk il-kawża mbagħad tiġi riappuntata wara l-perjodu perentorju ta’ sitt xhur.

“

“... fil-każ in eżami l-proċeduri bil-miktub seħħu fit-termini li teżiġi il-liġi u għaldaqstant huwa applikabbli d-dettami tal-artiklu 964(1) tal-Kap. 12. *Di più* r-rikors tal-attur sabiex tiġi ri-appuntata l-kawża ġie intavolat fit-2 ta’ Novembru 2010, u *cioè* ċertament *entro* s-sitt (6) xhur illi jirrikjedi l-artikolu 964(1) tal-Kap. 12. Għaldaqstant il-fatt illi l-kawża ma ġietx ri-appuntata fi żmien sitt xhur ma jkolpox l-azzjoni attriċi b’deżerzjoni, minkejja n-nuqqas da parti tal-atturi u *cioè* li ma ipprezentawx l-*affidavit* kif kienu ordnati li jagħmlu skond id-digriet tat-18 ta’ Novembru 2010.¹”

7. By application dated 30 April 2013 Appellants requested to court to reconsider its decree of the 25 April 2013 or, failing that, to grant leave to appeal. Leave to appeal was granted on the 27 June 2013, and Appellants filed the relative application of appeal on the 2 July 2013. Plaintiffs accepted notice of service of the application on the 21 November 2013 but they failed to file a reply within the time limit allowed by law.

8. In the first place this court observes that the desertion of the case is being invoked by Appellants not in terms of art. 963 of the Code (failure

¹ It is established that a case is not deemed deserted if the application for re-appointment is filed within the six-month time limit, even if the case is subsequently re-appointed after the lapse of the peremptory time of six months.

... ..

... in the present case the written proceedings were closed within the time prescribed by law, and the applicable provisions are therefore those of art. 964(1) of Chapter 12. Moreover plaintiffs’ application for re-appointment was filed on the 2 November 2010, definitely within the six months prescribed in art. 964(1) of Chapter 12. Therefore, the fact that the case was not re-appointed for hearing within six months does not bring about desertion of the action, notwithstanding plaintiffs’ failure to file the *affidavit* in terms of the decree of 18 November 2010.

to close the written proceedings within the peremptory times established by law) but in terms of art. 964:

“964. (1) Any cause in any court of civil jurisdiction which, after having been set down for hearing, is subsequently by order of the court adjourned to an unspecified date or otherwise suspended, shall be deemed to be deserted unless it is re-appointed for hearing by the court within the peremptory time of six months of it having been so adjourned or suspended or an application for its re-appointment has, within such period, been filed in court:

“ ”

9. The filing of the application within the six-month period is sufficient to avoid desertion even if the case is not re-appointed for hearing within that time. However, this will not apply if the application is rejected because of some irregularity or other valid reason; in that case the applicant will have to file a new, correct, application within the original six-month period. If it were otherwise, the mere filing of an ill-founded application will suspend the desertion indefinitely, which is absurd and was certainly not the intention of the legislator. The same can be said when the application is allowed under a condition. To say that this would suspend the running of time for desertion indefinitely until it pleases the applicant to observe the condition would in effect mean that the applicant would be allowed to prolong indefinitely the time within which he is to comply with the conditions set out in the re-appointment decree. This will defeat the purposes of the institute of desertion, which is meant to avoid delays due to failure by plaintiff to pursue his case diligently. The correct interpretation is that, if an application for re-appointment is allowed subject to applicant's observing some condition

(as in the present case), the applicant must satisfy that condition within the original the six-month limit unless the court for good reason – such as when the time between the delivery of the decree and the expiry of the time is unreasonably short – directs otherwise. Failing that, the case will be deemed deserted.

10. In the present case there can be no doubt that Plaintiffs did indeed fail to act diligently in the conduct of the proceedings. In fact, this lack of diligence is apparent throughout: they failed to appear for the hearing of the case; they allowed more than two years to lapse before filing their evidence by *affidavit*; they even failed to reply to Appellants' application of appeal.

11. This court has on more than one occasion observed that, while the conduct of the parties is relevant in assessing the state's responsibility for unreasonably long judicial proceedings, it is also the duty of the court to ensure that, notwithstanding the casual attitude of the parties, proceedings are conducted expeditiously, and to use all means allowed by law for that end. Indulging parties who take a cavalier attitude towards the proceedings is not conducive to a proper conduct of those proceedings. The institute of desertion is a strong disincentive to carelessness and nonchalance should not be rendered ineffective through a too accommodating interpretation.

12. In the present case Plaintiffs' culpable inactivity amply exceeded the time allowed by law; the case is therefore to be deemed deserted in terms of art. 964 of the Code.
13. For these reasons the court revokes the decree of the 25 April 2013; consequently it also revokes the decree of re-appointment of 30 January 2013 and declares the case deserted on the day on which the time prescribed in art. 964 of the Code expires, in terms of art. 967 of the said Code.
14. All costs are to be borne by Plaintiffs jointly.

< Final Judgement >

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