MALTA

TRIBUNAL GHAL TALBIET ZGHAR

GUDIKATUR DR.

VINCENT GALEA

Seduta tas-26 ta' Mejju, 2014

Talba Numru. 33/2013

Dr. Clinton Bellizzi [I.D. 216377M] in his capacity as Administrator of Melita Mansions Garage Owners Association

Vs

Fiorentina Darmenia Jochimsen

The Tribunal,

Having seen the Notice of Claim put forward by the applicant on the 24th January, 2013 by means of which he requested the Respondant to pay him the sum of one thousand one hundred and sixty three euros and eighty five cents [€1,163.85] and this after stating:

> "The sum of one thousand, one hundred and sixty three Euros and eighty five cents (€1,163.85) representing your share pro rata, from the annual contribution for expenses and fees necessary for the

preservation, maintenance, ordinary repairs, enjoyment and rendering of services in the common interest and electricity bills, arrears of the said contribution and legal costs defrayed to date".

Having seen the Reply filed by the Respondant on the 13th March, 2013 by means of which she replied thus to the Claim put forward by the Claimant:

"Because the claimant appears in Limited capacity and not as natural individual, only, the defendant challenges the claimant's active-legitimation. The alleged claim apparently shall exist in some relation with an association which is not known to the Authority in charge, and not registered acc. to the regulations in the 2nd Schedule of the Civil Code or any other legislation in force in Malta.

The Defendant has never subscribed to an association as mentioned in the writ of summons.

Therefore the Defendant is disputing the claim and will defend herself.

Further, the Defendant applies for this procedure to be conducted in the English language".

Having seen the note of the 13th March, 2013 whereby the Tribunal acceded to the request to hold these proceedings in the English language;

Having seen the note of the defendant dated 29th November, 2013 whereby she stated that:

"*Either for burdens deriving from common parts or to maintain a servitude annexed to immovable property the evidence provided by the*

claimant further clarified that acc. to Art. 3(5) of Chapter 380 LoM the Small Claims Tribunal has no jurisdiction to decide over the claim raised" and

"*purely precautiosuly the defendant raises the plea of prescription*"

Having seen the note of the 8th January, 2014 whereby the case was adourned for judgement for today.

Having seen the Acts;

Considers:-

1. **Francis Cuschieri**, gave evidence and stated that he and his wife owned a business with the trade name Go For It which provided services as an administrator for condominia. One of these condominia was Melita Mansions. He continued stating that his company provided this service to this condominia for two (2) years. They resigned from these duties in August 2012. He also stated that "*during the two years I was acting as an administrator I had contact with Mr Kai Jochimsen and with Mrs Fiorentina Darmenia Jochimsen, we went to their apartment in Rudolph Street Sliema and tried to understand their reason why they were not paying their contribution for the common expenses*" (fol. 51). The witness also stated that "*the main queries by the spouses Jochimsen were that they could not use the lift to the main door of the flats ...* " (fol. 52).

2. **Dr. Christine Bellizzi** stated that she and her Husband, the Claimaint, reside in the Melita Mansions Builiding and they also own two (2) car spaces in the garage complex which is below the apartments. She went on to state that there are five (5) levels of garages underneath the apartments. The lift which leads to the garages goes up to level minus one and then one would have to go up a

couple of stairs which lead you to the street level. The witness also stated that "*the access to minus level one (-1) where the lift is is free and accessible to all the garage owners*" (fol. 53) whilst "*access from level zero (0) upwards is reserved to the apartment owners*" (fol. 53). She stated also that problems with regards to the respondant have been ongoing since the time when the apartments and garages were built that is since 2004. The witness stated that when she spoke to the Respondant she complained that she did not have access to the street from level zero (0) when she was in her garage. Dr. Bellizzi's reply to this complaint was that Respondant only needed to go up a couple of steps from level minus one (-1) to have access to the street. She also spoke to Mr Kai Jochimsen about the situation of Respondant not paying her dues and his reply was, according to Dr. Bellizzi "*... they did not have any ownership of the common parts and thus were not liable to pay any fees*" (fol. 53).

3. **The Claimant Dr. Clinton Bellizzi** stated that the owner's association was authorised to collect the periodical fee on behalf of Church Street Developments Limited by means of a resolution.

4. **Nicky Zahra** was produced as a witness. He stated that he was the project manager of Church Street Developments Limited, which company no longer exists as about two (2) years ago, this company was struck of the Register of Companies. He continued stating that according to a contract of sale dated 27th October 2011 in the acts of Notary Daniela Mercieca, Church Street Developments Limited transferred to Alpine Holdings Limited all the common parts that form part of the garage complex consisting of five (5) levels of garages which garage complex underlies the block of buildings named Melita Mansions in Church Street, Sliema. The witness also stated that he is the Chief Investment Officer in Alpine Holdings Limited. This latter company retained one (1) garage in the complex and pays its share of the common expenses to the owners association. He also stated that he was the person responsible for the setting up of the Owner's Association which was set up "*... to remove the possibility of taking care of all the issues with regards to the common parts from the company and putting it, shifting it to the Owners Association*" (fol. 85). It was the Association, the witness confirmed, that had the right to collect the dues. The dues collected where to be utilised by the said Association.

In cross examination, he stated that two (2) associations were set up. One to look after the forty two (42) garages and the other one to look after the seven (7) apartments. There are also several owners of apartemnts who own garages and are thus in both Associations. The witness stated that he was only involved in the setting up of the garage Association.

Further considers;

5. By means of this present case, the Claimant in his capacity as the Administrator of Melita Mansions Garage Owners Association asked this Tribunal to condemn the Respondant to pay the sum of one thousand one hundred and sixty three euros and eighty five cents [€1,163.85] representing her share pro rata, from the annual contribution for expenses and fees necessary for the preservation, maintenance, ordinary repairs, enjoyment and rendering of services in the common interest and electricity bills, arrears of the said contribution and legal costs defrayed to date. Respondant on her part claimed that the Claimant does not have the necessary legal interest to file this Claim in the sense that the Association "is not registered according to the regulations in the 2nd Schedule of the Civil Code or any other legislation in force in Malta". She also stated that she never subscribed to an association as mentioned in the Claim and thus she is disputing the Claim. Respondant also raises in her various notes, filed periodically during the case, the question of the lack of jurisdiction of this Tribunal in deciding this case[1] and also raised the plea of prescription[2].

6. The Tribunal per force must consider first and foremost whether it has the competence rationae materiae to decide this case because if it results that the Tribunal is not competent to decide this case, then it must stop and not take cognisance of it any longer. The plea of lack of competence can be raised marte proprio by the Tribunal. In our juridical system we find that "*l-inkompetenza hi sollevabbli "ex officio" meta ghar-raguni ta' materja tal-kawza ma tkunx ta' kompetenza tat-tribunal adit*[3]. *Dan ghar-raguni illi l-kompetenza ratione*

[1] see note dated 25th November, 2013 a fol. 94 and note dated 20th May, 2013 a fol. 55 and specifically at fol. 57;
[2] see note dated 25th November, 2013 a fol. 94;
[3] **Emmanuele Vella v. Raffaela Barbara**, Appeal 31st May 1957; **Patrick Grixti Soler v. Vincent Sultana**, Appeal 27th March 1981.

materia hi ta' ordni pubbliku[4] *u din allura lanqas tista' titwarrab bi ftehim bejn il-partijiet*"[5].

7. Thus the Tribunal is duty bound *ex officio* to raise the question of its competence and must thus proceed to give a decision in this regard.

What is the competence of the Tribunal?

8. According to **sub-article (2) of article 3 of Chapter 380** we find that:

> (2)Subject to subarticle (5), the Small Claims Tribunal shall have jurisdiction to hear and determine only all money claims of an amount not exceeding three thousand and four hundred and ninety-four euro and six cents (3,494.06):
>
> Provided that, in determining the sum referred to in this subarticle, no account shall be taken of fees and costs relative to the same claim.

9. Also **sub-article (3) of article 3 of Chapter 380** states that:

> (3)(*a*)If the plaintiff claims payment of several sums due for the same cause, the value of the claim is to be determined by the total amount of the claims.
>
> (*b*)If the plaintiff claims payment of several sums due for different causes, the value of the claim is determined by the highest sum, irrespective of the smaller sums.

[4] Vol. XXIX pII p468

[5] **Carmelo Degiorgio noe v. George Farrugia**, Appeal, 8th May 1981; **John Spiteri et v. Stephanie Spiteri pro et noe**, Appeal Number 23/99 decided by the Rent Regulation Board on the 12th December 2001 and confirmed by the Court of Appeal on the 20th October, 2003, **Sea Services Limited v. Paul Aquilina**, Writ of Summons Number 539/00 decided by the First Hall of the Civil Court on the 12th of December 2001 and **Joe Borg Olivier pro et noe v. Il-Ministru ta' l-Edukazzjoni, Xoghol u Familja**, Application Number 79/11, partial judgement given by the Administrative Review Tribunal on the 26th September, 2011.

(*c*)If the claim is for capital and interest, the value is determined by the aggregate of all the capital sums claimed, and the Tribunal shall have jurisdiction over the claim notwithstanding that the capital and interest claimed in their aggregate exceed three thousand and four hundred and ninety-four euro and six cents (3,494.06).

10. This means that **subject to sub-article (5) of article 3 of Chapter 380**, the Tribunal has the jurisdiction to hear and determine **only all money claims** of an amount **not exceeding** three thousand and four hundred and ninety-four euro and six cents (€3,494.06), provided that, in determining the sum referred to in this subarticle, no account shall be taken of fees and costs relative to the same claim.

11. With reference to the amount of €3,494.06c the law stipulates in **sub-article (3) of article 3 of Chapter 380** that:

i. If the plaintiff claims payment of several sums due **for the same cause**, the value of the claim is to be determined by the total amount of the claims.

ii. If the plaintiff claims payment of several sums due **for different causes**, the value of the claim is determined by the highest sum, irrespective of the smaller sums.

iii. If the claim **is for capital and interest**, the value is determined by the aggregate of all the capital sums claimed, and the Tribunal shall have jurisdiction over the claim notwithstanding that the capital and interest claimed in their aggregate exceed three thousand and four hundred and ninety-four euro and six cents (€3,494.06).

12. And **sub-article (5) of Article 3 of the said Chapter 380** provides:

"*Causes involving questions of ownership of immovable property, or relating to easements, burdens or other rights annexed to such property, even though the claim does not exceed three thousand and four hundred and ninety-four euro and six cents (€3,494.06), and causes of ejectment or eviction from immovable property shall not fall within the jurisdiction of the Tribunal*."

13. From a reading of these articles of the law it transpires that the Tribunal is prohibited by Law from deciding:

i. Causes involving questions of ownership of immovable property;

ii. Causes relating to easements, burdens or other rights annexed to such property,

Even though the claim does not exceed €3,494.06; and

iii. causes of ejectment or eviction from immovable property.

14. It is the Tribunal's considered opinion that, if one were to read this article of the law and interpret it in light of what has been stated above, it results that the Tribunal is competent to decide all those cases which are not specifically excluded by sub-article (5) of article 3 of Chapter 380, or by any other law, as long as these cases deal with Money claims and the amount, taking into consideration what has been stated above, does not exceed €3,494.06c.

15. Reference is also made to the **Fourth Schedule found in Chapter 387** of the Laws of Malta which states that: "*The disputes hereunder stated in Part A shall be settled by arbitration and shall be referred to arbitration under the rules stated in Part B in addition to such rules as may be issued by the Centre from time to time*". In **Part A 1.1 of the Fourth Schedule of Chapter 387** we also find that "*All disputes regarding a condominium which according to the Condominium Act (Cap. 398) are to be submitted to for arbitration*". This

means that mandatory arbitration is imposed only were the Condominium Act so states.

16. We then find, in **article 15(2) of Chapter 387** the meaning of the word **dispute** which "*For the purpose of this Act, ... shall include any controversy or claim arising out of or relating to the agreement, or the breach, termination or invalidity thereof or failure to comply therewith*".

17. **Article 30 of Chapter 398** (The Condominium Act) states that:

"*Saving the provisions of Part VI of the Arbitration Act, in matters which in accordance with this Act* ***may be or are to be referred*** *to arbitration, no court shall intervene or have jurisdiction except where so provided by the said Arbitration Act*". (emphasis by the Tribunal).

18. In the case **Carmel Axiaq et vs Amadeo Abela et** decided by the First Hall of the Civil Court on the 2nd of October, 2012 it was said that "*Kemm ir-Raba Skeda tal-Kap. 387 u l-artikolu 30 tal-Kap. 398 ... jillimitaw il-kazijiet fejn parti ghandha jew tista tmur ghal arbitragg. Hu minnu li l-Kap. 398 jirreferu fl-artikolu 30 ghal vertenzi li jistghu jew ghandhom jigu riferiti ghal arbitragg, pero il-kelma jistghu ma tpoggix obbligi mandatorji fuq il-Qorti li tiddeklina li tisma vertenzi li mhix eskluza bil-ligi fejn il-ligi stess timponi mezz ta' risoluzzjoni alternattiva ghal Qorti jew b'patt bejn il-partijiet*".

19. On a reading of the Condominium Act, one finds various articles of the Law with the words "*may refer the matter to arbitration*". The Tribunal refers to articles 8(7), 11(5), 14(8), 15(3), 15(4), 23(1). One also finds instances where the words "*shall be referred to arbitration*" are used such as in article 20 and article 25.

20. **Article 26 of the Condominium Act** states that:

"*In any dispute that in accordance with this Act is to be or may be referred to arbitration, the rules contained in the Arbitration Act or made thereunder relating to mandatory arbitration shall apply*".

21. Whilst **article 30 of said Act** states that:

"*Saving the provisions of Part VI of the Arbitration Act, in matters which in accordance with this Act may be or are to be referred to arbitration, no court shall intervene or have jurisdiction except where so provided by the said Arbitration Act*"

22. **Sub-article 11 of article 15 of Chapter 387** states that:

"*In addition to those designated by other laws, the classes of disputes referred to in the Fourth Schedule are subject to mandatory arbitration and in such cases the parties shall be deemed to be bound by an arbitration agreement in relation to such disputes*",

23. We have already seen that in the Fourth Schedule of the Arbitration Act we find that "*The disputes hereunder stated in Part A shall be settled by arbitration and shall be referred to arbitration under the rules stated in Part B in addition to such rules as may be issued by the Centre from time to time*" and that in Part A 1.1. of said Fourth Schedule we find that "*All disputes regarding a condominium which according to the Condominium Act (Cap. 398) are to be submitted to for arbitration*". Underling by the Tribunal. Therefore the First Hall of the Civil Court was correct in the case **Axiaq vs Abela** above mentioned to state that mandatory arbitration is imposed only where the Condominium Act so directs. We find that in the Condominium Act there are two (2) instances where the word "*shall*" is used (see articles 20 and 25) and

therefore in these two instances there is no doubt whatsoever that it is the Arbitration Centre which is competent. The issues referred to in these two articles of the law must by law be submitted to the Arbitration Centre. All other issues, specifically where the words "*may refer the matter to arbitration*" are used, then it is the choice of the individual whether to institute proceedings before the Civil Courts or whether to institute them in the Arbitration Centre. If this was not the case then sub-articles (3)[6] and (4)[7] of article 15 of Chapter 398 would not make any sense.

24. In this case the Claimant in his capacity as the Administrator of Melita Mansions Garage Owners Association asked this Tribunal to condemn the Respondant to pay the sum of one thousand one hundred and sixty three euros and eighty five cents [€1,163.85] representing her share pro rata, from the annual contribution for expenses and fees necessary for the preservation, maintenance, ordinary repairs, enjoyment and rendering of services in the common interest and electricity bills, arrears of the said contribution and legal costs defrayed to date. The collection of dues falls within the powers of the Administrator. Nowhere is it found, in the Condominium Act, that these type of cases shall be referred or may be referred to arbitration.

25. As has already been rightly pointed out by this Tribunal in the case **Candida Caruana noe vs Rita Sammut** decided on the 4th of October 2013 "*... minn ezami tal-Kap 398 tal-Ligijiet ta' Malta ma jirrizultax illi hemm specifikat illi azzjonijiet simili ghal din prezenti – u cioe azzjoni ghall-gbir ta' kontribuzzjoni dovuta minn wiehed mill-condomini – ghandha necessarjament tigi riferuta ghall-arbitragg, u galadarba l-azzjoni tittratta dwar hlas ta' kreditu, allura tali*

[6] (3) Where the administrator intends to resign his office before the expiration of the period mentioned in his appointment, he shall call a meeting to discuss the appointment of a new administrator. If during such meeting no agreement is reached as to the appointment of an administrator or such meeting is not held, the administrator may refer the matter to arbitration in accordance with the provisions, *mutatis mutandis*, of subarticle (1), and a new administrator shall be appointed by the arbitrator.

[7] (4) Apart from the case provided for in article 22(7)(*a*), any one or more of the condomini may refer the matter of the revocation of the appointment of an administrator to arbitration requesting such revocation on the grounds that the administrator has not rendered his accounts, on the grounds that there are reasonable suspicions of serious irregularities on the part of the administrator or on the grounds that there are serious failures by the administrator in the performance of his duties.

azzjoni tinkwadra ruhha fil-provvedimenti ta' l-Artikolu 3 tal-Kap. 380 tal-Ligijiet ta' Malta". Thus the plea of lack of competence of this Tribunal to decide this case is unfounded in Law and is being rejected.

26. The Respondant aslo claimed in her reply that "*because the claimant appears in Limited capacity and not as natural individual, only, the defendant challenges the claimant's active-legitimation. The alleged claim apparently shall exist in some relation with an association which is not known to the Authority in charge, and not registered acc. to the regulations in the 2nd Schedule of the Civil Code or any other legislation in force in Malta*".

27. The Respondant in her note dated 25th November 2013 (fol. 94) "*purely precautiously the defendant raises the plea of prescription*". The Tribunal makes reference to article 2111 of the Civil Code which states that "*The court cannot of its own motion give effect to prescription, where the plea of prescription has not been set up by the party concerned*". This means that the Court, or Tribunal, as the case may be, is not authorised to find the applicable prescriptive period unless this was indicated to him specifically by the party raising it[8]. In **Joseph Stellini et vs Carmel Stellini et** decided by the Court of Appeal on the 31st May 2013 it was stated that:

"Dan ".. jfisser li l-Qorti ma tistax tissupplixxi ex officio ghan-nuqqas tal-parti (Vol. XXXVII P II p 630[9]; Vol.XLI P I p 178 [recte:168][10]) u ma ghandhiex ghalhekk tfittex biex tara hijiex applikabbli ghall-kaz xi preskrizzjoni partikolari li ma tkunx indikata b'mod car u esplicitu minn min jinvokaha (Vol. XXXIII P I p 481; "Joseph Grech -vs- Emmanuele Camilleri et", Appell Kummercjali, 21 ta' Marzu 1977)"[11]; gie wkoll ritenut li l-eccezzjoni tal-preskrizzjoni trid issir permezz ta' eccezzjoni formali u mhux mod iehor[12]. Inoltre, peress li l-

[8] **Vol XXXIII p1 p481**; **Francis Bugeja nomine vs Indri Mecieca**, Appeal 29.05.2000;
[9] **Paolo Busuttil vs Rosina Abela et** decided by the First Hall of the Civil Court on the 23rd January, 1953 by Judge A. Magri;
[10] **Grazia Borg vs Rosa Farrugia noe et** decided by the Court of Appeal on the 15th March, 1957. The reference to the numbers 178 is a reference to the page where the quote from the above judgement is found.
[11] Mentioned in the judgement delivered by the First Hall of the Civil Court in the names **Donald Manche' noe vs Joseph Said** on the 28th May, 2003;
[12] Vide **Gayle Scerri vs Eric Borg** decided by the Court of Appeal (Inferior Jurisdiction) on the 20th October, 2003.

eccezzjoni tal-preskrizzjoni hija ta' natura perentorja, din tista' tigi sollevata fi kwalunkwe stadju tal-kawza, anke fl-istadju ta' appell[13]*".*

28. Thus this plea of prescription too is being rejected.

29. On the 28th April 2006 a general meeting was held whereby the Melita Mansions Garage Owner's Association was created and it was agreed to register such association with the Lands Registry. On the 3rd of May 2006 the Land Registry received a copy of the regulations of the Melita Mansions Garage Owner's Association. The administrator appointed was Noel Sciberras on behalf of Nikki Zahra (vide fol. 78). On the 10th January 2013 the Lands Registry received a notice of change and was informed that the new administrator was to be Notary Dr. Clinton Bellizzi (fol. 30). These proceedings where initiated by the administrator of Melita Mansions Garage Owners Association who is duly registered with the competent authority that is the Lands Registry. So the Respondant is not correct when she states that the the Association is not registered according to law. Thus this defence is also being rejected.

30. Another defence submitted by Respondant is that she "*... never subscribed to an association as mentioned in the writ of summons*". The Tribunal refers to Article 2 of Chapter 398 (The Condominium Act) which states that:

(1) Condominium is a building or group of buildings where the ownership or the use or the enjoyment of the common parts thereof is vested pro indiviso in two or more persons and the ownership of the various separate units in the building or group of buildings is vested pro diviso in the same two or more persons:

Provided that two or more tenements one or more of which overlies another and where there only exists a number of servitudes of the tenements over each other, and only the drains, or the drainage system or

[13] Vide article 732(1) of Chapter 12 of the Laws of Malta;

other piped or cabled services are owned in common, or where two or more tenements only have a common outer staircase or common outer landings, shall not be considered a condominium.

(2) For the purposes of this Act, a condominus means the owner of a separate unit and includes the emphyteuta or the usufructuary of such unit.

31. Respondant by means of a contract dated 4th August, 2004 in the records of Notary Henri Vassallo bought a car space from the company Church Street Developments Limited (fol. 26). In the said contract it was clearly stated that the common parts, in accordance with Act XXIX of 1996 namely the Condominium Act, were to remain property of vendor company and said company reserved its right to collect from the Respondant and from the other owners, periodically, a pro rata fee according to the number of car spaces and garages of the relative expenses. Also **sub-article (2) of article 6 of the Condominium Act** states explicitly that: "*A condominus cannot renounce to his rights in the common parts*". So therefore the argument put forward by the Respondant is also unfounded. This means that the Respondant is a condominus acording to law and according to the contract which she signed.

32. The Claimant put forward a statement (fol. 31) indicating that Respondant owed the association between the period 9th July, 2005 and the 1st of November 2013 the sum of €1,163.85c. The Tribunal finds that this amount has been sufficiently proven in terms of the law and thus will be acceding to Claimants request.

Thus the Tribunal, decides this case by stating firstly that it has the necessary competence and jurisdiction to decide this case. Secondly the plea of prescription raised by the Respondant is not being accepted and thirdly does not accede to the other defences raised by the Respondant and rejects them as unfounded at law. Consequently, the Tribunal accedes to the request by the Claimant and thus orders the Respondant to pay to the Claimant the sum of one thousand one hundred and sixty three euro and eighty five cents

(€1,163.85) together with interests which are to start running from today according to law.

All the expenses are to be borne by the respondant.

< Sentenza Finali >

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