



**CIVIL COURT FIRST HALL**

**THE HON. MR. JUSTICE  
JOSEPH ZAMMIT MCKEON**

**This day, the 14th of December 2017**

**Case No. 6  
Application of the Attorney General  
No. 1065/2017 JZM**

**In the Acts of the Executive Garnishee  
Order 1596/2017 JZM in the names :**

**Advocate Dr Tonio Azzopardi as special  
mandatary of Etienne Merlevede in his  
own name and on behalf of his twin  
minor children Gabriel and Chloe born  
on the 27 June 2007 as authorised by  
decree dated 19th February 2013**

**vs**

**Attorney General**

**The Court :**

**I. Introduction**

Having seen the application of the Attorney General filed on the 20<sup>th</sup> November 2017 wherein the following was stated –

*That on the 2<sup>nd</sup> of November 2017, Dr. Tonio Azzopardi acting as a special mandatory of Etienne Merlevede filed an application requesting this Honourable Court to ‘order the issue of a garnishee order to be executed on the garnishee [...] against the debtor for the debt herein mentioned [seventeen thousand euro and five hundred and sixty-six cents and saving further interest] and for the costs of this procedure, by virtue of the executive title’.*

*That by virtue of a decree dated 3<sup>rd</sup> November 2017, this Honourable Court upheld the request of Dr. Tonio Azzopardi acting as a special mandatory of Etienne Merlevede.*

*That preliminary the applicant would like to point out that no service of the garnishee order was effected on him and thus any time-frame established by law has not yet started running.*

*That without prejudice to the above, the applicant is aggrieved by this Order given that the Constitutional Court on the 19<sup>th</sup> of April 2017 in the names **Etienne Merlevede pro et noe vs. Attorney General et** (34/2013JPG) decided that ‘respondent Attorney General [is] to pay the applicants the sum of fifteen thousand euro (€15,000) for breach of article 8, to be divided equally between them’.*

*That the applicant submits that any amount that was due to Etienne Merlevede by virtue of the abovementioned judgement has already been deposited by means of a Schedule of Deposit the applicant under the authority of the Civil Court (Family Section) on the 5<sup>th</sup> of May 2017 (see attached schedule of deposit in the names Lara Merlevede vs. Etienne Merlevede deposit number 67/2017 marked as Doc AG1).*

*That furthermore, following an application of Lara Merlevede requesting the court to grant her care and custody of the children, the Court on the 23<sup>rd</sup> of September 2009 granted the mother Lara Merlevede care and custody pendente lite.*

*That given that the Civil Court (Family Section) granted care and custody to the mother of the minor twins and the said minors are residing with her, amounts due to the children, that is five thousand for each child as per the abovementioned judgement of the Constitutional Court, should not to be forwarded to the father.*

*Moreover, the Constitutional Court ordered that the amount be paid to the minor children and therefore the father cannot claim the amounts due to the minors as such amounts are only payable to the said minors.*

*That in view of the above, the applicant has paid in full the amount ordered by the Court including legal costs given that the Constitutional Court decided that the 'Costs of first and second instance are to be divided as to two-fifths at the charge of the Attorney General and three-fifths at the charge of the applicants. Lara Merlevede is to incur her own costs'. Rather it should be stated that it is Etienne Merlevede that owes the applicant the sum of one thousand four hundred and eighty euro and sixty-four cents (€1480.64) as judicial costs.*

*Therefore in view of the aforementioned, the applicant humbly requests this Honourable Court to revoke *contrario imperio* its decree of the 3<sup>rd</sup> November 2017 and to order the issue of the counter-warrant this under any order that this Honourable Court deems fit and appropriate.*

Having seen its decree of the 23<sup>rd</sup> November 2017.

Having seen the *note verbal* of the hearing of the 30<sup>th</sup> November 2017.

Having heard lawyers' submissions at the same hearing.

Having seen the judgement given by the Constitutional Court on the 19<sup>th</sup> April 2017 in re *Etienne Merlevede pro et noe v. Attorney General et (Application Number 34/13 JPG)*.

Having seen the acts of Executive Garnishee Order No 1596/17 in re *Advocate Dr Tonio Azzopardi noe vs Attorney General*.

Having seen the document filed by respondent on the 4<sup>th</sup> December 2017.

Having seen its decree given on the 30<sup>th</sup> November 2017 whereby the hearing was adjourned for today for a final ruling on the application.

## II. The facts

These are the facts on the basis of documents on file :-

1. By virtue of a decree given on the 19<sup>th</sup> February 2013, the First Hall Civil Court (Constitutional Jurisdiction) authorized Etienne Merlevede to file an application in his own name and for and on behalf of his two minor children Gabriel and Chloe claiming breach of their fundamental human rights.

2. The constitutional application was filed on the 17<sup>th</sup> April 2013 against the Attorney General.

3. By decree of the 25<sup>th</sup> July 2013, the Court of First Instance authorized the joinder in the action of Lara Merlevede. The latter is the wife of applicant, and mother of the two minor children.

4. On the 15<sup>th</sup> December 2015, the First Hall Civil Court (Constitutional Jurisdiction) decided against applicant proprio et nomine, rejecting all demands.

5. Applicant proprio et nomine entered an appeal on the 28<sup>th</sup> December 2015.

6. By virtue of a judgement given on the 19<sup>th</sup> April 2017, for reasons stated therein, the Constitutional Court partially upheld the appeal and ordered the Attorney General (a) to pay applicant de proprio the sum of €2,000 and (b) to pay the applicants the sum of €15,000 to be divided equally between them.

7. On the 5<sup>th</sup> May 2017, the Attorney General filed a schedule of deposit for the amount of €7,000 due to Etienne Merlevede de proprio.

8. On the 2<sup>nd</sup> November 2017, Dr Tonio Azzopardi as special mandatory of Etienne Merlevede proprio et nomine filed an application for the issue of an executive garnishee order against the Attorney General for the amount of €17,000 with interest.

9. The application was upheld on the 3<sup>rd</sup> November 2017 and executive garnishee order 1596/2017 was issued.

10. The Attorney General then filed this application.

### **III. The position at law**

The Attorney General is requesting the total revocation of the executive warrant in question on the basis of **Sec 281 of Chapter 12** of the Laws of Malta which states as follows :-

*(1) Without prejudice to any other right under this or any other law, the person against whom an executive act has been issued or any other person who has an interest may make an application, containing all desired submissions together with all documents sustaining such application, to the court issuing the executive act praying that the executive act be revoked, either totally or partially, for any reason valid at law.*

*(2) The application shall be served on the opponent who shall, within ten days, file a reply containing all submissions which such opposite party may wish to make together with all documents sustaining the reply which are within its ability to file :*

*Provided that the court may, in urgent cases, reduce the period referred to in this subarticle. In default of such opposition the court shall accede to the demand.*

*(3) The court shall decide on the application after hearing the parties and receiving such evidence as it may deem fit, if it so considers, within a period not later than one month from the filing of the said application.*

*(4) An appeal from a decree delivered under subarticle (3) may be entered by application within six days from the date on which the decree is read out in open court. The Court of Appeal shall appoint such appeal for hearing within one month from the date when the decree is read out in open court, and the appeal shall be decided within three months from the date when it has been appointed for hearing.*

*(5) The security referred to in article 249 shall not be required in the cases referred to in the previous subarticle.*

In a decree given on the 20th Gunju 2012 in re : **Rikors ta` Rose Marie Holland** wara l-**Mandati ta` Qbid (Ezekuttivi)** numri 1817/11 MB u 1818/11 MB fl-ismijiet : “**Victor Fenech et vs Anthony Fountain et**”, this Court (**PA/JRM**) stated as follows :-

“ ... r-rimedju moghti bl-imsemmi artikolu 281 huwa wiehed specjali (kemm fir-rigward tal-procedura mfassla u kif ukoll ghas-sura ta' rimedju moghti) mahsub li jgib it-thassir tal-att eżekuttiv, kemm ghal kollox jew inkella f'bicca minnu, u dan “ghal raguni valida skond il-ligi”. Ghalkemm ma tinghata l-ebda tifsira fil-ligi dwar x'tista' tkun “raguni valida” li twassal ghall-ghoti tar-rimedju mitlub, huwa meqjus li, ghall-finijiet tal-artikolu 281, l-ghan li ghaliha ddahhlet din id-dispozizzjoni fil-Kodici tal-Procedura huwa marbut ma' xi ghelt jew nuqqas fl-att eżekuttiv innifsu, li, bis-sahha tieghu, l-parti interessata tista' ggarrab pregudizzju, u dan billi jsir ezami formali tal-att li tieghu qieghed jintalab it-thassir. Il-Qorti tistharreg li r-rekwiziti mitluba mil-ligi ghall-hrug tal-Mandat ikunu tharsu u jkun jidhru mill-att eżekuttiv innifsu, u li dak il-Mandat ma jkunx inhareg b'mod abbuziv (ara : P.A. GV : 19.11.2008 fl-atti tar-rikors fl-ismijiet “Kummissarju VAT vs Mark Grima et noe et”);

Illi huwa accettat li l-fatt li l-hwejjeg maqbuda fl-eżekuzzjoni ta' Mandat ma jaghmlux mill-gid tad-debitur eżekutat ma ghandu jkollu l-ebda effett fuq is-siwi tal-Mandat innifsu, izda jekk stess ihalli effett fuq l-eżekuzzjoni (ara : P.A. AJM : 14.11.1994 fil-kawza fl-ismijiet “Josephine Spiteri vs Anthony Perry et”). Min ghandu d-dritt u l-interess li jattakka dik l-eżekuzzjoni, m'ghandux il-jedd li jattakka s-siwi tal-Mandat li bis-sahha tieghu saret tali eżekuzzjoni, sakemm ma tohrogx xi wahda mir-ragunijiet li trid il-ligi (ara : P.A. GCD : 28.5.1999 fil-kawza fl-ismijiet “Gianfranco Tolio vs Danuta Komarzynic”). Min-naha l-ohra, t-talba ghas-sospensjoni tal-eżekuzzjoni ta' Mandat ma ssirx taht l-artikolu 281 (ara : App. Civ. : 5.2.2002 fil-kawza fl-ismijiet “Persiano et vs Persiano” (Kollez. Vol : LXXXVI.ii.257);

Illi l-prattika stabilita, m'baghad, hi li min irid jattakka l-eżekuzzjoni ta' Mandat, irid jaghmel dan billi jmexxi bil-procedura normali mahsuba fil-ligi. Illum il-gurnata, din il-procedura hija azzjoni li tinbeda b'Rikors Mahluf (ara : P.A. : AJM 5.3.2001 fil-kawza “Terranet Limited vs Linknet Limited et”) ...

Illi jaghti 'l wiehed x'jargumenta bis-shih jekk l-eżekuzzjoni ta' Mandat ghandhiex titqies bhala parti essenzjali mill-istess Mandat. U dan jista' wkoll jitqies fid-dawl tar-rimedju moghti fi kliem l-artikolu 281 lil “xi persuna ohra interessata”. Fl-istess waqt, il-Qorti taghraf ukoll li l-fehmiet tal-qrati taghna dwar jekk l-artikolu 281 jistax iservi biex wiehed jattakka l-eżekuzzjoni ta' Mandat eżekuttiv m'hux dejjem jaqblu (ara : P.A. GC : 12.2.2010 fil-kawza fl-ismijiet “Car Care Products Ltd vs John Bugeja et” (li ma accettatx li l-art 281 jista' jintuza biex wiehed jattakka l-eżekuzzjoni tal-Mandat) u P.A. AE : 2.8.2011 fl-atti tar-Rikors fl-ismijiet “Alan Bartoli noe vs A Gatt Trading Ltd et” (fejn l-art 281 thalla jintuza biex jattakka eżekuzzjoni ta' Mandat ta' Qbid fuq hwejjeg li ma kinux tad-debitur eżekutat) Madankollu, l-fehma ta' din il-Qorti hi li l-procedura tal-artikolu 281 ma tistax tghin biex persuna tattakka l-eżekuzzjoni u mhux is-siwi tal-mandat innifsu. Din il-fehma, minbarra dak li ssemma qabel, tohrog ukoll mill-fatt li r-rimedju moghti mil-ligi ghal min irid jattakka l-eżekuzzjoni ta' att eżekuttiv (Art 276 tal-Kap 12) jigifieri bi procedura kontenzjuza “normali”, kien jezisti sa minn qabel ma ddahhal fil-Kodici r-rimedju specjali li lllum jinstab fl-artikolu 281 (qabel kien imsejjah l-art. 283A). Ma

*jidhirx li meta l-legislatur (fl-2006) wessa' l-applikazzjoni tal-artikolu 281 tal-Kap 12 favur "xi persuna ohra interessata" wessa' wkoll ir-ragunijiet li dwarhom dak ir-rimedju sata' jintalab qabel dak iz-zmien. Wiehed ma jridx jinsa li r-rimedju moghti taht l-artikolu 281 tal-Kodici tal-Procedura m'huwiex ir-rimedju wahdien li jista' jinghata "taht din il-ligi jew xi ligi ohra" (ara : App. Inf. 9.1.2008 : fil-kawza fl-ismijiet "Awtorita' Marittima ta' Malta vs Polidano Brothers Ltd") ;*

*Illi ladarba r-rikorrenti dehrilha li kellha tmexxi b'semplici rikors u mhux b'Rikors Mahluf, johrog li r-rikors imressaq minnha ma jiswiex ghall-finijiet tal-artikolu 789(1)(c) tal-imsemmi Kapitolu 12 u sa dan ir-rigward, l-eccezzjoni procedurali tal-intimat ezekutant tirrizulta misthoqqa. Dan, naturalment, jinghad bla ebda hsara ghal kull rimedju iehor li l-istess rikorrenti tista' tinqeda bih biex tikseb dak li talbet f'din il-procedura tal-lum ..."*

**This Court considers that the scope of the procedure according to Sec 281 of Chapter 12 is the same as when the matter was regulated by Sec 283A of Chapter 12, which was re-numbered and substituted by Sec 281, by virtue of Sec 12 of Act XIV of 2006.**

In a decree of the 5<sup>th</sup> May 2005 in re : **Atti tar-rikors** Nru 287/2005 wara l-**Mandat ta` Sekwestru** Nru 392/05 fl-ismijiet "**Edward Pavia vs Michael Sultana et**", this Court (**PA/JRM**) stated as follows with regard to the purpose for Sec 283A of Chapter 12 :-

*" ... Illi l-kaz li ghandha quddiemha l-Qorti llum jinkwadra ruhu u huwa espressament imsejjes mir-rikorrenti fuq dak li jipprovi l-artikolu 283A tal-Kapitolu 12 tal-Ligijiet ta' Malta ;*

*Illi l-Qorti hija tal-fehma li l-ghan li ghaliha ddahhlet din id-dispozizzjoni fil-Kodici tal-Procedura huwa marbut ma' xi ghelt jew nuqqas fl-att ezekuttiv innifsu, li, bis-sahha tieghu, l-parti ezekutata tbatu pregudizzju. Minn dak li jirrizulta minn ezami tad-dibattiti parlamentari li wasslu ghad-dhul tal-imsemmi artikolu fil-Kodici, ma kinitx il-fehma tal-legislatur li din il-procedura tintuza biex il-mandat jew att ezekuttiv iehor jigi attackat jew imhassar ghal ragunijiet ta' kontestazzjoni li huma marbuta mal-mertu nnfisu li, bis-sahha tieghu, l-istess att ezekuttiv ikun inhareg (ara : "Briffa vs Stones Properties Ltd noe" : Appell : 1.12.2000 : Kollez. Vol: LXXXIV.ii.1401 ; "K.T.I. vs Serge" : 25.5.2001 : Appell : Kollez. Vol: LXXXV.ii.414) Kemm hu hekk, l-ewwel kliem tas-subartikolu (1) tal-artikolu 283A jaghmluha cara li r-rimedju moghti lir-rikorrent jinghata bla hsara ghal kull jedd iehor taht l-istess Kodici jew xi ligi ohra ;*

*Illi l-ligi ma tghidx x'tista' tkun "raguni valida skond il-ligi", li nsibu fl-imsemmi artikolu. Madankollu, in generali, jista' jinghad li mandat jista' biss jigi attackat kemm-il darba jkun inhareg minn Qorti zbaljata jew jekk ikun hemm xi*

*difett fil-forma. Meta l-ligi riedet tfisser f'liema cirkostanzi jista' jintalab il-hrug ta' Kontro-mandat, dan qalitu u fissritu b'reqqa, per ezempju, fl-artikolu 836, li jitkellem dwar Mandati kawtelatorji. Il-Mandat mertu ta' l-kawza prezenti m'huwiex Mandat kawtelatorju ;*

*Illi, fil-qofol tal-kwestjoni, jirrizulta li bejn il-partijiet ghad hemm kontestazzjoni dwar jekk it-titolu ezekuttiv li bis-sahha tieghu nhareg il-Mandat impunjat ghadux fis-sehh. Fil-fehma ta' din il-Qorti, ghalhekk, sakemm ikun hemm provvediment gudizzjarju dwar dan, jew sakemm ma jirrizultax minn dokument jew fatt maqbul bejn il-partijiet li jipprova t-twettiq jew l-estinzjoni tat-titolu, tali titolu ezekuttiv ikollu jitqies li ghadu fis-sehh ;*

*Illi l-Mandat – li huwa att ezekuttiv – inhareg fuq il-bazi li t-titolu ezekuttiv ghadu fis-sehh. Mad-daqqa t'ghajn, jidher li l-Mandat ihares dak kollu li tipprowdi l-ligi ghas-siwi tieghu (Art 274 tal-Kap 12) u certament inhareg minn Qorti kompetenti u kien kollazzjonat kif imiss mir-Registratur tal-Qrati ;*

*Illi ghalhekk lill-Qorti ma jirrizultalhiex li hemm raguni tajba biex l-istess Mandat jigi attakkat.”*

[vide also the decree of this Court (**PA/JRM**) of the 30<sup>th</sup> October 2003 in re : Rikors Nru 958/2003 fl-atti tar-rikors ta` **Mandat ta' Qbid Ezekuttiv** nru 1496/03 fl-ismijiet : **“Emanuel Vella vs Lloyd`s Malta Limited et”**]

#### **IV. Considerations of the Court**

It is indeed evident even *prima facie* that the Attorney General is contesting the executive garnishee order not on a question of form, but because it is being argued that the mandatary of Etienne Merlevede could not seek the issue of the warrant for Etienne Merlevede de proprio once the amount of compensation liquidated in his favour by the Constitutional Court had been deposited under court authority. Nor could he request the issue of the warrant for the balance being the amount liquidated by the Constitutional Court in favour of the two minor children as the care and custody of Gabriel and Chloe Merlevede had been granted to Lara Merlevede by the Civil Court (Family Section).

It is the considered opinion of this Court that the position taken by the Attorney General is legally untenable :-

1) The application in question runs counter to the intended purpose of Sec 281 of Chapter 12. In fact the applicant is not contesting the formalities and



requisites of the executive warrant. And the applicant could not do otherwise because the mandator requested the issue of the warrant by indicating in precise terms the person of his mandator as results from the judgement of the Constitutional Court, and demanded payment of the exact amount liquidated in favour the mandator and his minor children by the Constitutional Court.

2) The Court does not consider the warrant to be abusive in any manner whatsoever. Nor did the Attorney General prove any abuse in the request itself for the issue of the warrant. The fact that Lara Merlevede had been granted care and custody *pendente lite* of her minor children is not relevant both as regards the requisites of the warrant and also as regards the merits. The Constitutional Court was well aware of the procedural position of Lara Merlevede vis-à-vis her minor children before the Civil Court (Family Section). Despite that, the Court did not make any particular disposition with regard to the amount that was liquidated in favour of the children, a matter which the Court was well entitled at law to provide for. The fact that the provision with regard to the minor children's entitlement was not severed in any manner whatsoever from the identity of the person who had filed the constitutional application marks a definite closure of the issue.

3) The Court views the application as a subtle attempt by the Attorney General to contest the decision of the Constitutional Court as regards to who should receive the payment of compensation in favour of Gabriel and Chloe Merlevede. The issue of the executive warrant is the legal consequence of the judgement of the Constitutional Court. The decision of the Constitutional Court should be respected and applied without reserve.

### **Decree**

**For the reasons above, the Court rejects the application of the Attorney General for the revocation of Executive Garnishee Order No 1596/17 in re *Advocate Dr Tonio Azzopardi noe et vs Attorney General*.**

**All costs are to be borne by the Attorney General.**

**The Hon. Mr Justice  
Joseph Zammit McKeon**

**Amanda Cassar  
Deputy Registrar**