



**CIVIL COURT FIRST HALL  
THE HON. MADAM JUSTICE ANNA FELICE**

**Today 26<sup>th</sup> April, 2018**

**Sworn Application No: 844/2015 AF**

**Mario Desira**

**vs**

**Steffen Mallinowski**

The Court,

Having seen the sworn application filed by the plaintiff Mario Desira in the Maltese language which reads as follows:

L-esponent u l-intimat kellhom diversi rapporti ta' negozju bejniethom, fosthom it-tehid tal-kiri tal-fond kummercjali 32/34 fi Triq Nazzareno Dalli, B'Bugia.

Bl-intendiment tal-partijiet, kienet is-siehba tal-intimat, Bouchra Boukaoua, illi hadet f'idejha l-kiri tal-fond fuq imsemmi, fis-26 ta' Novembru 2014.

L-intimat ftiehem mal-esponenti li jixtri l-effetti mobili li gew deskritti fl-abbozz ta' kitba hawn annessa (Dokument A) li ggib

id-data tas-27 ta' Novembru 2014, bil-prezz ta' hmistax-il elf Ewro (€15,000) pagabbli b'rati mensili ta' mitejn u hamsin Ewro (€250).

Sal-lum l-intimat jinsab lura f'dawn il-hlasijiet bl-ammont ta' elfejn Ewro (€2000).

Inoltre l-esponent kien halla biex jinzammu fil-fond fuq imsemmi, bi ftehim ukoll mal-intimat, numru ta' 'amusement machines' b'valur ta' ghoxrin elf Ewro (€20,000).

Sussegwentement irrizulta lill-esponenti illi l-intimat kien iddispona mill-'amusement machines' fuq imsemmija minghajr ma kellu l-ebda jedd ghal daqshekk.

L-intimat minhabba diffikultajiet finanzjarji li kellu, kien talab lill-esponent sabiex jaghmillu ricevuta tal-hlas tal-kera ghall-fond fuq imsemmi fl-ammont ta' elf, tmien mija u erbghin Ewro (€1,840), bl-intendiment car li wara l-produzzjoni ta' tali ricevuta kien ser jghaddi f'idejn l-esponent il-flejjes relattivi.

L-intimati baqa' ma hallasx l-istess flejjes.

Ghalhekk l-intimat huwa debitor tal-esponent fl-ammont komplessiv ta' tlieta u ghoxrin elf, tmien mija u erbghin Ewro (€23,840).

Intalbet din il-Qorti sabiex:

1. Tikkundannah ihallas lir-rikorrenti l-ammont ta' tlieta u ghoxrin elf, tmien mija u erbghin Ewro (€23,840) komplessivament dovut lill-istess rikorrenti kif spjegat hawn fuq.

Bl-imghax legali mid-data li fiha qieghed jigi prezentat dan ir-rikors guramentat, u bl-ispejjez komprizi dawk tal-Mandat ta' Inibizzjoni (numru 925/15) miksub kontra l-intimat ingunt in subizzjoni.

Having seen the sworn reply filed by the defendant Steffen Mallinowski in the Maltese language which reads as follows:

Preliminarjament, in vista tal-fatt illi l-eccipjenti huwa persuna li titkellem u tifhem bil-lingwa Ingliza u mhux bil-lingwa Maltija, jehtieg illi dawn il-proceduri jinstemghu bil-lingwa Ingliza.

Preliminarjament ukoll, l-eccipjenti ma huwiex il-legittimu kontradittur tat-talbiet attrici u kwindi huwa ghandu jigi liberat mill-osservanza tal-gudizzju stante illi kif jirrizulta mir-rikors guramentat tar-rikorrenti, il-fond kummercjali gewwa 32/34, Triq Nazzareno Dalli, B'Bugia gie mikri lil Bouchra Boukaoua u mhux lill-eccipjenti li ma jikri l-ebda fond minghand ir-rikorrenti.

Infatti, minghajr pregudizzju ghall-premess u fil-mertu, it-talba tar-rikorrenti ghall-hlas ta' kera fis-somma ta' elf, tmien mija u erbghin Ewro (€1,840), ghandha tigi respinta stante illi l-eccipjenti ma jikri, u qatt ma kera xejn minghand ir-rikorrenti u ghalhekk huwa ma ghandu jhallas l-ebda kera lir-rikorrenti.

Inoltre kif sejjer jirrizulta ahjar waqt i-trattazzjoni tal-kawza, l-fond li r-rikorrenti jghid li jinsab mikri lil Bouchra Boukaoua, gie mikri lilha minn Jade Desira u mhux mir-rikorrenti. Ghalhekk, ghandu jirrizulta li r-rikorrenti ma huwa dovut l-ebda kera kwalsiasi ghal dan il-fond u lanqas ma ghandu xi *locus standi* biex jitlob il-hlas ta' xi kera ghal dan il-fond minghand l-eccipjenti.

Fir-rigward tas-somma ta' hmistax-il elf Ewro (€15,000) pretiz mir-rikorrenti ghall-allegat bejgh ta' effetti mobbli, jigi eccepit illi din it-talba hija infondata fil-fatt u fid-dritt u ghandha tigi respinta stante illi din is-somma ma hijiex dovuta u l-eccipjenti ma ghandu jaghti xejn lir-rikorrenti.

L-eccipjenti qatt ma xtara l-ebda mobbli minghand ir-rikorrenti, liema mobbli lanqas jinsabu fil-pussess tal-eccipjenti u qatt ma kien ghandu.

L-“abbozz ta' kitba” (Dokument A) esebit mir-rikorrenti ma hijiex iffirmata mill-eccipjenti u in effetti l-eccipjenti qatt ma

ghamel l-ebda ftehim u qatt ma ffirmat l-ebda kitba għall-akkwist tal-mobbli msemmija mir-rikorrenti jew għall-hlas ta' xi prezz għal dawn l-istess mobbli.

Minghajr ebda pregudizzju għall-premess, u fir-rigward tat-talba tar-rikorrenti għall-hlas tas-somma ta' għoxrin elf Ewro (€20,000) rapprezentanti, allegatament, il-valur ta' *amusement machines* li kienu jinsabu fil-fond fuq imsemmi u li gew allegatament mibjughin mill-eccipjenti lil terzi, din ukoll għandha tigi respinta bħala infondata fil-fatt u fid-dritt. Għal kull buon fini, l-eccipjenti jiddikjara minn issa illi huwa qatt ma kellu fil-pussess tiegħu l-ebda *amusement machines* kwalsiasi, u lanqas xi magni li jappartjenu jew kienu jappartjenu lir-rikorrenti, wisq anqas biegh xi magni tar-rikorrenti.

Inoltre, dejjem minghajr pregudizzju għas-sueccipit, qatt ma kien l-ebda ftehim bejn il-partijiet illi r-rikorrenti ihalli dawn il-magni biex jinzammu fil-fond *de quo*.

Dejjem minghajr pregudizzju għall-premess, din is-somma ma hijiex dovuta lir-rikorrenti stante illi, *inter alia*, dawn il-magni ma jappartjenux lir-rikorrenti u għalhekk, huwa ma għandu l-ebda *locus standi*, illi jitlob il-hlas tal-allegat valur ta' dawn il-magni.

Fi kwalsiasi kaz, ir-rikorrenti għandu jgib prova dwar it-titolu tiegħu fuq dawn il-magni, dwar il-valur tal-magni kif mitlub kif ukoll dwar l-allegat bejgh ta' dawn il-magni da parti tal-eccipjenti u l-prezz percepit.

It-talbiet tar-rikorrenti huma kollha infondati fil-fatt u fid-dritt u għandhom jigu respinti bl-ispejjez kontra l-istess rikorrenti, u l-eccipjenti ma għandu jagħti xejn lir-rikorrenti.

Salv eccezzjonijiet ulterjuri.

Having seen its decree of the 5th November 2015 whereby it upheld the defendant's request to the effect that proceedings be heard in the English language.

Having seen its decree of the 25th October 2016 whereby it upheld the plaintiff's request for the annexation of the acts of the prohibitory injunction numbered 925/2015.

Having seen and examined all the proof, acts and documents submitted by the parties.

Having seen the decree whereby the cause was adjourned for judgment for today.

Having seen the acts of the proceedings.

Having considered that it results that by means of a private writing dated 26th November 2014, Jade Desira, the plaintiff's daughter, leased to Bouchra Boukaoua, the defendant's partner, the premises 32/34, Triq Nazzareno Dalli, Birzebbuga.

The plaintiff claims that the defendant owes him the sum of €23,840 consisting of:

- i. The remaining balance of €2000 following a private writing dated 27th November 2014 whereby the parties allegedly agreed that the defendant would pay the plaintiff the sum of €15,000 for the bar equipment and other moveables left by the plaintiff in the above mentioned Birzebbuga premises;
- ii. The amount of €20,000 which the plaintiff claims is owed to him by the defendant for a number of amusement machines kept in the Birzebbugia premises which were allegedly disposed of by the defendant, without the plaintiff's permission;
- iii. The amount of €1840 which the plaintiff claims is due to him by the defendant by way of rent for the Birzebbuga premises.

The defendant begins by pleading that he is not the proper and legitimate defendant in these proceedings in view of the fact that the Birzebbuga premises, regarding which payment of rent is being requested of him, was in fact rented to Bouchra Boukaoua and not to him.

In its judgment of the 5th October 2001 in the names of Frankie Refalo vs Jason Azzopardi et, the Court of Appeal in its Inferior Jurisdiction stated the following in its considerations on the plea under examination:

*“Din il-Qorti allura tikkonsidra illi biex tistabilixxi jekk parti in kawza kienetx jew le legittimu kontradittur tal-parti l-oħra, kellha bilfors tivverifika prima facie jekk il-persuna citata fil-gudizzju kienetx materjalment parti fin-negozju li, skond l-attur, holoq ir-relazzjoni guridika li minnha twieldet l-azzjoni fit-termini proposti.*

*Jekk dan in-ness jigi stabbilit, il-persuna citata setghet titqies li kienet persuna idoneja biex tirrispondi ghat-talbiet attrici, inkwantu dawn ikunu jaddebitawlha obligazzjoni li kienet mitluba tissodisfa, dan inkwantu il-premessi ghaliha, jekk provati, setghu iwasslu għall-kundanna mitluba f’kaz li jinstab li l-istess konvenut ma jkollux eccezzjonijiet validi fil-ligi x’jopponi ghaliha. Dan naturalment ma jfissirx li jekk il-Qorti tiddeciedi – kif iddecidiet korrettement f’dan il-kaz - illi l-konvenut kien gie sewwa citat inkwantu jkun stabbilit li l-interess guridiku tieghu fil-mertu kif propost mill-attur illi hu kellu necessarjament ikun finalment tenut bhala l-persuna responsabbli biex tirrispondi ghat-talbiet attrici kif proposti. Kif lanqas ifisser li l-istess konvenut ma jkollux eccezzjonijiet validi fil-mertu, fosthom dik li t-talbiet attrici kellhom fil-fatt ikunu diretti lejn haddiehor jew lejn haddiehor ukoll inkwantu dan ikun involut fl-istess negozju u li allura seta’ jigi wkoll citat bhala legittimu kontradittur fil-kawza.”*

The Court finds that insofar as the plaintiff is requesting from the defendant payment of rent for the Birzebbuga premises, the defendant is correct in pleading that he is not the proper or legitimate defendant in these proceedings in that it is not he who leased the premises for which the plaintiff is requesting rent. Neither does it appear that the above mentioned premises were ever leased to him.

In addition, as rightly pointed out by the defendant in his sworn reply, it was in fact Jade Desira who leased the

Birzebuga premises to Bouchra Boukaoua and not the plaintiff and so it follows that in any case, any claim for rent by Mario Desira is unfounded at law in that he has no legal standing to make such a claim. Therefore, the plaintiff's fourth plea to this effect is also correct and is being upheld by the Court.

Under cross-examination, the plaintiff stated that he asked his daughter to appear on the contract of lease in her own name in order for her to gain experience in commercial matters. The plaintiff continued by explaining that it was the defendant's partner who leased the property from his daughter because the defendant was precluded from entering into the contract himself. The Court does not find either of these arguments convincing and in any case, the fact remains that insofar as the plaintiff appears to be requesting rent from the defendant, the latter is not the proper or legitimate defendant to answer for the plaintiff's claim, and any claim for payment of rent should have been made by Jade Desira and not by the plaintiff.

The plaintiff also claims that the defendant owes him the sum of €2000 which represents the remaining balance due for the sale of bar equipment and other movables left by the plaintiff at the Birzebuga premises, in accordance with a private writing dated 27th November 2014, as well as the sum of €20,000 which the plaintiff claims he paid to Anthony Cremona for the amusement machines rented to him, and which were allegedly disposed of by the defendant without the plaintiff's consent.

The defendant pleads that he does not owe any money to the plaintiff, specifically, that he never acquired movables from the plaintiff and that in fact, the private writing which the plaintiff exhibited along with the sworn application was never signed by him. With regard to payment of the value of the amusement machines which the plaintiff alleges the defendant disposed of without his permission, the defendant pleads that such amusement machines were never in his possession, that there was never any agreement between the parties to the effect that such machines should be kept at the Birzebuga premises, that the amusement machines in question do not even belong

to the plaintiff and that in any case the plaintiff must bring forward proof of their value.

By way of legal considerations, as explained by the First Hall, Civil Court in the case of Gaetana Mamo vs Therese Mercieca et delivered on the 26th October 2005:

*"In bazi ghad-dritt probatorju, kull parti ghandha f' kaz bhal dan id-dmir li taghti prova ta' l-ezistenza tal-fatt allegat, favorevoli ghat-tezi taghha. L-oneru hu distribwit b' mod li l-attrici trid tipprova l-fatti kostituttivi tad-dritt azzjonat minnha ("actori incumbit probatio") mentri l-konvenuti huma tenuti jipprovaw il-fatt minnhom allegat kostitwenti l-kontroprova offerta biex tikkuntrasta il-pretiza ta' l-attrici ("reus in excipiendo fit actor"). Ara Kollez. Vol. XLVI P I p 5. Naturalment, il-piz probatorju tal-konvenuti jinsorgi konkretament fil-kaz biss li l-attrici tkun ressqet prova tal-fatti posti bhala bazi tad-domanda taghha. Dan ghaliex in-nuqqas jew insufficjenza tal-prova tac-cirkostanzi dedotti mill-konvenuti biex tikkonfuta l-pretensjoni ta' l-attrici ma jiddispensax lil din mill-oneru li tiddemostra adegwament il-legittimita` u l-fondatezza tal-meritu tat-talba taghha;"*

The Court also refers to the case of Kenneth Cassar vs Samy El Saghtir, decided on the 23rd November 2005 by the Court of Appeal in its Inferior Jurisdiction:

*"Huwa indubitat illi min irid jivvalora dritt li jippretendi li ghandu jehtieglu jipprova l-fatti li jikkostitwixxu l-fondament ta' dak l-istess dritt. Dan fis-sens illi jinkombi bi dmir fuq il-parti li tallega fatt favorevoli ghaliha li taghti prova ta' l-ezistenza tal-fatt. Skond id-dritt probatorju, il-karattru favorevoli tal-fatti allegati huwa kriterju ta' distribuzzjoni ta' l-oneru tal-provi. Dan kemm jekk il-fatti jikkostitwixxu l-bazi tad-dritt azzjonat ("actori incumbit probatio") u sija jekk il-fatti jingiebu a bazi ta' l-eccezzjoni tal-konvenut biex jikkontrastaw l-pretiza ta' l-attur ("reus in excipiendo fit actor"). Huma dawn ir-regoli legali ta' gudizzju li jikkonsentu lill-gudikant japproda ghal decizjoni fil-meritu;"*



In the judgment in the names of F Advertising Limited vs Simon Attard, delivered on the 21st May 2010, the same Court reiterated that:

*"Kif imtenni bosta drabi minn din il-Qorti, id-disponibilita` tal-provi hi dejjem imhollija fl-inizzjattiva tal-parti. Dan, multo magis, imbaghad in vista tal-principju generali li l-oneru tal-prova jaggrava dejjem fuq il-parti li tallega l-fatti migjuba biex issostni d-domanda. Jekk dan ma jsirx, u fid-djalettika processwali l-parti tonqos li ggib il-prova okkorrenti, dik l-istess parti ma tistax tlum lit-Tribunal milli jiddeciedi iuxta alligata et probata ghax dan hu wkoll principju konsagrat fid-duttrina procedurali u, in kwantu tali, jintitola lill-gudikant li jestrax d-decizjoni tieghu unikament mill-allegazzjonijiet provati, u mhux ukoll minn dak li messu ngieb ghab-bazi tad-domanda u baqa' ma giex offert bi prova konvincenti."*

In the case of Andrew Dalli vs Michael Balzan, delivered on the 31st January 2003 the First Hall, Civil Court held that:

*"Naturalment l-attur li jallega d-debitu ghandu fl-ewwel lok u dejjem l-obbligu li jipprova l-kreditu minnu vantat. Inkella, fin-nuqqas li jaghmel dan, jibqa' jimpera l-principju actor non probante, reus absolvitur."*

Finally, the Court refers to the judgment delivered by the Court of Appeal in its Inferior Jurisdiction on the 12th July 2007 in the case of Joseph Attard vs Joseph Xerri:

*"Tajjed li jigi mfakkar illi l-kwalifikazzjoni tad-deduzzjoni probatorja bhala oggett ta' "oneru" iggib maghha bhala konsegwenza illi l-inadempiment jew il-falliment taghha titraduci ruhha fi zvantagg ghal min hu hekk gravat b' dan il-piz. Dan ghal raguni illi l-fatt favorevoli minnu allegat jithalla fi stat ta' incertezza u tali qaghda tissarraf f' dannu ghalih."*

To substantiate his claims for payment, the plaintiff relied on his own sworn testimony and that of Anthony Cremona, from whom he had leased the amusement machines for which he is

requesting payment. On his part, the defendant did not present any evidence but relied solely on the cross-examination of the plaintiff.

Upon reviewing the acts of the case, the Court finds that the plaintiff failed to put forward sufficient evidence to substantiate his claims for payment. With regard to the alleged outstanding balance arising out of the private writing dated 27th November 2014, the Court finds that it cannot accept this document, unsigned by the defendant, as valid proof of its content. The plaintiff failed to explain why the document was not signed by the alleged debtor whilst also choosing not to question the defendant on oath regarding its content. In view of the fact that in his sworn reply the defendant categorically denied having signed the document exhibited by the plaintiff or entering into any sort of agreement with him, and in the absence of further evidence, the Court finds that it has no choice but to reject the plaintiff's claims in this regard, in accordance with the legal maxim *actore non probante, reus absolvitur*.

The Court reaches the same conclusion with regard to the plaintiff's claim for payment for the missing amusement machines. Once again, in view of the defendant's categorical denial of any form of agreement relating to the machines in question, or even that they were ever in his possession and in view of the fact that the plaintiff did not provide adequate proof to the contrary, the Court finds that it cannot uphold the plaintiff's demands. The witness Anthony Cremona simply confirmed that he had leased the amusement machines in question to the plaintiff and that although he had been told by the plaintiff that the machines were being kept at the Birzebbuga premises, on going there himself, he saw the defendant and a woman who told him that she had asked the Birzebbuga Local Council to dispose of the machines after the plaintiff ignored her requests to remove them himself.

The plaintiff certainly did not put forward sufficient evidence to substantiate his claims that the defendant, who has no legal title over the premises whatsoever, was responsible for the alleged disappearance of the amusement machines and that

consequently, he ought to be condemned to pay the plaintiff the sum of money which the latter had to fork out himself.

In view of these considerations of fact and law, the Court reaches the conclusion that the plaintiff has not shown any valid reasons to found his claims for payment from the defendant and therefore, the Court has no choice but to dismiss his claims in their entirety.

For these reasons the Court decides the case between the parties by:

Upholding the defendant's second and fourth plea with regard to the amount of €1840 demanded by the plaintiff by way of rent;

Upholding the defendant's pleas on the merits as being founded in fact and at law;

Rejecting the plaintiff's claims as being unfounded in fact and at law.

The Court orders that the costs of the proceedings be borne by the plaintiff.

JUDGE

DEP/REG