Indebiti solutio

FIRST HALL OF CIVIL COURT

THE. HON. MR. JUSTICE TONI ABELA LL.D.

Sitting of the 10th day of December, 2020

Number 6

Application number 867/17TA

Romaly Perez u Monica Diaz Medina

vs

Carmine di Cicco (ID. 30718(A)) u b'digriet tal-21 ta' Jannar 2019 l-isem tal-konvenut ġie korrett għal Carmine Di Cicco

The Court:

Having seen the sworn application of plantiffs Romaily Perez and Monica Diaz Medina of the 15th September 2017 sworn by Romaily Perez on the same day by which it premised the following:

"1. Illi l-atturi dahlu f'negozjati mal-konvenut fejn il-konvenut kien ser icedilhom in-negozju konsistenti fil-gestjoni ta' restaurant fi Triq San Gorg, San Giljan u l-ishma li ghandu fis-socjeta' Elbeson Limited (C-39407) liema socjeta' tiggestixxi l-istess fond.

2. Illi l-ftehim kien illi din ic-cessjoni ssir versu l-prezz totali ta' €45,000.

3. Illi pero l-ftehim kien illi meta jithallsu l-ewwel hdax-il elf Ewro (€11,000) kellu jibda l-process ta' trasferiment ta' l-ishma li l-konvenut ghandu fis-socjeta' Elbeson Limited u jigu vverifikati d-dokumenti kollha kif ukoll it-titolu fuq ir-restaurant in kwistjoni.

4. Illi l-atturi effettivament hallsu l-ewwel hdax-il elf Ewro (€11,000) kif jirrizulta mill-annessi ircevuti (Dok A u B).

5. Illi pero l-konvenut rega' lura mill-ftehim u la beda l-process ta' trasferiment ta' l-ishma u lanqas ma pprovda l-informazzjoni u dokumentazzjoni kif miftiehem.

6. Illi konsegwentement l-atturi interpellaw lill-konvenut sabiex jirrifondi s-somma mhallsa u dan permezz ta' ittra ufficjali (esebita bhala Dok C) pero baqa' inadempjenti.

Ghaldaqstant l-esponent jitlob umilment li din l-Onorabbli Qorti joghgobha:

i) Prevja dikjarazzjoni li l-konvenut ma ottemperax ruhu mal-ftehim ta' cessjoni ta' negozju ta' restaurant fi Triq San Gorg, San Giljan u l-ishma li ghandu fis-socjeta' Elbeson Limited (C-39407) liema socjeta' tiggestixxi l-istess fond, tikkundanna lill-konvenut jirrifondi lill-atturi s-somma ta' €11,000.

Bl-ispejjez, inkluz dawk tal-mandat ta' sekwestru ppresentat kontestwalment u l-imghax mid-data tan-notifika ta' l-ittra ufficjali Dok C u l-konvenut ingunt in subizzjoni."

Having seen the sworn reply of respondent Carmine Di Cicco of the 14th of February 2018 sworn on the same day by which it pleaded the following:

"1. Illi fil-mertu, it-talbiet attrici huma ghal kollox infondati fil-fatt u fid-dritt u bhala tali ghandhom jigu michuda bl-ispejjez peress illi s-somma ta' hdax il-elf euro (€11,000) mertu ta' l-istess talbiet hija depositu ghal trasferiment tal-kumpanija lill-istess awturi, u dan kif huwa indikat ben tajjeb fl-iskrittura tad-depozitu annessa fir-rikors odjern tal-atturi. Nonostante dan it-trasferiment, l-atturi kienu waslu f'negozjati avvanzati sabiex jassumu l-kirja ta' restaurant minghand l-esponenti, stante li minghajr ebda raguni valida l-atturi ghazlu li ma jassumux tali kirja, u dan ghad-dannu tal-esponenti, li sofra telf ta' qliegh minhabba tali nuqqas a kolpa tal-atturi.

2. Illi d-depozitu citat fil-kaz odjern jsegwi l-ampidi tal-provvedimenti ta' Artikolu 1359 tal-Kap 16 tal-Ligijiet ta' Malta.

3. Illi fi kwalunkwe kaz u minghajr pregudizzju ghas-suepsost, anke jekk in pessima ipotezi dina l-Onorabbli Qorti ma taqbilx li tali flus servew

ta' depositu sabiex jinkera tali restaurant dan minghajr raguni valida l-atturi naqsu milli jassumu tali kera, l-atturi odjerni xorta kisru d-disposizzjonijiet ta' *bona fidi* hekk kif elenkati f'Artikolu 993 ta' Kap 16, u dan fid-dawl li l-esponenti dahlu f'diversi spejjez sabiex tali kirja issehh verso l-atturi, u dan meta minhabba l-atturi stess huma rrifjutaw li jikru lil haddiehor li kien lest jhallas il-kirja ghal prezz oghla, u dana kif se jirrizulta ampjament matul it-trattazzjoni tal-kawza, it-talbiet attrici xorta huma infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez.

4. Salvi eccezzjonijiet ulterjuri.

Bl-ispejjez kontra l-atturi li huma minn issa stess ingunti in subizzjoni."

Having seen all the acts of the case;

Having seen the documents produced during the course of the proceedings;

Having seen all the evidence presented by the parties during the course of these proceedings;

Having seen all the records of the case;

Having seen that the case has been adjourned for today for the delivery of judgment;

Now therefore:

Points of facts:

1. The plaintiffs entered into negotiations with the respondent by virtue of which the latter was to assign to the former the business consisting of the following:

(i) the management of a restaurant numbered 37, named “Che Bonta’ ”, situated in St. George’s Road, Saint Julians; and

(ii) the shares of the company called Elbeson Limited (C-39407) held in the respondent’s name. Elbeson Limited acquired the said restaurant by title of lease from the company Debono Holdings Limited as per agreement dated 24th July 2013 (a’ fol 41).

2. In view of such negotiations the plaintiffs paid the respondent the amount of €11,000 out of an agreed amount of €45,000 (see receipts signed by respondent a’ fol 4 and 5, testimony of the respondent a’ fol 67 second page, affidavit Romaley Perez a’ fol 26 last para and affidavit of Monica Diaz a’ fol 34).

3. The negotiations however stopped short of being concluded as the Plaintiffs decided not to accede to the Respondent’s requests to pay the rest of the agreed amount.

4. The Plaintiffs instead instituted this action to claim refund from the Respondent the said amount of €11,000.

Points of Law

5. By virtue of this action the Plaintiffs are requesting this Court to condemn the Respondent to refund to the Plaintiffs the sum of €11,000.

Plaintiffs premise that the Respondent reneged on their agreement by having failed to initiate the process of share transfer and to provide the requested information and documentation (see premise 5, page 2 of the sworn application as well as plaintiffs' affidavits a' fol 26 and 33).

6. The Court considers that the Plaintiffs, by way of the action of *indebiti solutio*, are claiming to recoup from the respondent, that was paid to him without being so due according to law.

7. The action being exercised by the plaintiffs arises from the Civil Code, which grants the payer the right to recover payment where the obligation is subjectively (article 1022) and/or objectively (article 1147) non-existent.

8. Article 1022 entitles the payer of a debt who mistakenly thinks that he should pay, the right to recover that payment (*indebitum ex persona sollventis*). Article 1147 entitles the payer the right to recover the payment made when there is no debt (*indebitum ex re*). On these two distinct rights, it is taught that "*fil-kaz ta' l-indebitu ex persona il-pagament irid ikun sar bi zball, fil-kaz ta' l-indebitu ex re id-debitu li bil-hlas gie estint ma jezistix affattu.*" (**Maria Galea vs Grace Borg**, **Civil Court First Hall, 12th October 2005**).

9. The Civil Code also imposes upon who receives that which is not due, the duty to restore it (articles 1021 and 1023): By virtue of article

1021, *“A person who receives, whether knowingly or by mistake, a thing which is not due to him under any civil or natural obligation, shall be bound to restore it to the person from whom he has unduly received it”*. In terms of article 1023, “*(1) Any person who has unduly received the payment of a sum of money, shall, if he was in bad faith, be bound to restore both the capital and the interest thereon as from the day of the payment. (2) Where, however, he was in good faith, he shall only be bound to restore the capital.*”

10. The Plaintiffs’ cause of action in the present case is not that the €11,000 payment made in favour of the Respondent was vitiated by a mistake, but that such payment is undue for reasons stated in premise 5 already referred above. The Plaintiffs are therefore seeking to recover such payment by invoking the right granted under article 1147 of the Civil Code.

11. On this right, case-law affirms that “*l-indebitu oġġettiv li jitfisser bħala “ex re”, jiġifieri fejn il-ħlas ikun sar meta min ħallas ... ma kellu l-ebda raġuni li torbtu jagħmel dan, jew għaliex qatt ma kien hemm ir-rabta li jsir il-ħlas (**condictio indebiti sine causa**) jew għaliex dik ir-rabta ntemmet qabel laħaq sar il-ħlas (**condictio ob causam finitam**). Ir-regola tal-liġi dwar ir-radd lura ta’ dak li jkun ingħata bla mistħoqq tibqa’ tgħodd minkejja li min irċieva l-ħlas kien jemmen li kellu jedd għalih, għaliex il-mala fidi ta’ min ikun irċieva l-ħlas tgħodd biss biex wieħed iqis kemm għandu jrodd lura lil*

*dak li jkun wettaq il-ħlas (P.A. GCD **26.10.2001** fil-kawża fl-ismijiet **Accountant General et vs Frances Agius**);*

*Illi, għalhekk, tkun mistħoqqa wkoll l-azzjoni għar-radd lura tal-ħlas indebitu fejn jirriżulta li l-ftehim li bis-saħħa tiegħu ikun sar ħlas bħal dak ikun, għal xi raġuni maħsuba fil-liġi, null jew b'mod ieħor vizzjat (Cass. **6.10.1976**, nru. 3303 u Kumm. **11.4.1961** fil-kawża fl-ismijiet **Grech vs Abela** (Kollez. Vol: **XLV.iii.782**)). Kemm hu hekk jinsab imfisser li "L'azione di ripetizione d'indebito oggettivo, in quanto ha per unica effettiva base l'assoluta inesistenza dell'obbligazione che il solvens ha materialmente adempiuta col pagamento non dovuto, non e` in sostanza che un'azione di nullita` per mancanza di causa, che ha per presupposto la mancanza dell'accipiens del diritto di acquistare il bene o il valore patrimoniale trasmessogli dal solvens, prescinde dal verificarsi del danno ed ha natura autonoma e principale" (Cass. **30.12.1970,** nru. 2748). Fuq kollox, azzjoni bħal din hija waħda personali li tista' ssir biss kontra dik il-persuna li mingħandha jintalab ir-radd lura tal-ħlas imwettaq (Caruana Galizia Notes on Civil Law – Of Obligations, paġ. 309)*;

*Illi biex isseħħ l-azzjoni tal-ħlas lura tal-indebitu jeħtieġ li jirriżultaw flimkien tliet elementi jiġifieri: (a) il-ħlas, (b) in-nuqqas tal-kawża għal dak il-ħlas u (ċ) l-iżball ta' min wettaq il-ħlas, u dan għaliex jekk min ħallas kien jaf li ma kienx hemm għalfejn iħallas, wieħed għandu jqis li kellu f'moħħu li jagħmel att ta' liberalita' (P.A. PS **16.12.2002** fil-kawża fl-ismijiet **Korporazzjoni***

***Enemalta vs Renato Sacco**). Jekk kemm-il darba jonqos xi wieħed minnhom, l-azzjoni taqa' Ara P.A. **25.5.1954** fil-kawża fl-ismijiet **Bianco vs Pellegrini Petit** (Kollez. Vol: **XXXVIII.ii.483**). Iżda fid-dawl ta' dak li jiddisponi l-artikolu 1147 tal-Kodiċi Ċivili, hemm il-fehma li lanqas huwa meħtieġ li s-solvens jipprova l-iżball fejn l-indebitu ikun wieħed oġġettiv P.A. PS **12.10.2005** fil-kawża fl-ismijiet **Maria Galea vs Grace Borg** (konfermata mill-Qorti tal-Appell fid-**29.2.2008)**. F'dak il-każ, jaqa' fuq il-parti attriċi li tipprova biss il-ħlas u kif ukoll l-ineżistenza tal-kawża li wassalha biex tagħmel dak il-ħlas;*

*Illi minħabba li l-għan ta' din l-azzjoni huwa wieħed li jintegra l-patrimonju ta' min ikun ħallas bla ma kellu għalfejn, hemm fehma li dik l-azzjoni ma tistax tirnexxi jekk kemm-il darba min jippretendi r-radd lura ta' ħlas minnu magħmul ikun diġa' b'xi mod ieħor tħallas lura (P.A. RCP **2.10.2001** fil-kawża fl-ismijiet **Paolo Bonniċi Ltd. vs il-Kontrollur tad-Dwana**);*" (**L-Awtoritá tad-Djar vs Yvonne Attard**, Civil Court First Hall, 22nd May 2008).

Considerations

12. The Court observes is faced with two outrightly conflicting versions of the parties as to the true narrative of events. In these circumstances, the Court has to decide on the balance of probabilities and preponderance of the evidence adduced by both parties as to their respective versions of the story (vide **Decision in the names of "Zammit vs Petroccochino",**

Commercial Appeal, 25 February 1952). The Court has therefore to establish which of the two versions is nearer to the truth in order to avoid finding the easier path out of this conflict, by giving in the benefit of the doubt in favour of anyone of the parties. In civil matters, the establishment of truth rests on the fine scale of the balance of probabilities and not on the more rigid principle of in *dubio pro reo* (**vide Decision the names of Enrico Camilleri vs Martin Borg delivered by the Court of Inferior Appeal on the 17th March 2003**).

13. The court has no qualms to state, that the version given by the plaintiffs is nearer to the truth than that of the defendant. Their version was buttressed by the sworn affidavit of Valdkom Mitkovski who was present for all the meetings between the parties. No one else was (vide affidavit a' fol 38).

14. The Court finds it strange, that the only direct witness to the whole affair was not summoned to be cross examined and stranger still, that Emilio Nieto, who was supposed to have introduced plaintiffs to the defendant and was to partake of the partnership with plaintiffs, mysteriously vanished out of the scene, so much so that plaintiffs had to bear his monetary part of the deal. The Court notes, that defendant informed plaintiffs that he had struck a separate deal with said Emilio Nieto. We don't come to know what this deal was all about save, that in the last minute, this Emilio Nieto, who was mentioned on several counts by both

parties, informed plaintiffs that he had change of heart in partaking in the deal.

15. Along with other circumstances of the case, such as defendant persisting to get paid the whole amount of the consideration, nothwithstanding the rightful request of the defendants to be given beforehand all the relevant information to avoid leaping in the dark, has led the Court to believe that the plaintiffs and not the defendant, are stating the whole truth.

16. The first, out of the two constitutive elements, which must exist in order to exercise the action under article 1147 as per case-law above cited, is the proof that the €11,000 payment has in fact been made to the respondent. This emerges unchallanged from the acts of the case (see receipts signed by respondent a' fol 4 and 5, testimony of the respondent a' fol 67 second page, affidavit Romaley Perez a' fol 26 last para and affidavit of Monica Diaz a' fol 34). This first element is therefore satisfied.

17. The second constitutive element required by article 1147 is the objective inexistence of the obligation for either one of the three reasons specified in the said judgement **L-Awtoritá tad-Djar vs Yvonne Attard** cited above. These are where the payment was performed without cause *("condictio indebiti sine causa")* or such cause was subsequently terminated in that it was annulled, or because the suspensive condition

under which it was submitted has occurred *("condictio indebiti ab causam finitum")*.

18. The Court further points out that the Respondent, qua director of the Lessee company Elbeson Limited, is not entitled to assign the lease of the restaurant in question "*unless such right was agreed upon in the contract*" (article 1614(1), Civil Code). Tough defendant seems to suggest that the landlord, notwithstanding this clause, was ready to accept the assignment, for reasons only known to himself he never summoned Charles Debono whose company owns the the restaurant. However, such right was not agreed upon in the lease contract of the 24th July 2013 (referred above). On the contrary, clause 5.1 of the said contract expressly prohibits the lessee company Elbeson Limited "*from sub-letting, assigning, transferring and/or entering into management with any third party of the Premises, in whole or in part, or assigning the lease thereof to any third party without the prior written consent of the Lessor*", that is, the company Debono Holdings Limited. No such written consent has been presented by the Respondent in the acts of these proceedings. Nor does this Court understand the reason behind the failure of the respondent to produce this agreement to the plaintiffs at the time they were requesting it, in order that they may view it before all the negotiations collapsed.

19. Most fundamentally, since such an assignment contemplates the "*sale of a debt, or of a right or of a cause of action*" as per article 1469 of

the Civil Code, the law requires under pain of nullity, that it is "*made in writing*" as per article 1470 of the said Code. Legally therefore, there was never a true and proper assignment of the lease of the restaurant.

"*Hija ġurisprudenza ormai paċifika li biex ikun hemm ċessjoni ta' dritt, (inkluż anki d-dritt ta' inkwilinat), jeħtieġ li ċ-ċessjoni ssir bil-miktub*" (**Mary Fenech et vs Carmelo Ellul et**, Court of Appeal, 6th June 1990); "[f]*is-sens strett tal-Kodiċi Ċivili jinstab kontemplat illi gjaladarba c-cessjoni hija bejgh ta' kreditu, ta' jedd jew ta' azzjoni (Artikolu 1469), dak il-Kodici jesigi "ad validitatem" li c-cessjoni ssir bil-miktub (Artikolu 1470), oltre li jrid ukoll ikun hemm korrispettiv li hu rekwizit essenzjali ta' kull xorta ta' bejgh u ta' assenjazzjoni. Dan jghodd ukoll ghac-cessjoni ta' kirja billi, kif deciz, "la cessione d' affitto soggiace alle regole relative alla cessione dei diritti in generali e quindi dev' essere fatta in iscritto" (***Kollez. Vol. XVI P II p 140)**" **(Rita Pirotta vs Simone Carbonaro, Court of Appeal, 17th November 2004**).

20. The same applies to the assignment of the shares of the company Elbeson Limited held in the respondent's name. Indeed, such transfer should have *ad validitatem* been drawn up in written form as per article 43(2) of Chapter 364 and article 118(2) of Chapter 386 which provides that "*It shall not be lawful for a company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer or an authentic copy thereof has been delivered to the company*". A private writing would have been sufficient in terms of the law (vide **Decision of the**

Court of Appeal in the names of Peter Cassar Torregiani pro et -vs- Onor Domenic Mintoff of the 14th October 2004). Furthermore, the said article 43(2) specifically lays down that an instrument is required under pain of nullity and *quod nullum est nullum producit effectum.*

21. Since the arrangement entered into between the Plaintiffs and the Respondent never materialised in written form as is legally required for their agreement to come into force, such negotiations never gave rise to a binding agreement that is legally enforceable. There is therefore a total objective inexistance of the obligation in terms of article 1147(1) of the Civil Code.

22. Consequently, the Respondent has no right to keep the €11,000 so unduly paid to him by the Plaintiffs. On the contrary, he is legally bound to restore such amount as per articles 1021 and 1023 (2) of the Civil Code. The Respondent is, however, not bound to restore the interest in terms of sub-article (1) of the said article 1023 since this is not being requested by the plaintiffs. Therefore no interest is due from date of payment save as provided hereinunder.

Decision

Now therefore, in view of the above reasons and considerations, the Court hereby:

Acceeds to the first demand of the Plaintiffs and condemns the Respondent to restore to the Plaintiffs the sum of €11,000 along with interest according to law from today until effective payment is made.

Denies all the pleas of the Respondent.

All expenses of these procedures, including those of the garnishee order, to be borne by the Respondent.

Mr. Justice Toni Abela

Deputy Registrar