



## **Court of Appeal**

**HON. JUSTICE GIANNINO CARUANA DEMAJO  
PRESIDENT**

**HON. JUSTICE TONIO MALLIA**

**HON JUSTICE ANTHONY ELLUL**

**Sitting of Thursday, 17<sup>th</sup> March, 2022.**

**Number 6**

**Sworn application no. 601/2014/1**

**Natalia Menshova**

**v.**

**Raphael Asciak on his own behalf and also as director on behalf of *Saint Springs Limited* and *MJA Services Limited*; and by decree of 11 October 2021 following the death of Raphael Asciak the case proceeded in the name of Vanessa Asciak as sole heir of the said Raphael Asciak and in the name of Michael Asciak as director on behalf of *Saint Springs Limited* and *MJA Services Limited***

1. Plaintiff appealed a judgement delivered on 17 March 2015 whereby the first instance court threw out her case after upholding a plea of nullity filed by defendants in terms of art. 907 of the Code of

Organisation and Civil Procedure [“C.O.C.P.”]. The relevant facts are as follows:

2. Plaintiff Menshova had filed a counter-claim together with her defence to a claim brought against her by defendant *Saint Springs Limited*<sup>1</sup>. In her counter-claim plaintiff requested the court to:

- »1. tordna lid-direttur Raphael Asciak jagħti rendikont tal-operat kollu tas-soċjetà attriċi inklużi gwadanji u/jew qligħ li s-soċjetà għamlet, kif ukoll inġieq inkors mill-istess soċjetà attriċi u dan kemm matul il-perjodu li tulu Natalia Menshova kienet għada tokkupa l-kariga ta' direttiċi kif ukoll minn wara r-riżenja tal-istess Natalia Menshova;
- »2. tordna l-likwidazzjoni tas-soċjetà *Saint Springs Limited* numru ta' registrazzjoni C-22404 u jiġu appuntati likwidaturi sabiex jesegwixxu dan l-inkarigu;
- »3. konsegwentement jiġu stabbiliti permezz ta' periti nominandi n-*net value assets* [sic] tas-soċjetà attriċi;
- »4. tordna li sehem Natalia Menshova min-*net value assets* li s-soċjetà tippossjedi jgħaddu għand l-istess Natalia Menshova fi żmien stabbilit minn dina l-onorabbli qorti;
- »5. tillikwida d-danni sofferti mill-intimata Natalia Menshova kkaġunati mis-soċjetà attriċi fil-konfront tagħha;
- »6. tikkundanna lis-soċjeta attriċi tħallas lii Natalia Menshova s-somma hekk likwidata.
- »Bl-ispejjeż ... ..«

3. On the 4 February 2014 plaintiff renounced to her counter-claim. Then, on the 7 July 2014 she filed the sworn application whereby she commenced the present proceedings requesting the court to:

- »1. tiddikjara u tiddeċiedi illi l-esponenti hija l-kreditriċi ta' ħamsin fil-mija tal-assi netti tal-istess soċjetà *Saint Springs Limited* u dan abbażi tal-ftehim iffirmit bejn il-kontendenti datat 16 ta' Settembru 2010 ... ..
- »2. tillikwida l-ammont tas-sehem tal-assi netti tal-kumpannija msemmija dovuti lill-esponenti;
- »3. tikkundanna lill-Ralph [recte, Raphael] Asciak *qua* direttur uniku, u rappreżentant legali tas-soċjetà *Saint Springs Limited* sabiex jgħaddi u jħallas lill-esponenti ħamsin fil-mija (50%) tal-assi netti hekk likwidati;

<sup>1</sup> *Saint Springs Limited v. Natalia Menshova and Aqua Favour Limited*, sworn application n° 703/2012.

»4. f'każ illi jirriżulta, għas-sodisfazzjon ta' din l-onorabbli qorti, illi l-istess Ralph Asciak bil-volontà tiegħu u/jew b'negliġenza jew amminstrazzjoni ħażina naqqas jew żvaluta drastikament il-valur tal-assi tal-istess *Saint Springs Limited*, tikkundanah personalment sabiex jgħaddi u jhallas lill-esponenti ħamsin fil-mija (50%) tal-assi netti hekk likwidati;

»Bl-ispejjeż kontra l-intimat ... ..«

4. Arguing that plaintiff's demands in the present case are identical to her counter-claim in the earlier proceedings, defendant entered the following plea, *inter alia*:

»... .. ir-rikorrenti qatt ma setgħet tipproċedi b'din l-azzjoni qabel ma ħallset l-ispejjeż inkorsi mis-soċjetà intimata *Saint Springs Limited* in konnessjoni mar-risposta tagħha għall-kontro-talba li ġiet intavolata mir-rikorrenti fil-kawża *Saint Springs Limited v. Natalia Menshova et – 703/12MCH*, u li ġiet debitament ċeduta mir-rikorrenti, u kif ukoll l-ispejjeż tar-rikors għar-revoka tal-mandat li saret mill-istess soċjetà għall-mandat ta' sekwestru kawtelatorju li saret mir-rikorrenti (a bażi ta' dik l-istess kontro-talba) liema sekwestru ġie mneħħi mill-istess rikorrenti u l-penali dovuti lir-rikorrenti a bażi ta' digriet datat tlieta (3) ta' Lulju 2014 li sal-lum għadhom ma tħallsux u dana kollu *ai termini* tal-artikolu 907 tal-Kap. 12 tal-Liġijiet ta' Malta.«

5. The first instance court upheld the plea for reasons which the court expressed as follows:

»... .. l-attriċi odjerna għamlet kontro-talba fil-kawża fl-ismijiet inversi (703/2012). Din il-kontro-talba ġiet ċeduta fl-4 ta' Frar 2014, *cioè* qabel infetħet din il-kawża. Kontro-talba hi talba ġudizjarja fiha nfisha u, anki jekk tiġi ċeduta l-kawża principali, il-kontro-talba għandha ħajja indipendenti u ekwivalenti għal kawża *stand-alone*. Jekk wieħed iħares lejn it-termini tal-kontro-talba ċeduta t-talba hi biex Natalia Menshova tieħu sehemha min-*net asset value* tal-kumpannija *Saint Springs Limited* li tagħha kellha ħamsin fil-mija tal-assi. Fil-kawża quddiem din il-qorti l-ewwel tliet talbiet huma identiċi biż-żieda ta' talba personali kontra Ralph [*recte*, Raphael] Asciak li jkun responsabbli hu għall-ħlas ta' sehemha f'każ ta' sejbien ta' negliġenza jew amminstrazzjoni ħażina *qua* direttriċi [*recte*, direttur].

»Kwindi hu ċar illi l-kawża preżenti hi fis-sustanza l-istess bħall-kontro-talba ċeduta. Jirriżulta mix-xieħda ġuramentata ta' Ralph [*recte*, Raphael] Asciak fis-seduta tal-24 ta' Frar 2016 illi għadu ma tħallasx it-taxxa ta' drittijiet u spejjeż dwar il-kontro-talba fil-kawża 703/2012 mingħand Natalia Menshova, u l-istess Menshova ma ċaħditx tali dikjarazzjoni. Il-qorti ser tilqa' l-eċċezzjoni tal-konvenuti.

»Għalhekk il-qorti taqta' u tiddeċiedi billi tilqa' t-tieni eċċezzjoni tal-konvenuti, u kwindi qed tikkikjara null l-att ġudizjarju li bih infetħet din

il-kawża u dan a baži tal-artikolu 789(1)(a) tal-Kap. 12. Spejjeż għall-attriċi. «

6. Plaintiff filed her appeal on the 1 April 2016, to which defendants replied on 2 June 2016. Plaintiffs' grounds of appeal are as follows:

»Fl-ewwel lok l-appellanti tirrileva li l-ewwel onorabbli qorti ma adoperatx il-prinċipju li n-nullità għandha tiġi applikata b'mod ristrettiv. Dan il-punt ġie diskuss fil-kawża Carmelo Cassar Parnis v. Gustavo Soler noe deċiża fil-11.03.49 (Vol. XXXII.II.p 344) fejn ġie sottolineat li:

»“In-nullitajiet jistgħu jkunu jew dikjarati *expressis verbis* jew le. Bħala regola ġenerali, il-liġijiet u d-dottrina, u l-liġi tagħna in partikolari, ma jiffavorux In-nullitajiet: anzi jippropendu kemm jista' jkun għat-teżi tal-validità tal-att li jkun hemm diskussjoni fuqu. Anki fejn in-nultità hija dikjarata espressament mil-liġi, hija ma toperax qatt waħedha b'mod li, jekk l-att ikun sentenza, tnaqqas *motu proprio* il-karattru ta' ġudikat ta' dik is-sentenza, imma huwa meħtieġ li dik in-nullità tiġi proposta mill-interessati fi żmien utili u b'wieħed mill-mezzi li trid u biss tirrikjedi l-liġi.”

»Fl-isfond tal-premess, l-appellanti tagħmel referenza għall-fatt li l-ewwel onorabbli qorti, b'mod simplistiku, waslet għall-konklużjoni li l-kawża odjerna u l-kontro-talba li ġiet ċeduta fl-atti tal-kawża 703/2012 MCH huma identiċi. Madankollu, jiġi rilevat li l-appellat ma ressaq l-ebda prova rigward dan, obbligu li jinkombi direttament fuq min ressaq l-eċċezzjoni, u għalhekk ma jstax jingħad b'ċertezza li l-mertu taż-żewġ istanzi huwa l-istess.

»Fit-tieni lok, u mingħajr preġudizzju għall-premess, jirriżulta li l-esponenti appellanti għandha pendenti proċeduri relatati mal-irtirar tal-kontro-talba tagħha fl-atti tal-kawża enumerata 703/2012 MCH, quddiem il-Kummissjoni għall-Amministrazzjoni tal-Ġustizzja, li l-eżitu tagħhom jincidi direttament fuq il-mertu ta' dan l-appell. «

7. Defendants replied as follows:

»L-ewwel aggravju

»... ..

»... .. huwa ċar [illi] t-termini użati fil-kontro-talba u fit-talbiet odjerni huma l-istess u fl-essenza tagħha t-tabliet (kontro-talba u talbiet odjerni) huma l-istess. L-ewwel qorti tgħid “Fil-kawża quddiem din il-qorti l-ewwel tliet talbiet huma identiċi biż-żieda ta' talba personali kontra Ralph [*recte*, Raphael] Asciak li jkun responsabbli hu għall-ħlas ta' sehemha f'każ ta' sejbien ta' negligenza jew amministrazzjoni ħażina *qua* direttriċi [*recte*, direttur]”.

»L-ewwel qorti kellha quddiernha fatti u provi li wassluha għad-deċiżjoni tagħha. Minkejja li l-appellanti tgħid li l-esponenti ma ressqu l-ebda prova in sostenn tal-argument tagħhom, il-verità hija li fl-atti hemm il-provi kollha neċessarji. L-esponenti kienu ipprezentaw, fost oħrajn, kopja legali tar-rikors ġuramentat, risposta, kontro-talba u risposta għall-kontro-talba fl-atti tar-rikors ġuramentat 703/2012/MCH

kif ukoll in-nota li permezz tagħha Natalia Menshova iritirat il-kontro-talba tagħha nhar il-4 ta' Frar 2014. L-esponenti pprezentaw ukoll ittra interpellatorja li ntbgħatet bil-posta lil Nathalia Menshova sabiex tħallas l-ispejjeż tal-kontro-talba fil-kawża 703/12. *Inoltre*, Ralph [*recte*, Raphael] Asciak xehed bil-ġurament (seduta tal-24 ta' Frar 2016) illi għadu ma tħallasx it-taxxa ta' drittijiet u spejjeż dwar il-kontro-talba fil-kawża 703/2012 mingħand Natalia Menshova, u l-istess Menshova ma ċaħditx tali dikjarazzjoni.

»B'hekk il-qorti ma' kellha l-ebda għażla ħlief li tapplika l-liġi f'din il-sitwazzjoni. Il-liġi hija ċara: l-artikolu 789(1)(a) tal-Kap. 12 jgħid li l-eċċezzjoni ta' nullità tal-atti ġudizzjarji tista' tingħata (a) jekk in-nullità hija iddikjarata mil-liġi espressament. Fil-fatt l-artikolu 907(2) jgħid li l-parti li tiffinunzja għall-atti għandha tħallas l-ispejjeż tal-kawża u hija ma tistax tibda kawża oħra għall-istess haġa, qabel ma tkun fil-fatt ħallset dawk l-ispejjeż lill-parti l-oħra.

»Għalhekk hawnhekk ma għandniex kwistjoni ta' interpretazzjoni wiesgħa jew restrittiva tal-liġi; hija kwistjoni ta' applikazzjoni ta' disposizzjonijiet ċari tal-liġi. Tista' titressaq eċċezzjoni ta' nullità meta n-nullità hija iddikjarata mil-liġi espressament. F'dan il-każ in-nullità hija espressa fl-artikolu 907(2). L-attriċi appellanti ma ħallsetx l-ispejjeż dovuti u b'hekk il-qorti ma kellha l-ebda għażla ħlief li tiddikjara l-kawża odjerna nulla.

»It-tieni aggravju.

»L-attriċi appellanti tgħid li hija għandha pendenti proċeduri relatati mal-irtirar tal-kontro-talba tagħha fl-atti tal-kawża 703/2012 MCH quddiem il-Kummissjoni għal Amministrazzjoni tal-Ġustizzja, li l-eżitu tagħhom jinċidi direttament fuq il-mertu ta' dan l-appell.

»L-appellati ma jistgħux jifhmu kif dan jimpinġi fuq l-eżitu ta' dan l-appell. Il-kummissjoni ma għandha l-ebda poter fdan ir-rigward u huma l-qrati li jiddeċiedu l-kawżi u mhux il-kummissjoni jew l-appellanti. ... ..«

8. Artt. 907(2) and 789(1)(a) of the Code of Organisation and Civil

Procedure provide as follows:

»**907.** (2) The party discontinuing the action shall pay the costs of the proceedings, and he may not commence another action for the same cause before he has actually paid such costs to the other party.

»**789.** (1) The plea of nullity of judicial acts is admissible -

»(a) if the nullity is expressly declared by law;«

9. The first point to be determined is whether plaintiff's demands in the present case and her counter-claims in the earlier proceedings are in effect "the same cause".

10. Although plaintiff's demands and counter-claims are worded differently, and there is a counter-claim for the liquidation of defendant company *Saint Springs Limited* which is not expressly repeated in the present proceedings, in effect both causes – insofar as they concern *Saint Springs Limited* – aim at the same objective, namely the determination of the net assets of the company and the assignment of half thereof to plaintiff.
  
11. The other element of the plea under art. 907 C.O.C.P. is the failure to pay the costs of the earlier proceedings. Defendants are claiming that, before commencing the present action, plaintiff did not pay the costs of her counter-claim in the previous action, and also the costs of proceedings for the revocation of a precautionary warrant which had been issued at plaintiff's request to secure her counter-claim. The costs relative to the counter-claim amount to one thousand, eight hundred and sixty-six euro and six eurocents (€1,866.06), including value added tax, according to a bill of costs issued on the 12 May 2015. The costs relative to the precautionary warrant according to a taxed bill amount to four hundred and seventy-one euro and twenty-two cents (€471.22) *plus* seventy-three euro and ninety-two cents (€73.92) value added tax, in total five hundred and forty-five euro and fourteen cents (€545.14). Total costs therefore amount to two thousand, four hundred and eleven euro and twenty cents (€2,411.20).
  
12. Defendants are also claiming a penalty inflicted on plaintiff in terms of art. 836(8) C.O.C.P in the proceedings relative to the revocation of a

precautionary warrant, but that penalty is not a “cost” of the proceedings and cannot therefore be taken into account.

13. In their note of 27 January 2022 defendants are also claiming the costs of proceedings *in re* Natalia Menshova v. Ralph Asciak (application n° 352/12). However they produced no evidence that those proceedings concerned “the same cause” as the present proceedings<sup>2</sup>. Likewise, the costs of garnishee order 461/14 cannot be taken into account since the garnishee order was issued at the request of defendants, not of plaintiff.

14. The relevant time is the time of commencement of the present action, *i.e.* the 7 July 2014. Although plaintiff renounced to her counter-claim on the 4 February 2014, and became liable for the payment of the costs thereof on that date, the said costs were not assessed before the 12 May 2015 and were therefore not liquid on the 7 July 2014 when plaintiff filed the present action.

15. Still, plaintiff ought to have requested the assessment of the costs of the present action herself, so as to be in a position to settle them before filing the present action, as required by art. 907(2) C.O.C.P.

16. However, there was a development in this case which has to be taken into account.

17. After plaintiff filed her appeal on the 1 April 2016, *Saint Springs Limited* on the 15 June 2017 also unconditionally withdrew its claims

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<sup>2</sup> Application n° 352/12 is a spoliation suit and is not the same cause as the present proceedings.

as plaintiff in the earlier proceedings, which means that it became liable for the costs thereof.

18. Plaintiff's costs in the earlier action according to a taxed bill amount in total to three thousand, three hundred and eighty-six euro and fifty-nine euro-cents (€3,386.59) before value added tax. Even before taking into account value added tax, the balance due to plaintiff exceeds that owed by her.
19. Defendants argue that what is owed by them to plaintiff cannot be set-off against what is due to her by them, notwithstanding the provisions of art. 1196 C.C., because there was no formal plea to this effect.
20. This may be the case, but the question here is not whether either party ought to be condemned to pay any balance but rather whether plaintiff ought to be denied access to a court. Since the provisions of art. 907 C.O.C.P. do have that effect they are to be interpreted restrictively, and the principle of good faith in judicial proceedings requires that a party be stopped from invoking this article when that party itself is a debtor of judicial costs, for a higher sum and in the same proceedings.
21. For this reason this court is of the view that, taking into account developments which occurred after the present appeal was filed, defendants plea under art. 907 ought to be dismissed.
22. Since this development occurred while the present appeal was pending, and after the judgement delivered by the first court on the 17



March 2016, the first instance court was correct in allowing the plea under art. 907(2), at least insofar as it concerned defendant *Saint Springs Limited*. It is therefore fitting that the costs of *Saint Springs Limited* at first instance be paid by plaintiff.

23. Insofar as the action is directed against the other defendants, plaintiff was right in stating that the first court ought to have applied the provisions of art. 907 restrictively, because the above observations concern solely plaintiff's present action insofar as it is directed against *Saint Springs Limited* and not insofar as it is directed against the other defendants. The other defendants – Raphael Asciak *proprio* and *MJA Services Limited* – were not party to the earlier proceedings and no costs are due to them. Even before the development referred to above, those defendants could not therefore have availed themselves of the plea under art. 907 C.O.C.P. which plea should only have been allowed in the interests of *Saint Springs Limited* alone. Plaintiff's first ground of appeal insofar as it concerns these two defendants is in any case to be allowed.

24. Plaintiff's second ground of appeal concerns proceedings before the Commission for the Administration of Justice. Defendants are correct in rebutting this ground for the reason that the commission has no power to cancel plaintiff's withdrawal of her counter-claim in the earlier proceedings or to exempt her from her liability for costs. The second ground of appeal is therefore dismissed.

25. For the above reasons the judgement of the 17 March 2016 is being revoked, the plea under art. 907(2) is being rejected and the records are to be sent back to the first court so that the hearing of the case may proceed.

26. Costs are to be apportioned as follows:

- i. the costs, at first instance, of defendant Raphael Asciak are to be paid by his successor Vanessa Asciak, whereas the costs on appeal are to be paid as to one-fourth ( $\frac{1}{4}$ ) by plaintiff (since her second ground of appeal was dismissed) and as to three-fourths ( $\frac{3}{4}$ ) by Vanessa Asciak;
- ii. the costs, at first instance, of defendant *MJA Services Limited* are to be paid by the said defendant, whereas the costs on appeal are to be paid as to one-fourth ( $\frac{1}{4}$ ) by plaintiff (as above) and as to three-fourths ( $\frac{3}{4}$ ) by *MJA Services Limited*;
- iii. the costs at first instance of *Saint Springs Limited* are to be paid by plaintiff and those on appeal are to be paid as to one third ( $\frac{1}{3}$ ) by plaintiff (since the set-off occurred after the appeal was filed) and as to two thirds ( $\frac{2}{3}$ ) by *Saint Springs Limited*.

Giannino Caruana Demajo  
President

Tonio Mallia  
Judge

Anthony Ellul  
Judge

Deputy Registrar  
da