MALTA

QORTI TAL-MAGISTRATI
(GHAWDEX)
(GURISDIZZJONI SUPERJURI)
(SEZZJONI GENERALI)

MAGISTRAT DR.
JOSETTE DEMICOLI

Seduta ta' l-24 ta' Settembru, 2013

Citazzjoni Numru. 76/2011

HK Design Limited

vs

Sabine Schaller

The Court;

This decree regards the defendant's request to be authorized to file a sworn reply in terms of article 158 of Chapter 12 of the Laws of Malta since she wants to justify her being in default.

Plaintiff company opposes such a request.

Having heard defendant in cross-examination.

Having heard the lawyers' oral submissions.

Having seen the acts and documents of this case.

Having seen that the case has been adjourned for a decree for today.

Considerations

At this stage it is important that the Court refers to the facts of the case as they result chronologically:

- The sworn application was filed by plaintiff company HK Design Limited on the 26th September 2011 against defendant. It is important to note that although the sworn application was filed in the Maltese Language, a translated copy of it in the English language was also filed.

- The sworn application, the documents and the notice of hearing of the case together with the translation of such acts and documents in the English language were notified to defendant personally on the 4th October 2011.

- No sworn reply was filed.

- On the first day set for hearing that is on the 24th November, 2011 defendant did not appear in Court.

- The case was adjouned for the 2nd February 2012. Plaintiff company requested an adjournement. The case was thus adjourned for the 22nd May 2012. Once again the case was adjourned for the 26th September 2012 and then for the sitting of 7th December 2012.

- On the 7th December 2012 plaintiff company filed two sworn declarations be means of a note. This note together with the sworn declarations was notified to defendant on the 12th December, 2012. The case was adjourned for the sitting of the the 1st March 2013.

- On the 30th January 2013 defendant filed an application which is being presently dealt with.

- Defendant appeared for the first time in Court for the sitting of the 1st March 2013 duly assisted by her lawyer. From then onwards defendant always appeared in Court.

- On the 4th June 2013 defendant filed her affidavit in connection with her request and on the 4th July 2013 defendant was cross-examined by plaintiff's company legal counsel.

In a nutshell, defendant states in her application that her failure to file the answer according to law is the result of a misunderstanding or lack of proper communication between her legal counsels and herself, since whenever she received any paper from the Court even though it could have been in Maltese (a language which she does not understand) she always referred it to a legal counsel for proper action.

In her sworn declaration defendant stated that she was aware that she had some disagreement with Alan Bozoklu who instituted this court case on behalf of plaintiff company. In fact she confirms that she had received letters from plaintiff's company's lawyers and she always contested the claims. She states that she was referred to a lawyer's firm Ganado and Associates to whom she referred all correspondence by email after scanning the document. She did not receive any reply but assumed that every document and letter sent they took care of. She further states *"I presume that I must have sent them the sworn application which gave rise to this court case for them to reply".* She stated that she was surprised when she received a letter from court and showed it to her friend Joseph Sultana. The latter advised her that a case was pending against her and thus she sent an email to her lawyers in Malta and realized that nothing had been done about the case. In cross-examination defendant could not confirm that she actually sent the sworn application to her lawyers in Malta.

Article 158(10) of Chapter 12 of the Laws of Malta states the following:

"If the defendant makes default in filing the sworn reply mentioned in this article, the court shall give judgement as if the defendant failed to appear to the summons, unless he shows to the satisfaction of the court a reasonable excuse for his default in filing the sworn reply within the prescribed time. The court shall, however, before giving judgement allow the defendant a short time which may not be extended within which to make submissions in writing to defend himself against the claims of the plaintiff. Such submissions shall be served on the plaintiff who shall be given a short time within which to reply."

First of all, defendant is not in any way contesting the fact that she has been duly notified with the sworn application. As stated in the case in the names of **Adrian Busietta vs Formosa & Camilleri Limited nomine**[1] **"***il-validita' tan-notifika ghall-finijiet procedurali ma teskludix, illi l-konvenut jista' jiggustifika l-kontumacja tieghu, jekk ikollhu raguni tajba. Kieku kull darba li jigi pruvat li saret notifika skond l-istess artikolu, kellu jigi prekluz mill-purgazzjoni tal-kontumacja, kienet tmur ghal kollox inutili u ozzjuza d-disposizzjoni tal-**Artikolu 158 (10) tal-Kap 16** illi tippermetti lill-konvenut juri lill-Qorti li kellhu raguni tajba (reasonable cause) ghan-nuqqas tieghu.* ***("Paul Grixti vs Direttur tax-Xogholijiet Pubblici" - A.C. 12 ta' Dicembru 1995.)".***

Reference is being made to the case in the names of **Joseph Muscat Manduca vs Louis Manduca et**[2] whereby after having referred to various judgments stated that:

"Illi minn tali sentenzi jirrizulta li l-posizzjoni hija llum wahda cara u cioe`:-

[1] Cit Nru: 1180/97RCP decided on 5th October 1999
[2] Cit Nru: 660/2003RCP decided on 25th February 2010

*1) "Illi l-istitut tal-kontumacja bhala mizura ta' natura punittiva necessarja biex tassigura s-serjeta` fil-proceduri u rispett dovut lejn l-atti emessi mill-Qrati. Mill-banda l-ohra proprju minhabba s-sanzjoni spiss irreversibbli li timporta r-rigorozita` tal-procedura ghandha tigi applikata u interpretata b' mod restrittiv" ("**Paul Vella et nomine vs Anthony Ellul**" - P.A. 4.7.1991 Vol. LXXX.II.729).*

*2) "L-istitut tal-kontumacja huwa bazat fuq il-presuppost illi l-konvenut, bin-nuqqas tieghu wera kontumelja u dispett ghas-sejha tal-Qorti, meta huwa gie konvenut b' avviz, citazzjoni … … … u hija din id-disubbidjenza animata psikologikament f' dawk il-fatturi ta' kontumelja u dispett li l-ligi trid tirrepprimi u tippunixxi, in kwantu kontumacja bhal dik hi element ta' disordni socjali" ("**Margaret Bugeja et vs Alfred Ellul**" - Appell mill-Bord JSP - 13 ta' Jannar, 1999).*

*3) Illi ghalhekk meta kwalsiasi Qorti li tigi konfrontata b' kontumacja formali ma jkollhiex ukoll il-konvinzjoni certa u soda ta' dan l-appell negattiv tan-nuqqas tal-konvenut, allura jkun jehtieg ezami ulterjuri tal-fatturi l-ohra necessarji biex dik il-konvinzjoni tigi furmata. U hekk titlob ir-raguni guridika ta' sitwazzjoni fejn il-konvenut se jigi kundannat fl-assenza ta' difiza ("**J. Vella pro et nomine vs J. Vella**" - A.K. 21.5.1993; "**P. Grech noe vs N. Zammit**" - A.C. 14.1.1993).*

*Illi ghalhekk apparti c-cirkostanzi fuq premessi, wiehed irid isib bilanc bejn l-osservazzjoni tal-principju audi alteram partem u negligenza tali da parti tal-konvenut li juri dispett u nuqqas ta' ubbidjenza lejn il-Qrati, b'mod li lanqas jinteressah li jiddefendi l-kawza tieghu ("**Paul Grixti vs Direttur tax-Xoghlijiet Pubblici**" - Appell 12 ta' Dicembru, 1970)."*

When defendant was notified with the sworn declaration she was also notified in the English language since the plaintiff company filed a translation of the sworn

application immediately upon filing same application. This also results from the acts of the case[3].

It is to be noted that as is duly required by law on the sworn application there is the following notice:

"Whosoever is in receipt of this sworn application in his regard shall file a sworn reply within twenty (20) days from the date of service thereof, which is the date of receipt. Should no written sworn reply be filed in terms of the law within the prescribed time, the Court shall proceed to adjudicate the matter according to law. It is for this reason in the interest of whosoever receives this sworn application to consult an advocate without delay that he may make his submissions during the hearing of the case."

It is obvious that there were already issues going on between plaintiff company and defendant so much so that defendant expressly declared in her sworn declaration that she had received various letters from plaintiff company's lawyers which she contested.

Defendant also exhibited various documents which consist of the emails that were sent from defendant or on defendant's behalf to her lawyers. However, these emails show that prior to the filing of the sworn application there was an exchange of emails and the filing of a judicial letter. There is no email which evidences that defendant has actually sent the sworn application together with the documents to her lawyers. In addition to this, defendant herself is not even sure that she actually sent the sworn application to her lawyers so much so that in her sworn declaration she states that she 'presumes' that she scanned them. She has not proven by other means that what happened was truly a misunderstanding.

In this case the court deems that defendant knew or should have known that she had to file a sworn reply within twenty days from the date of service. It has not

[3] A tergo fol 6 of the file

even transpired that she took care to speak to her lawyers. It is obvious that she has not duly followed the acts she received. It is also to be noted that whilst she was notified with plaintiff company's affidavits on the 12th December 2012 she filed the present application on the 30th January 2012 practically six weeks after.

The court deems that defendant has not satisfied her burden of proof, that is, she did not manage to prove that she had a reasonable cause to fail to file the sworn reply within the stipulated time.

Hence, the court for the above-mentioned reasons does not accede to defendant's request to file a sworn reply.

Costs of this incident are to be borne by defendant.

< Sentenza In Parte >

----------TMIEM----------