



MALTA

CIVIL COURT

FIRST HALL

THE HON. MR. JUSTICE

JOSEPH R. MICALLEF

Sitting of the 6 th May, 2014

Citation Number. 1114/2012

Joseph **TABONE**

vs

CAPECE CONSTRUCTION LIMITED (CF – 53626) u għal kull interest
Fabio Billi

The Court:

Having taken cognizance of the Sworn Application filed by Joseph Tabone on the 8th of November, 2012, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare that both or either of the defendants be condemned to pay him the sum of ten-thousand one-hundred and nineteen euro and sixty cents (€ 10,119.60) being the outstanding balance due to him for works carried out by him in connection with a contract of works under the “Restoration Works to Valletta Landfront Fortifications” project as well as extra works connected therewith, or such other sum as may be established by experts to be appointed by the Court; and (b) declare that both or either of the defendants be condemned to pay him the sum of seven-thousand three-hundred and sixteen euro (€ 7,316) being the outstanding balance due to him for works carried out by him in connection with a contract of works on the Birgu bastions’ project as well as extra works connected therewith, or such other sum as may be established by experts to be appointed by the Court. Plaintiff requested also payment of costs and legal interests to run from the 11th September 2012 to date of effective payment;

Having seen its interlocutory decree of the 13th of November, 2012, whereby it ordered service of the Application on the defendants and gave orders to the plaintiff as to the production of evidence on his part;

Having taken cognizance of the Sworn Reply filed by defendant Fabio Billi on January 7th, 2013, whereby, by way of preliminary pleas, he pleaded that he was non-suited since he was in no way bound to plaintiff under contract; and, secondly and without prejudice to the preceding preliminary plea, that he was just the defendant company’s employee and any undertaking he signed in respect to plaintiff’s engagement was

entered into in that sole capacity and his intervention gave rise to no legal relationship between him and plaintiff. Defendant then proceeded to raise pleas on the merits;

Having taken cognizance of the Sworn Reply filed by defendant company on January 25th, 2013, whereby, by way of preliminary pleas, it raised the nullity of the Sworn Application on the basis of lack of clarity of plaintiff's action in terms of articles 156(1)(a) and 156(1)(c) of the Code of Organization and Civil Procedure; and it also raised the plea that it was non-suited with respect to the claim regarding payment for works carried out in the Birgu bastions' project, since it had never instructed plaintiff to carry out any work in connection with that project. Defendant company then proceeded to raise other pleas on the merits. The defendant company simultaneously also filed a Counter-Claim against plaintiff for damages for non-performance arising out of unjustifiable delay;

Having taken cognizance of the Sworn Reply filed by plaintiff on the 11th February, 2013, whereby for the reasons therein stated, he rebutted the defendant company's Counter-Claim;

Having ruled by decree made during the hearing of February 12th, 2013, on a request to that effect by counsel to defendant company, that all proceedings of this case would henceforth be conducted in English;

Having also directed that, before proceeding any further, the Court would consider the defendants' first two preliminary pleas, and that evidence in support of those two pleas and to counter them was to be brought forward by the parties;

Having appointed Dr Maria Dolores Gauči as Judicial Assistant by decree dated February 12th, 2013 to hear witnesses and to collate any documentary evidence in respect to the said two preliminary pleas;

Having heard counsel to the parties offering their verbal submissions regarding the said preliminary pleas during the hearing of February 27th 2014;

Having examined all the relevant documents in the records of the case;

Having put off the case for to-day's hearing for judgment on the said preliminary pleas;

Having Considered:

This is an action for payment for works carried out under a contract of works, with a counter-claim for damages for non-performance raised by one of the respondents. Plaintiff is suing for the payment of the outstanding balance of the value of works he claims to have carried out in connection with restoration works on fortifications at Valletta and Birgu. Whereas the contractor (the defendant company, hereinafter referred to as "Capece") is filing a counter-claim for damages alleging that plaintiff failed to perform the assigned tasks diligently and in timely fashion, thereby giving rise to damages for delay;

Two preliminary procedural pleas were raised to plaintiff's action. Capece, firstly, pleaded the nullity of the Sworn Application on the basis of non-observance of the requisites of clarity of the claims and

enumeration of the requests in terms of articles 156(1)(a) and 156(1)(c) of Chapter 12 of the Laws of Malta; it also pleaded being non-suited in respect of any balance claimed by plaintiff in regard to works carried out in the Birgu sector of the said projects, in that it had never either engaged nor instructed plaintiff to work in that part of the project. Defendant Billi raised the plea that he was non-suited because he was acting only as one of Capece's employees and any undertaking he signed was in that specific capacity and in no other capacity or direct personal interest;

This judgment will deal with the said two preliminary pleas in the order that they have been raised;

The relevant facts which emerge from the records of the case show that plaintiff is a licensed builder¹, specializing in stone dressing and restoration works. On April 19th 2012², he entered into a subcontract agreement with Capece for restoration works to be carried out on fortifications situate at Valletta. Respondent Billi appeared in the said subcontract agreement for and on behalf of Capece. Capece is a company registered in Malta. The main contractor entrusted by the Ministry for Resources and Rural Affairs to execute the main contract titled "*Tender for Restoration Works to Valletta Landfront Fortifications – VLT11*" (Contract No. CT3064/10) was a consortium called "*Fortres Joint Venture*" (hereinafter referred to as "FortresJV"), amongst the components of which were CM Costruzioni Srl and Impresa Capece Minutolo;

That FortresJV itself had, amongst others, been charged as contractor under two separate tender contracts for works to be carried out in respect of restoration of fortifications in and around the Great Harbour area. The first such contract was signed between the said Ministry and FortresJV in late March of 2011 in respect of the Vittoriosa (Birgu)

¹ Affidavit 14.6.2013 at p. 961 of the records

² Doc "JT1", at pp. 4 – 25 (particularly Annex 'B' at pp. 13 – 18) of the records

fortifications titled “*Restoration Works to Birgu Landfront Fortifications – BRG10*” (Contract No. CT3070/10) (hereinafter referred to as “the Birgu contract”³). The second contract was also signed between the Ministry and FortresJV in early August of 2011 in respect of the Valletta fortifications (Contract No. CT3064/10) (hereinafter referred to as “the Valletta contract”⁴);

That respondent Fabio Billi was employed as a restorer by Capece for an indefinite duration by virtue of a contract of service dated November 14th 2011⁵;

That between February and April of 2012, plaintiff was involved in works on the Birgu project⁶. His involvement in the Valletta project was subsequent to his signing the subcontract with Capece. He was introduced to Capece by George and Karl Paċe of Joe Pace K3 Limited in connection with works on the Birgu project on or around November of 2011⁷. Joe Pace K3 Limited itself had entered into a subcontract agreement with Capece on January 26th 2012, regarding restoration works on the Birgu project⁸. That subcontract too was signed by respondent Billi on behalf of Capece. At the time of the subcontract, plaintiff had a partnership arrangement with Joe Pace K3 Limited;

That after snags had emerged in the relationship between Joe Pace K3 Limited and Capece regarding the setting up of scaffolding at the Birgu project, plaintiff says he was persuaded to continue the work on the project. As a matter of fact, Joe Pace K3 Limited and Capece terminated their contractual relationship by mutual agreement on November 28th 2012⁹ and payment was made in full settlement¹⁰.

³ Doc “ME”, at pp. 453 to 876 of the records

⁴ Doc “HB”, at pp. 53 to 452 of the records

⁵ Docs “FB1” and “FB2” at pp. 36 – 9 of the records

⁶ Evidence of Architect Mario Ellul 11.4.2013, at pp. 921 – 2 of the records

⁷ Doc “JT” at p. 961 of the records

⁸ Doc “MC”, at pp. 996 to 1012 of the records

⁹ Doc “MC1”, at p. 1014 of the records

¹⁰ Doc “MC2”, at p. 1013 of the records

Plaintiff's involvement on the Birgu project spanned over a number of weeks;

That by virtue of a legal letter dated 11th September, 2012¹¹, plaintiff requested respondent Billi to pay (in terms of the subcontract agreement dated 19th April, 2012) for what he claimed were outstanding payments in regard to both the Valletta and the Birgu projects;

Plaintiff filed this action on November 8th, 2012;

The Court's legal considerations must first inquire into the defendant company's first preliminary plea – that relating to the nullity of the Sworn Application filed by plaintiff (which in actual fact is the second plea in its Sworn Reply). Then, if the said plea is deemed not to be valid, it will proceed to inquire jointly into Capece's third preliminary plea and Billi's first preliminary plea – whether the respondents are non-suited. In truth, both these preliminary pleas are procedural, and it is precisely because of this prevailing procedural aspect that the Court had ruled that, before proceeding any further to examine the merits, it had to rule on the validity or otherwise of the said pleas;

As to **its second preliminary plea**, Capece raises the issue of the formal validity of plaintiff's Sworn Application. Capece founds its plea on two facets – clarity of the subject-matter of the plaintiff's cause [art. 156(1)(a) of Chap 12], and lack of numbering of the plaintiff's claims [art. 156(1)(c) of Chap 12]. During oral submissions, Capece's learned counsel argued that this plea is not a capricious attempt at nit-picking, but a drawing of the Court's attention to a mandatory procedural violation which the law expressly visits with the sanction of nullity;

¹¹ Doc "JT2", at p. 26 of the records

On his part, plaintiff's learned counsel suggests that while it is true that neither the statement (recitals) nor the claims in the Sworn Application are numbered, he denies that either the statement or the claims are obscure. He also argues that the oversight of lack of enumeration should not lead to the striking off of the Application as an extreme sanction;

The Court can never emphasize enough that, in matters relating to the validity of judicial acts, the distinction has to be drawn between absolute and relative nullity. In the latter case, the Court is duty bound to draw the parties' attention or to make *ex officio* orders, whereas this is not at all possible in the case of absolute nullity prescribed by law under the former¹². Furthermore, it is settled law that for a judicial act to be struck down as being null "*jeħtieġ li jkunu jikkonkorru raġunijiet gravi, fosthom nuqqasijiet ta' evidenti preġudizzju għad-difiża tal-konvenut; u huwa risaput li l-leġislazzjoni u l-ġurisprudenza patrija ilhom progressivament jirrifuġġu mill-formliżmu eċċessiv, fonti ta' litigji żejda u prokrastinazzjonijiet inutili, purke' ovvjament ma tirriżultax l-effettiva vjolazzjoni tal-liġi*"¹³;

When the law prescribes that the Sworn Application should consist of a "statement which gives in a clear and explicit manner the subject of the cause in separate numbered paragraphs", this is to be taken to mean that the recitals should guide the person who peruses of the Application to the reason behind the claim or claims made by the plaintiff. Coupled to this is the need for the defendant to be in a position to contest the claim¹⁴. Where there is no inherent contradiction between what is premised and what is claimed, then a plea of nullity of a judicial act should not be lightly entertained. For a Sworn Application (or Counter-Claim) to pass the rigours of the law, it is enough that the party sued can discern what the party suing is claiming against him¹⁵ and that the judicial act is such as to allow the defendant to set up a proper defence to the plaintiff's claim¹⁶;

¹² Vide P.A. SM 1.10.1910 in *Ludovico Magro vs Pio Żammit* (mhix pubblikata), which contains a clear exposition of the effects of nullity of judicial acts

¹³ Comm. App. 15.4.1977 in *John Mallia vs Maria Assunta Borġ et* (not published)

¹⁴ Cfr., for example, P.A. 5.6.1959 in *Sciortino et vs Micallef* (Kollez. Vol: XLIII.ii.748)

¹⁵ P.A. 14.2.1967 in *J.G. Coleiro vs Dr. J. Ellul* (Kollez. Vol: LI.ii.779);

¹⁶ Comm. App. 20.1.1986 in *Carmelo Bonnici vs Eucharistico Żammit noe et*

It is pertinent to point out that the success or otherwise of the plea of nullity of judicial acts depends on whether it can validly rely on at least one of the four instances under the provisions of article 789(1) of the Code of Organisation and Civil Procedure. It appears that Capece's plea relies on the provisions of article 789(1)(c) and (d) of the said Code. It has been authoritatively explained that the distinction to be drawn between a nullity under paragraph (c) and one under paragraph (d) of the said sub-section, consists in the fact that, under the latter, the judicial act lacks an essential requisite and not a simple violation of the prescribed form¹⁷. One must underline the fact that the law refers to "essential particulars" and not to any particular, which means that certain defects which are not "essential" fall beyond the ambit of the sanction of nullity. For a particular to be considered "essential" in a judicial act, it is necessary that its violation seriously and irremediably hampers one or more of the basic procedural rules by virtue of which a cause may proceed swiftly, efficiently, diligently and in full and proper observance of the parties' rights and of the tenets of natural justice¹⁸;

To cite but one judgment which addresses cogently this question, the Court states that: *"... ma hemmx kwestjoni li dottrinarjament huwa importanti li jiġu, għall-finijiet ta' l-oġġett tat-talba u tad-dritt li jiddeterminaha, eżaminati attentament il-fattijiet li jkun taw lok għall-ġudizzju, u dawn il-fattijiet ma jstgħux ma jkunx a konjizzjoni tal-kontendenti; jekk minn dawn il-fattijiet jitnissel aktar minn dritt wieħed sabiex id-domanda tkun imressqa 'l quddiem f'ġudizzju, ma hemm xejn fil-liġi li l-attur li jippromwoviha ma jkunx jista' jddeduccihom jekk jittendi li huma ntiżi għall-otteniment ta' l-oġġett propost, salv li l-istess ma humiex inkonciljabbli. Dina r-redazzjoni ta' l-att taċ-ċitazzjoni ma tirrendix dak l-istess att għall-kawżalijiet tiegħu mhux ċar, iżda se mai turi in forza ta' liema drittijiet ("jus petendi") l-attur ikun qiegħed jippromwovi l-azzjoni. Apparti dana, ebda preġudizzju ma jitnissel lill-konvenut minn dana l-aġir ġuridiku, ilgħaliex huwa jkun jista' jirripudja l-azzjoni attriċi għad-drittijiet kollha radikati fl-att promotorju tal-kawża. . . "*¹⁹;

As to the issue of clarity of the plaintiff's action in this cause, the Court has no doubt whatsoever that this is lucidly laid out and easily

¹⁷ Cfr, for example, P.A. C.S.:4.11.1988 in *Carmelo Galea vs Pawlu Cuschieri* (unpublished)

¹⁸ P.A. GCD 31.10.2008 in *Diane Vella et vs Medserv Operations Limited*

¹⁹ Civ. App.14.11.1949 in *Borġ noe vs Vincenti* (Kollez.Vol: XXXIII.i.535, at p. 538)

understandable. The action is a very simple action for the payment of works executed under contracts of works. The allegations made by the plaintiff in his sworn statement are clear enough to comprehend, and defendants were in no difficulty to set up their respective defences and, in Capece's case, its own Counter-Claim. Thus, insofar as Capece's preliminary plea concerns the issue of clarity of plaintiff's action, the Court finds no reason to apply the sanction of nullity of the judicial act;

As regards the question of the nullity because neither the statement nor the claims are numbered, the Court firmly believes that such violation is not an "essential" one for the purposes of either art. 789(1)(d) nor a violation of form under art. 789(1)(c) of the Code which ought to lead to the striking off of plaintiff's action. Although the law lays down that the statement's paragraphs must be numbered, as well as the respective claims, it does not expressly state that the non-enumeration constitutes an absolute nullity²⁰. The non-enumeration of the said paragraphs and of the claims has been authoritatively deemed not to constitute an "essential particular" of a judicial act, nor can it constitute a reason of nullity which causes the defendant "a prejudice which cannot be remedied"²¹;

Furthermore, in terms of the *proviso* to article 789(1) of the Code, a plea of nullity of a judicial act under paragraphs (a), (c) or (d) shall not be upheld if the violation is capable of remedy under any other provision of the law. In actual fact, a shortcoming of the type encountered under the present case is remediable under article 175(1) or (3) of the Code and the correction which may (and which is hereby being ordered) would in no way impair or prejudice the defendants' pleas on the merits;

For these reasons, the Court rejects Capece's second preliminary plea and declares that the plaintiff's action is not affected by formal nullity;

²⁰ This is stated in view of the provisions of art. 789(1)(a) of Chap 12

²¹ P.A. GCD 18.4.1997 in *Aqua Logic Ltd vs Miriam Ellis* (unpublished)

The Court will now pass on to consider the **preliminary pleas regarding the respondents' standing as proper defendants** to the plaintiff's action. The issue of the proper defendant in litigation is a matter of public policy and is a plea peremptory of the action, may be raised at any stage of the proceedings (even at an appellate stage) and could be raised by the Court of its own motion (*"ex officio"*)²²;

It is imperative at this juncture to underline that whereas respondent Billi maintains that he is not the proper defendant with respect to the entire plaintiff's action, in the case of respondent Capece, the company makes it clear that it is limiting this plea insofar only as plaintiff's action refers to claims made in connection with the Birgu project. In other words, Capece can never be declared non-suited in a full and complete manner, even if its plea were to succeed;

As far as their respective plea goes, both respondents aver that they are not the proper defendants in the sense that they had no legal relationship with the plaintiff. As stated above, Capece admits that it had a contractual relationship with plaintiff regarding the Valletta project, and reserves its contestation to his claims on the merit. Capece denies a contractual relationship with plaintiff on the Birgu project. Respondent Billi denies a contractual relationship with plaintiff altogether;

On his part, plaintiff insists that both respondents are properly suited and that his action can validly survive against both or either of them severally. He relies on the allegation that respondent Billi was the person who instructed him in every technical aspect of both the Valletta and the Birgu projects and that the same respondent never denied that he was the "person in charge". He also relies on the allegation that Capece knew fully well that he had been engaged on both the Valletta and the Birgu projects and that its disavowal at this stage of any obligation towards him is tantamount to a fraudulent attempt at reneguing of its liability;

²² Civ. App. 29.1.1997 in the case *Carmela Bonanno pro et noe vs A.I.Ċ. Carmelo Bonanno et* (unpublished)

It is a settled principle of the law of obligations that a person is deemed to have promised or stipulated for himself, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement²³. Furthermore, a person cannot by a contract entered into in his own name bind or stipulate for anyone²⁴. Unless it transpires expressly from any covenant that it is being stipulated for the benefit of a third party²⁵, an agreement carries its effects and shall be operative only between the contracting parties and shall be neither of any prejudice nor any advantage to third parties, unless in those cases established by law²⁶;

The presumption that a person contracts in his own name is a *juris tantum* presumption²⁷ which can be rebutted by cogent proof brought forward by the person who claims that he was contracting on behalf of someone else as well as proof that the person contracting with him was aware of this situation²⁸. In case of doubt, the presumption prevails and one is deemed to contract in one's own name²⁹;

A juridical relationship, furthermore, may arise out of various situations, not only within a contractual context. These situations would also give rise to legal effects tantamount to a reciprocally binding relationship and which would found a legal relationship³⁰. As a matter of fact our Courts have held that “*B’relazzjoni ġuridika’ wieħed neċessarjament jifhem dak l-att jew pluralita’ ta’ atti konnessi li jimmiraw għall-produzzjoni ta’ effett ġuridiku fl-ambitu tad-drittijiet bejn żewġ soġġetti jew aktar. Tali att jew atti huma, mbagħad, ravvizabbli minn manifestazzjoni ta’ volonta’, ossija ta’ dik l-imġiba li in bażi għaċ-ċirkostanzi li fih tavvera fit-traffiku ġuridiku*”

²³ Art. 998 of Chap 16

²⁴ Art. 999(1) of Chap 16

²⁵ Art 1000 of Chap16

²⁶ Art 1001 of Chap 16

²⁷ Inf Civ App PS 19.10.2005 in *Borg Cold Stores (Import & Distribution) Ltd vs Mario Pickard et noe*

²⁸ Comm App. 4.5.1973 in *Philip Galea Souchet vs Michael Falla* (unpublished) and Civ. App. 6.10.1999 in *Lawrence Formosa noe et vs Silvio Felice* (unpublished)

²⁹ Civ. App. 1.2.2008 in *Dr Renato Ċefai noe vs J & M Aluminium Ltd*

³⁰ Inf Civ App PS 31.10.2008 in *Charles Thorne et vs John Mallia Borg et*

*tnissel fid-destinatarju t-tifsira li l-parti trid tipproduċi l-konsegwenzi ġuridiċi predetti*³¹;

On the other hand, where the contracting party is an entity vested with legal personality, it becomes imperative that a physical person entrusted to negotiate on its behalf be manifestly so authorized to bind it in its covenanted undertakings and that such person be duly identified to enter into negotiations on its behalf. This requirement evokes the “doctrine of ostensible authority” which aims at guaranteeing that negotiations and undertakings are *bona fide* and that the ensuing obligations are enforceable against such legal entity³²;

Applying these tenets to the present case, the Court is convinced that respondent Billi’s plea ought to succeed. First and foremost, he was an employee of Capece and was not shown to be a director or other officer of that company. Secondly, he was authorized by Marzio Capece Minutolo to appear on the subcontract with the plaintiff on behalf of Capece and not in his own name. Thirdly, the document itself expressly states that Billi appeared thereon on behalf of Capece. Fourthly, respondent Billi was the technical expert supervising the entire project and was entrusted by the consortium to act as such and to continually liaise with the consortium and the owner of the project, namely the Government of Malta through the Director General Contracts. Fifthly, the project contract was awarded to the consortium (of which Capece was a constituent member) and not to respondent Billi. Finally, even when plaintiff sent a legal letter calling for payment of the works performed, he addressed it to respondent on behalf of Capece at the latter’s address;

The Court considers most enlightening the evidence tendered by respondent Billi when cross-examined as to whether he personally undertook contracts or effected payments in connection with the

³¹ Inf Civ App PS 27.11.2009 in *Perit Robert Musumeċi vs Nażżareno sive Reno Fenech*

³² P.A. JZM 25.2.2010 in *AMC Marketing Ltd vs BBQ Centre Ltd* (not appealed)

restoration projects. He said *“Never, never on my own. I mean, if I give a cheque to somebody or I paid somebody it was under the instruction and with the money of Capece, and if I was signing like I did on this contract³³, I was signing under direct instructions of Capece. I was not taking the decision on my own. Even to buy things that were necessary for the work, I needed approval from Capece. ... I never did things on my own. Because I was an employee; that was my role. I had a contract as a restorer ... And I was always very clear that I was never acting on me (sic); and I never paid somebody with my money or I never gave them a cheque of my account. I always brought things, and even the contract, I signed on behalf of Capece Construction. I didn’t sign on as Fabio Billi, on my own. And I did under strict instructions of Mr Capece. Mr Capece renewed the contract and decided everything”³⁴*. This evidence is eloquent and should quell any doubt that respondent Billi might have in any way given plaintiff the impression that he was engaging him in his personal capacity;

This being so, the logical consequence is that respondent Billi has nothing to answer for in regard to any of plaintiff’s claims. Thus, his plea will be upheld as being sound at law;

The position of Capece is more problematic. The respondent company relies on the fact that no (sub-)contract exists with the plaintiff regarding the Birgu project and denies that it had in any way engaged him to work on its behalf in that particular phase of the project. Plaintiff himself acknowledges as much, but states that the way he was engaged to undertake those works left him in no doubt that Capece was tasking him to render a service to the company. He furthermore submits that he was goaded into continuing with the works by Marzio Capece Minutolo and by respondent Billi themselves;

³³ The reference here is to the subcontract entered into with plaintiff regarding the Valletta project

³⁴ Respondent’s evidence 3.1.2014 at pp. 1053 – 4 of the records

The Court notes that indeed no contract of works was entered into between Capece and the plaintiff regarding the Birgu project. It notes that, at the time the plaintiff was actually rendering works at the Birgu project, Capece had a running sub-contractual relationship with a third party (Joe Pace K3 Limited) which relationship was terminated only by mutual consent about three weeks **after** the plaintiff had already filed this present lawsuit;

On the other hand, the law does not require that a contract of works need be entered into in writing under pain of nullity (“*ad validitatem*”)³⁵. Secondly, the records of the case show evidence that plaintiff actually worked on the Birgu project and that he engaged about two other employees to work intermittently there with him. This fact is acknowledged by respondent Billi as well as by the project architect³⁶. Thirdly, when Capece sub-contracted the plaintiff for the Valletta project, it had already observed his performance under the Birgu project. Fourthly, Capece terminated its (sub-)contractual relations with Joe Pace K3 Limited before the works on the Birgu project had been concluded and did not show that it engaged anybody else to finish them off, which task, it seems, was left in the hands of plaintiff;

Additionally, Capece pleads that plaintiff was a partner (originally it had alleged that he was a director) with the recognized sub-contractor (Joe Pace K3 Limited) and that he was allowed to work on the Birgu project only in that capacity³⁷. Furthermore, Marzio Capace Minutolo alleged (though he was in no way able to prove)³⁸ that plaintiff was actually paid by the proper sub-contractor for the works he had undertaken in the Birgu project. Plaintiff denies this, whilst acknowledging that he was indeed a partner with Joe Pace K3 Limited but never an employee nor was he an officer thereof;

³⁵ Art. 1233(1) of Chap 16

³⁶ Evidence of AIC Mario Ellul 7.3.2013 at p 883 of the records

³⁷ His evidence 7.10.2013 at p. 1016 of the records

³⁸ *Ibid.*, at p. 1019 of the records

The Court, after weighing all these factors, cannot rule out categorically that there was a juridical relationship between plaintiff and Capece even with respect to the Birgu project. The allegation that payment has already been received from plaintiff is not a valid argument to sustain the plea of not being the proper defendant: it could give rise to some other plea as to the validity of the claim of outstanding payments due. Plaintiff argues that the works for which Joe Pace K3 Limited were paid had nothing to do with the kind of work he was tasked to undertake and that the problems which arose between that company and Capece had to do with the setting up of the scaffolding and not with the execution of the stone-works for restoration;

The Court is of the considered opinion that, within the present context and at the (initial) stage which the proceedings have arrived at, it is early days to decree that Capace is not in any way answerable to plaintiff's claims even with regard to the Birgu project. This is not to say that the Court finds liability: but this is an issue which will have to be definitively determined after enquiry into the merits. Furthermore, although there can be little doubt as to the inexistence of an expressly-covenanted contractual relationship, it is not remotely impossible for a legal relationship to have existed between plaintiff and Capece on a quasi-contractual basis. Such a relationship – which carries enough strength to mutually bind the parties thereto – falls perfectly within the parameters of plaintiff's action as proposed by him;

The Court cannot, therefore, uphold Capace's third preliminary plea as proposed and will be rejecting it;

The Court therefore decides and rules that:

It **rejects the second preliminary plea** of the defendant company regarding the nullity of the plaintiff's Sworn Application, with **costs** against the said respondent;

It **rejects the third preliminary plea** of the defendant company and declares that it is the proper defendant to plaintiff's action, with **costs** against the said respondent;

It **upholds the first preliminary plea** of defendant Fabio Billi and declares him non-suited, with **costs** against the plaintiff; and

Orders that the case proceeds on the merits.

< Partial Sentence >

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