

Court of Appeal
(Inferior Jurisdiction)

Judge Anthony Ellul

Appeal number:- 10/2014AE

Hannah McGivern [ID 75960(A)]

vs

Andre' Vella Borda [ID 298674(M)] on behalf of Eurosposa

Friday, 5th February 2016.

On the 9th May 2013 applicant filed a claim in the Consumer Claims Tribunal alleging that on the 8th January 2013 she tried on several wedding dresses at Eurosposa, and chose one. When she asked the salesgirl about the price she was informed that for an order to be placed she would have to pay a deposit and in case she changed her mind the order could be cancelled and the deposit refunded. On the 10th January 2013 applicant went back to the shop and after trying on the same dress she decided to place a deposit of €100 on the basis of the information given to her by the salesgirl. The dress was already at the shop and no alterations or adjustments were required. On the 17th January 2013 applicant changed her mind due to alleged financial difficulties and called the shop to cancel the order. The owner informed her that according to Maltese law she could not cancel the order and that she was bound to pay the whole sum due for the dress. Plaintiff requested the Tribunal to order the defendant to refund the sum of €100. The selling price of the dress was Eur1,700.

In his reply, respondent rebutted plaintiff's claim on the grounds that the "Order Form" which she had signed constituted a contract of sale and that the terms and conditions together with their implications were clearly explained to applicant prior to her signing. He moreover denied that the salesgirl made the statements alleged by plaintiff.

Respondent also filed a counter-claim requesting the Tribunal to order the plaintiff to pay the sum of €1,700, i.e. the price for the wedding dress.

In a judgement delivered on the 23rd April 2014 the Tribunal rejected plaintiff's request and upheld respondent's counter-claim with respect to the sum of €1,600, since applicant had already paid €100 as deposit. The Tribunal also ordered applicant to collect the wedding dress from the shop and pay the balance accordingly. All legal fees were to be borne by applicant herself.

On the 13th May 2014, applicant lodged an appeal. Respondent filed a reply dated 24th November 2014.

Preliminary plea.

Respondent claims that the appeal is null¹ since it was filed in the English language without the appellant's request and the court's authorization in terms of the Judicial Proceedings (Use of English language) Act (Chapter 189).

The Court notes that during the first sitting², appellant requested that proceedings are held in English. Although this request was made during the hearing, it is considered that the overall spirit of the law has been respected and that the subsequent authorisation by the Court rectified any shortcoming.

This plea is rejected.

First grievance.

Appellant has requested the court to declare that the judgement delivered by the Tribunal is null and void because despite the fact that the same Tribunal upheld a request by applicant³ for the proceedings to be conducted in English, the Tribunal nevertheless proceeded to hand down a decision in Maltese to the detriment of her human and statutory rights.

The court is of the view that this matter has not caused any prejudice to the plaintiff. Appellant could have requested a translation of the judgement. Furthermore, her legal counsel is Maltese speaking. The contents of the appeal application is proof that this mistake on the Tribunal's part did not have any negative consequences on the plaintiff's right to a fair hearing.

Second grievance.

According to appellant, the Tribunal's conclusions are flawed in that they are based on an incorrect interpretation of the law.

On the 10th January 2013, appellant signed a document entitled ORDER FORM, which states that:-

"Alterations: At extra charge. Once the order form is signed, the client is obliging himself/herself to purchase the items listed in the same order form. This order form is a contract of sale. Purchases must be collected within 7 days of our written notice. Deposit is part of the purchase price. Client is to make full payment withing 6 months from date of purchase unless this payment is made before this date. Your

¹ Point number 2 at Fol 26 of the appeal proceedings

² *Process verbal* dated 12th November 2014 at fol.21

³ As per *process verbal* of the Tribunal dated 19th June 2013 (fol. 5)

copy of this form must be presented when collecting purchases or making payments”.

She contends that the form was (i) merely a document indicating the specifications and the price of the wedding dress, (ii) just a “contact form”, and (iii) without prejudice, in any case the conditions stipulated therein were tantamount to “*unfair contract terms*” in terms of Chapter 378 of the Laws of Malta⁴.

Respondent reiterates that the “Order Form” is a contract of sale and payment of €100 was a payment on account of the price⁵.

The Civil Code (Cap.16 of the Laws of Malta) defines “sale” as a “*contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former*”⁶. Of particular relevance to the present case is Article 1347 of the Code which stipulates that: “*A sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, **as soon as the thing and the price have been agreed upon**, although the thing has not yet been delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer.*”

The Court considers that the “Order Form” reflects an agreement that had been reached between the parties with regards to the purchase of the wedding dress. Since the parties agreed on the thing and the price, the sale was completed. At that point in time the appellant became the owner of the dress. Both parties were from then onwards bound with obligations towards each other – the seller to deliver the dress and the buyer to pay the price.

It is also noted that after the applicant signed the order form and paid the deposit, defendant on behalf of Eurosposa removed the wedding dress from display and put it aside. He also removed the picture of the dress from the catalogue which, being one advertising exclusive wedding gowns, meant that after the 10th January 2013 no other client could see its picture or order an identical one. Defendant also confirmed that the dress is still in the shop but not on display⁷.

Appellant’s claim that the form was merely a “contact form” with no other legally binding implications is not justified when analysed in the context of the wording used. Although the form refers to “contact of sale” rather than “contract of sale”, there is no room to doubt that it was actually referring to a contract of sale. Furthermore, the court does not believe the appellant that she was unaware that the

⁴ Applicant’s reply to respondent’s counter-claim at fol 11.

⁵ Evidence of Andre’ Vella Borda dated 2nd April 2014 at fol 12.

⁶ Article 1346 of the Civil Code.

⁷ Evidence of Andre’ Vella Borda *ibid*.

self-explanatory terms in the document were actually "*terms and conditions*"⁸. If they are not to be deemed as such it is hard to decipher what they actually are and what was the purpose of their inclusion in the documents.

For the above reasons, there was no misinterpretation of the law and this grievance is rejected.

Third grievance.

Appellant also complained that the Tribunal did not decide the case according to equity. Chapter 378 stipulates that claims before the Tribunal are to be determined according to the substantive merits and justice of the case and also in accordance with equity⁹, this does not in any way imply that Tribunals have the *vires* to arbitrarily discard the application of the law. Equity is not intended to substitute the law:

"Dejjem tajjeb li jigi qabel xejn imfakkar illi kif drabi ohra rilevat, "l-ekwita` minnha nfisha trid li ssir gustizzja u jekk ikun jezisti dritt li jiskaturixxi minn obbligazzjoni assunta legalment u li tirrizulta jew minn xi disposizzjoni kontrattwali regolarment konvenuta u accettata bejn il-kontendenti, l-ekwita` trid illi dik id-disposizzjoni, dik l-obbligazzjoni, mhux biss tigi onorata, imma tigi protetta mit-Tribunal ghal Talbiet Zghar, li wara kollox, qieghed hemm biex jaghmel gustizzja. Ikun l-akbar kontro-sens li jinghad illi minhabba konsiderazzjonijiet ohra, li fil-fehma tat-Tribunal ghat-Talbiet iz-Zghar ikunu importanti, drittijiet legali jigu skartati u addirittura injorati jew negati meta huwa evidenti illi dan ma jkun xejn hlief illegalita` li minnha nfisha ma hiex konfacenti u kompatibbli mal-kuncett ta' ekwita`"¹⁰ ;

"...it-Tribunal ma kellu l-ebda dritt, anke jekk abbazi ta' l-ekwita`, li jissorvola kompletament l-applikazzjoni tal-ligi ghall-mertu."¹¹

Appellant contends that the Tribunal did not decide equitably when it did not take into consideration the fact that she changed her mind with regards to an "*off the shelf*" wedding dress which did not even require any modification, and instead ordered her to pay the remaining balance for it when she no longer needed it.

The Court notes that appellant had already tried on the wedding gown twice on two separate occasions before deciding to purchase. She therefore had enough time to

⁸ Evidence of Hannah McGivern 2nd April 2014 at fol 12.

⁹ Article 21 (1) of the Act

¹⁰ **Gasam Mammo insurance Limited vs RyanAir Ltd** Appell Nru 897/2009 deciz 27 ta' Mejju 2015

¹¹ **Blye Engineering Company Limited vs Vincent Caruana** deciz mill-Qorti tal-Appell 27 ta' Ottubru 2000

carefully consider her choice and decide whether to actually purchase it or not. During her second visit when she opted to buy the dress she read the terms and conditions in the Order Form¹². Therefore she was aware of the contents thereof. Moreover, despite her allegation that she was told that a refund of her deposit was possible if she changed her mind, it transpires that the only wording about the deposit in the Form - which she signed for - was that it was "*part of the purchase price*".

This grievance is rejected.

Fourth grievance.

Appellant also claimed that the Tribunal completely ignored the provisions dealing with *unfair contract terms*, i.e. Articles 44(1)(2) and 44(2)(c), (e), (f), (g), (h), (k), (s), (t), 45(1)(a), (b), (c) and (d).

However the appellant failed to explain which were the terms of the contract that she considered to be unfair.

The court having considered the various paragraphs of Article 44 and 45 of the Consumer Affairs Act (Chapter 378), is of the view that this complaint is unjustified. The case concerns a sale of a wedding dress and the contract was not based on any unfair terms.

This objection is rejected.

Fifth grievance.

According to appellant, the binding provisions of Council Directive 93/13/EEC on unfair terms in consumer contracts have also been ignored by the Tribunal. The Court points out that as stipulated in Article 47C of Cap.378, the purpose of Part VI thereof is specifically to implement the provisions of Council Directive 93 /13 /EEC and states also that the provisions of this Part shall be applied and interpreted accordingly.

For the reasons already stated, the Court has already considered that the terms of the Order Form in question are not deemed unfair in terms of Part VI of the Act. The mere fact that the Tribunal did not find any breach of this Part does not imply that this part of the law has not been taken into consideration.

This grievance is rejected.

Sixth grievance.

¹² Appellant's evidence *ibid*.

Appellant complains that the Tribunal's conclusions are further flawed in that they are based on an incorrect interpretation of facts.

In accordance with established case-law the Court of Appeal does not normally disturb the appreciation of facts made in first instance unless such appreciation is manifestly unjust and unreasonable:-

*"Huwa ben risaput li f'kaz ta' appell, il-qorti ta' revizjoni m'ghandhiex tiddisturba d-diskrezzjoni ezercitata mill-ewwel qorti fl-apprezzament li dan ikun ghamel tal-provi migbura u "normalment tkun inklinata li tiddisturba tali apprezzament tal-fatti li tkun ghamlet l-ewwel Qorti jekk hija tkun konvinta li huwa b'dan il-mod biss, li tkun tista' tikkoregi xi ingustizzja manifesta".*¹³

*"Bla dubju, l-apprezzament tal-fatti hu rimes ghad-diskrezzjoni tal-gudikant adit mill-mertu u, di regola, indipendentement mix-xorta tat-tribunal li quddiemu l-kawza tkun trattata, dak l-istess apprezzament ma jigix disturbat sakemm ma jkunx jirrizulta xi motiv gravi biex Qorti ta' revizjoni twarrab dak l-apprezzament u tissostitwih b'dak taghha".*¹⁴

The fact that ultimately applicant's version of events did not lead to a satisfactory outcome does not automatically imply that the Tribunal based its conclusions on an incorrect interpretation of the facts presented to it. The appellant merely repeated the statement of facts she made before the Tribunal. However, she did not propose any convincing argument that convinces this Court to discard the Tribunal's conclusion. The Court is satisfied that the Tribunal evaluated all facts and evidence presented by both parties and exercised its discretion within the parameters of the law. The Court does not find any flaws in the Tribunal's appreciation of facts and conclusion reached.

This objection is therefore rejected.

For all the above reasons the Court rejects the appeal with costs against the appellant.

Anthony Ellul

¹³ **Nazzareno Spiteri et vs Karl Busuttil et** decided by the Court of Appeal on the 27th March 2015

¹⁴ **Emanuel Borg et vs Anna Clews et** decided on the 27th February 2009