Diploma in Law

Lecture 8: Judicial Procedure

Lecturer: Dr. Emma Portelli Bonnici

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Diploma in Law (Malta)

Referees in Judicial Proceedings

- Referees are the same as ex parte expert witnesses, only that these are appointed by the court and not by the parties
- Legal referees are to be appointed in the case of a technical matter, as the court would know the law; and these are mostly used to gather and organise evidence
- Indeed, the functions of judicial assistants and referees overlap
- Referees are generally appointed by the court of first instance, and not at appeal stage
- The report of the referee shall state the inquiries made and his findings, together with the grounds of such findings
- Where authority has been granted to referees to receive documents or examine witnesses, no further documents or witnesses on the subject-matter of the reference can be made before the court, except in certain circumstances before the Court of Appeal or where the court deems it expedient
- When one asks for additional referees, this implicitly acts as an appeal from the opinion of the first referee
- Such ‘appeal’ must be filed by a note within ten days from the publication of the first report

- The parties may ask for their own ‘referee’ to be appointed, especially at appeal stage, so long as such referee is an expert in the field required and has not yet come into any contact with the case at hand

- The court is not bound by the contents of the report of the referee, and indeed, if the court believes and has good cause to depart from such a report, it can do so, although this is rarely the case

- On site inspections by judicial referees are also possible

Proof by Admission or Reference to the Oath of the Adversary (Subizzjoni)

- It may be argued that the COCP is relatively out of date in this regard, and indeed, this is also a concept that does not really seem to have much place within the law anymore, although it can nonetheless be a useful tool

- This concept is known as ‘subizzjoni’ in Maltese, and the phrase ‘ingunt minn issa in subizzjoni’ is written in the sworn application because should the defendant fail to turn up, the applicant would be fully entitled to refer to his oath

- The aim of this particular institute is to make the other party appear when summoned before the court, and can be used by both the plaintiff and defendant

- This may therefore be defined as the judicial confession provoked by the interrogatory of the adverse party

Procedure Before the Courts in General

- The application, or sworn application (before the superior courts) is served on the respondent, and if the respondent fails to appear before the courts or fails to file an answer, the plaintiff would present in court the ‘kapitoli’
- These are a set of questions which the plaintiff duly prepares in such circumstances, and such questions are then listed, numbered and submitted to the court
- If an answer is filed, or an appearance before the courts is made, then it is not possible for such ‘kapitoli’ to be filed

- If the defendant is not served with the application or sworn application, then it is not possible for the plaintiff to file such ‘kapitoli’

- When a person is summoned for the subizzjoni, he is told that he is being asked to answer these questions, and if he doesn’t appear, such questions will be deemed to be admitted by him

- The court will ask the plaintiff to produce the said list of questions, which can also take the form of declarations; and such questions or declarations must be clear and concise in nature

- They must also be signed by the advocate or legal procurator, or by the party submitting
- Nevertheless, questions which the court deems to be superfluous or which the court may deem fit to reject may be cancelled or indeed rejected
- Furthermore, if, of course, good cause is shown for non-appearance, then the court has the right to not admit the ‘kapitoli’ in question

Procedure Before the Superior Courts

- A plaintiff who intends to furnish evidence by reference to the oath of the defendant shall give notice in the written pleading commencing proceedings
- This too applies in the case where the defendant requires reference to the oath of the plaintiff
- Where the plaintiff fails to give the defendant such notice, he shall, at two days before the hearing of the cause, present a note in the registry so that the defendant may be informed that reference to his oath is required
- However, it must be noted that the superior courts are normally very reluctant to the filing of the ‘kapitoli’, and although legal, this is rarely resorted to

Procedure Before the Inferior Courts

- The probability is that if the defendant had been served and did not file an answer within the inferior courts, then there would not be a contestation on his behalf
- Therefore, here, the ‘kapitoli’ would be prepared just before the court session commences
- If the defendant does not answer the said ‘kapitoli’, the law considers the defendant to have ‘turned up’ to have conferred on oath such questions, and duly admitted the questions submitted
- Therefore, the implication is that silence involves consent and admission of all elements in this case, giving the plaintiff a distinct advantage in this regard
- If the reference is required by the defendant, then the demand shall be made orally, either before or during the hearing of the cause; and in the former case, notice of such demand shall be given to the plaintiff
- Certain demands before the inferior courts, such as that of the eviction of tenants, cannot occur on the same day as the filing of the ‘kapitoli’, but in the case of a money claim inferior to €580, once the ‘kapitoli’ are filed, and the court sees that the defendant is default, then judgement could be delivered there and then

Subizzjoni vs. Contumacia

- Both the procedures of subizzjoni and contumacia involve a party failing to appear in Court
- Contumacia implies that such party will not enjoy the right to produce evidence in his favour, or to file pleas, or to contest or cross-examine evidence, and is taken to entail a contestation of all allegations and arguments brought by the plaintiff
- On the other hand, subizzjoni implies an admission and acceptance of the questions posed

Reference to the Oath of the Adversary

- It shall not be lawful to make reference to the oath of any party situated outside of Malta
- The party to whose oath reference is made may defer back the questions or any part thereof to the party referring
- Where the party to whose oath a reference is made refuses to answer the questions or fails to defer them back to the oath of his adversary, the questions shall be deemed to be proved in favour of the party referring
- Where the questions have been deferred back to the party referring and such party refuses to answer them, the questions shall be deemed to be proved against him
- In both circumstances, of course, this may be used as evidence

Uses of Subizzjoni

The uses of subizzjoni are as such twofold:

1. Where another party is regularly not attending, or fails to appear for a good cause;
2. To force the court to give a deferment of the case, provided that the conditions for subizzjoni are fulfilled

Appeal Applications

- According to Article 142(1), “save as is otherwise provided by this Code or by any other law, the mode of procedure before an appellate court is by application”.

History

- Prior to the amendments effected by Act XXIV of 1995, the rikors was one of three modes of instituting proceedings that also included libel (libell) and petition (petizzjoni).

- The idea of the Permanent Law Reform Commissions was that the modes of procedure before the courts should be simplified and made more uniform. It was therefore suggested to abolish these latter two procedures. Consequently, that which was Title I, entitled ‘Of the Mode of Procedure by Libel and Petition’ was removed.

- With the latter two modes being abolished, the PLRC opted to substitute the petition with the application as the normal mode of procedure before the Court of Appeal.

Main Requisites

- An appeal is entered into by means of the application in the Registry of the Court of Appeal within 30 days from the date of judgment as per Article 226(1).

- The application shall contain a request (talba) that the judgment appealed from or any part thereof be (i) reversed or (ii) varied. Moreover, an application may also contain a request that a decree be annulled.

1. Application for Reversal

The application for a reversal of a judgment (Article 143(1)) must contain:

(a) A reference to the original claim and to the judgment appealed from;

(b) Detailed reasons on which the appeal is entered, known as aggravji;

(c) A request that the claim be allowed or dismissed.

It is not a good rule of practice to reproduce the judgment in full. The Court of Appeal will have the case file with the full decision of the court of first instance. It is enough if reference to the operative part is made.

2. Application for Variation

- The application for a variation of a judgment (Article 143(2)) must contain (i) and (ii) as stated under an application for reversal. It must also (iii) distinctly state the heads of the judgment complained of and (iv) must specifically state the manner in which it is desired that the judgment be varied under each head.

3. Application for reversal, annulment or variation

Furthermore, sub-article (3) speaks of appeals from decrees and not from judgments, which may be reversed, varied or annulled. Such application must contain:

1. A reference to the contents of the decree appealed from; and
2. Detailed reasons for such reversal, annulment or variation

Reference can be made to Article 229 that provides a distinction between those decrees that can be appealed from prior to the final judgment and those that require the outcome of the judgment before an appeal can be lodged. In the latter case, an appeal from the final judgment must accompany the appeal from the decree.

Relationship between Reversal, Annulment and Variation

- In all three instances, it is important to note that a request for reversal shall be deemed to include a request for annulment & variation of the judgment or decree in question.
- Similarly a request for annulment shall be deemed to include a request for reversal & variation of the judgment or decree.
- Prior to the amendments, an appeal application had to be divided into two parts. The first part included those pleas stating why a judgment ought to be declared null on grounds of formality. The second part laid down those pleas, which, in the case where the appellate court would not accept the nullity pleas contained in the first part, the court would consider the revocation or variation of the judgment of the first court. This is now no longer necessary as requests for reversal and annulment implicitly include the other requests.
- However, where a variation is intended and requested, the only variation is possible. The amendments did not touch the 'variation' and left it in its original form.

- Really the words 'reversal' and 'annulment' are co-terminus.

Default of Compliance

- Article 143 also provides for those instances when the application is in default of compliance with the above-mentioned requirements. The application is not automatically thrown out and thus voided, but the Court shall order the appellant to file, within two days form the court order, a note containing the particulars required by law that were previously omitted.
- The costs to file such note shall be borne by the appellant.

Service of Application

- Article 144 notes that an appeal may be lodged by any party in the cause and may be directed against one or more of the parties.

Ex: in A & B vs X & Y:

Y may lodge an appeal solely against A.

ALL other parties need to be served with the appeal application (B&X)

Only A needs to file his respective answer with 30 days from date of
service i.e. only party against whom the appeal is directed.

Production of Documents

- The appeal and application AND reply shall be supported with the production of ALL documents relevant to the application, answer or reply.

Pleadings

- After the reply has been filed, or after the time for such reply has expired, the written pleadings are deemed to be closed in terms of law.

- However, even if the 30 day period allowed for a reply lapses the party shall still be allowed to make oral submissions to the court during the hearing of the appeal.

- The Court of Appeal has the discretion to allow the production of further documentation or the filing of additional written pleadings if the case so warrants.

- When the written pleadings are closed, the Registrar must appoint the cause and serve the notice to the parties concerned informing them of the respective date and time for the first hearing.

- If the appellant (BUT NOT respondent) is not served with the notice, the registrar UNLESS he has been exempted, must inform the advocate of such party in writing, within 10 days, that the notice has not been served.

- The advocate then signs a copy of the receipt of such communication, which is therefore deemed to constitute sufficient notice of the hearing to the appellant. Hence, the responsibility of notifying the appellant can easily be shifted upon his advocate. This is provided that no action may lie against the advocate for failure to inform such party.

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ADVOCATES

Cross Appeals

- The cross appeal or appell incidentali, first introduced by Justinian is dealt with in Article 240 of the COCP.

- Take two parties, A and B. Judgment is passed and although party A is not entirely satisfied with the decision, he decides not to appeal. On the other hand, party B appeals. This may alter A's position and lead him to argue that if B wants to reopen the entire question at hand, he would also like to reopen the entire question himself at an appeal stage. A will be able to file a cross appeal while B appeals concurrently.

- This is the scenario dealt with in Article 240. Any party may avail himself of an appeal entered from a judgment or partial judgment. ‘Appeal’ also includes an appeal from (i) a head/s of any judgment or (ii) an interlocutory decree.
- Any party may enter a cross appeal not only in respect of the aforementioned given in the same cause even if not appealed from by the appellant.
- A cross appeal may be made (i) against or (ii) by a party, not being one against whom a cross appeal is directed, in terms of Article 144(1).
- The proviso to this article states that a party may not avail himself of such appeal if he has already appealed from such judgment or head thereof.

Interpretation

- It is clear from the above article that a cross appeal is therefore linked to an appeal filed by another party.
- Availing one's self of the right of cross appeal renders the whole appeal common for both parties. There are two main conditions, imposed by law that bars the exercising of the cross appeal.

1. The first and more obvious condition as noted in Saliba vs Registratur tal-Qrati ta' Ghawdex (CoA, 2011) is that the cross appeal may only be instituted by a party to the proceedings. In this case, the company in question seeking to cross appeal had no locus standi. It therefore couldn't cross appeal.

2. The main condition imposed by law bars the respondent if he has already appealed from such judgment or head thereof. In fact, as soon as the respondent lodges an appeal, it would be deemed as a renunciation to the right to an incidental or cross appeal.

- Here we talk of a situation where the respondent has already appealed from a judgment or head thereof. Does the proviso intentionally omit the interlocutory decree? Possibly, the law didn't contemplate this situation of one having appealed form the decree because such an appeal without an appeal from a definitive judgment is useless.
- It is interesting to recall that as aforementioned, a party may also cross-appeal against the person who did not appeal from the decision. This was not the position prior to 1995, where the cross appeals could only be availed of against the party appealing from the judgment and not against the other parties interested in the suit.

Time Limits

- As for time-limits, a cross appeal can be filed even though the original time limit for the filing of an appeal would have lapsed. Indeed, it has to be filed within 30 days of the principal appeal.
- Logically, in the same way that an appeal may be filed within 30 days from the date of the judgment as per Article 226(1), a cross appeal may be filed within 30 days of the principal appeal. Yet, the law specifically provides so through a cross- reference to Article 144(1).
- Furthermore, Article 144(2) adds that the subject on whom the cross appeal is directed has a further 30 days to file a reply rebutting the allegations included in the cross appeal served on him.
- In Galea vs Cauchi (CoA, 2010) court declared plaintiff's cross appeal declaration to be null as it was filed fuori termine i.e. beyond the 20-day time limit (at the time, 20 days was the time limit, this has since been amended).

Nullity

- The link between the cross appeal and principal appeal goes beyond the requirement of time limits for filing.
- Indeed, if the principal appeal is null, the cross appeal is also null. This is unlike desertion. The cross appeal is contingent and dependent on the principal appeal as was enunciated in Symes vs Azzopardi (CoA, Commercial, 1987).
- In fact, the court in Borg vs Borg (1944) when discussing the relation between the principal appeal and the cross appeal stated that the cross appeal "ha l-mossi minn dak l-appell principali, u li qieghed jippresupponi l-ezistenza ta' dak l-appell principali, mentri dan qatt ma ezista skond il-ligi."

Declaration

- Sub-article (2) to Article 240 treats the procedure to be followed in lodging the cross appeal. The party who intends to avail himself of a cross appeal must make a declaration to that effect in the answer, stating therein his demands and the grounds for his cross appeal.
- The declaration continues to be operative even if the opposite party abandons his appeal, as per Article 241. This is in line with the autonomous existence of the cross appeal. It increases the cross appeal's attractiveness.

Other Provisions

- The provisions dealing with the appeal stage in general are also applicable to cross appeals. For example, all documentation in support of the demand or defence must be produced with the application, answer or reply. Moreover, any default in compliance with any of the requirements mentioned above shall not render the cross-appeal void, but the Court will, in any such case, make an order directing the cross appellant to file, within 2 days, a note containing such particulars as are required by law and which have not been duly stated in the answer.
- As for costs, it is not clear whether a guarantee for costs is required for a cross appeal, as is the case for the principal appeal. However, the cost of the order and of the filing of the note will be borne by the cross appellant.

L'appello del Comodo

- Act XXIV of 1995 extended the provisions relating to cross-appeals to the appello del comodo.
- As the law stood, where the action of the plaintiff was directed against two or more defendants, and only one of such defendants filed an appeal, it was not possible for P to file a cross-appeal against the non-appealing defendant.
- In virtue of the so-called appello del comodo, the plaintiff would file an appeal from the judgment contingent on the success of the appeal of the appealing defendant. In this respect, plaintiff would declare that even though he agrees with the decision of the court of first instance he is reserving the right to appeal from the judgment of the court of appeal if defendant benefited from reversal, variation or annulment of the judgment. Both appeals would then be heard concurrently by the Court of Appeal.
- Following the amendments, even though an appeal might not have been filed by all the plaintiffs or defendants to the suit, the respondent may lodge a cross-appeal against any such plaintiffs or defendants who may not have filed such appeal.
- This is reflected in article 240 (1) which provides that: "Such cross appeal may be made even against or by any party not being one against whom an appeal is directed"

Cross Appeals Summary

- Cross appeals may be filed on grounds of fact, law or both. This is line with our Court of Appeal that is a final court, dealing with both grounds i.e. grounds of fact and/or law AND dealing with the principles behind and merits of a case. This is unlike other civil law systems that through their Court of Cassation do not give rulings as to the merits of a case but refer the case back to the court in question to do so.
- It is not entirely correct to state that a cross appeal is identical to a principal appeal because if the principal appeal is for some reason null OR if the malleverija (tantamount to guarantee) is not deposited, then one may run the risk that the cross appeal is also null as it depends on the principal appeal.
- The cross appeal is an extension of the principal appeal.

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