



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MUSCAT v. MALTA

(Application no. 24197/10)

JUDGMENT

STRASBOURG

17 July 2012

FINAL

19/11/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Muscat v. Malta,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Nicolas Bratza, *President*,

Lech Garlicki,

David Thór Björgvinsson,

Päivi Hirvelä,

George Nicolaou,

Ledi Bianku, *judges*,

David Scicluna, *ad hoc judge*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 26 June 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 24197/10) against the Republic of Malta lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Maltese national, Mr Paul Muscat (“the applicant”), on 23 April 2010.

2. The applicant was represented by Dr J. Brincat, a lawyer practising in Malta. The Maltese Government (“the Government”) were represented by their Agent, Dr Peter Grech, Attorney General.

3. The applicant alleged that the domestic courts had denied him the right to access to court, contrary to Article 6 § 1.

4. On 13 September 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Mr Vincent De Gaetano, the judge elected in respect of Malta, was unable to sit in the case (Rule 28). Accordingly the President of the Chamber decided to appoint Mr David Scicluna to sit as an *ad hoc* judge (Rule 29 § 1(b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1970 and lives in Malta.

A. Background of the case

7. The applicant was one of the parties to civil proceedings instituted against, *inter alia*, him (as possessor), concerning the rescission of a contract of perpetual emphyteusis of a hotel owing to a failure to effect the relevant payments, namely *John Bugeja et proprio et nomine v Caral Ltd and for any interest they might have Paul Muscat* [the applicant] and *Joseph Muscat*. In these proceedings the address of the applicant (the then defendant in the proceedings) was correctly marked as “Olinda Hotel, St. George’s Road, St. Julians”, and the claimant’s address correctly marked as “43, George Borg Olivier Street, St Julians”.

8. By a judgment of 31 October 2002, the first-instance court found against the defendants and ordered the property to be returned to the claimant. The defendants had forty days to vacate the property.

9. Caral Ltd, the holder of the emphyteusis and main defendant, did not appeal. In consequence, the rescission of the emphyteusis and the eviction of Caral Ltd became final.

10. On 20 November 2002 the applicant appealed. The appeal application was signed by Dr M., the Assistant Advocate for Legal Aid. On the same date, through the assistance of Dr M. (in his capacity as Assistant Advocate for Legal Aid), the applicant requested legal aid (Article 911 of the Code of Organisation and Civil Procedure “COCP”). In both the appeal application and the legal-aid request, signed by Dr M., the addresses of the applicant and the respondent were inverted.

11. On 28 January 2003 the applicant was granted legal aid and Dr A. and Ms T. were nominated as advocate and legal procurator respectively for this purpose. The applicant was informed that he should enquire at the court registry for details of those nominated. It would appear that he did not make an enquiry at the relevant time.

12. On 29 April 2003 the court bailiff unsuccessfully attempted to serve notification of the appeal on the respondent at “Olinda Hotel, St. George’s Road, St. Julians” (the applicant’s address). In consequence, he marked the notification as undelivered “*riferta negattiva*” (see Relevant domestic law) and noted that the venue was derelict.

13. No further attempts at notification were made.

14. On 20 November 2003, at the first appeal hearing conducted in the absence of both parties, the appeal was declared to have lapsed (been deserted), on the basis that no notification of the appeal application had been made to the respondent within the peremptory one-year period.

15. On 7 September 2004 the applicant lodged an application with the ordinary courts requesting the revocation of the decision of 20 November 2003, in that it had been issued on the basis of a lack of notification as a result of an error in the address of the respondent as

submitted in the appeal application signed by the Assistant Advocate for Legal Aid.

16. By a decision of 15 September 2004, the applicant's request was rejected as unjustified on the basis that it had been the applicant, through his legal representative, who had supplied the erroneous address and during the rest of the year the applicant had not taken any steps to rectify the error.

17. On 1 November 2004, the applicant lodged another application with the ordinary courts, requesting the revocation of the decision of 20 November 2003. He argued, *inter alia*, that the error had been made by the Legal-Aid Office and not by himself, and that he had never been given a copy of the procedural acts presented in his name, which would have enabled him to rectify the error. On 4 November 2004 the applicant's case was dismissed as it was substantially the same as his previous request.

B. Constitutional redress proceedings

18. On 27 June 2005 the applicant instituted constitutional redress proceedings before the Civil Court (First Hall). Referring to the European Court's judgments under Article 6 §§ 1 and 3 (c), he complained that the decision of 20 November 2003 and the decisions confirming it denied him the right to a fair trial, to legal assistance and to access to court as guaranteed by Article 6 of the Convention. He therefore requested the court to revoke the said decision.

19. On 4 May 2009 the Civil Court rejected the applicant's claims. Having considered the evidence, the court noted that the relevant addresses in the appeal folder had been incorrect and that at the time (after the appeal application against the decision of November 2003) the applicant was not in contact with the Assistant Advocate for Legal Aid but with legal counsel who had acted for him previously, and maybe Dr A., his appointed advocate for legal aid. However, neither of these advocates advised the applicant to verify the acts of the proceedings. Thus, neither the applicant nor a legal representative had ever verified whether the respondents had been successfully notified. In consequence, the Civil Court found that the applicant was mostly responsible for causing the case to lapse, as he had failed to conduct the necessary verifications and had failed to prove that what had happened had been beyond his control. Even assuming that the initial error was imputable to somebody else it was up to the applicant to follow up his appeal proceedings. Moreover, unlike in the case of *Czekalla v. Portugal* (no. 38830/97, ECHR 2002-VIII) the error in the present case did not make the appeal null and void, and it could have been avoided if the applicant had been careful to monitor the state of his case.

20. On 11 May 2009 the applicant appealed to the Constitutional Court. He argued, *inter alia*, that in view of an error on the part of an agent of the

State, the application of “lapsed” status (desertion) provisions to his case had had disproportionate consequences.

21. On 30 October 2009 the Constitutional Court dismissed his claims on the merits. It reiterated that throughout an entire year the applicant had done nothing to correct the underlying error or to follow up his appeal proceedings. The case was the applicant’s and not the lawyer’s and therefore it was the applicant’s responsibility to show assiduous interest in what was going on and to follow the case scrupulously. The error in the present case was a minor one and could have been corrected. It was, therefore, irrelevant who had originally made the mistake. A simple check could have easily been made with the court’s registry. However, nothing had been done, and in consequence only one attempt to notify the respondent had been made.

22. As to the application of Article 963 (see Relevant domestic law) of the Code of Organisation and Civil Procedure (“COCP”), the Constitutional Court held that the provision used the word “may” and therefore the court was not obliged to make any assessment to decide whether the use of the provision would be justified. In any event, in the present case, it had appeared that notwithstanding the first failed notification (*riferta negattiva*) nothing had been done to request a second notification. It followed that the court’s decision not to make use of the provision had been justified. Moreover, procedural rules safeguarded the interests of both parties and those of legal certainty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Desertion of causes

23. At the time of the present case, Article 963 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, regarding desertion of causes, read as follows:

“(1) Saving the provisions of sub-article (3) and of articles 416 and 420, the written pleadings in any cause shall be closed, in first instance, within the peremptory time of six months, and, in second instance, within the peremptory time of one year.

(2) The time shall commence to run, in first instance, from the day on which the sworn application is filed, and, in second instance, from the date of the application of appeal for the reversal or variation of the judgment appealed from.

(3) If it is found that the written pleadings in any cause set down for hearing are not closed, the court may order such cause to be again placed with the causes the pleadings whereof are not yet closed and fix for the closing of the pleadings of that cause a peremptory time not exceeding one month.

(4) Notwithstanding the provisions of sub-article (3), the pleadings shall be deemed to be closed if the party not served with the pleading necessary for the close of the record appears at the trial and does not raise the question that the pleadings are not closed and proceeds or knowingly allows others to proceed to further acts without raising such question.”

24. In 2007, sub-article 3 above was amended to read as follows:

(3) If, even where the peremptory times referred to in sub-article (1) shall have lapsed, it is found that the written pleadings in any cause are not closed, the court shall once only give such orders which it may deem fit so that such pleadings may be closed as soon as possible in order to avoid that such cause be deserted by reason of some failure to notify or by reason of the failure of performance of a procedure or formality.

(3A) The desertion of a cause shall be declared by means of a decree delivered in open court if, after the orders referred to in sub-article (3) shall have been given, the written pleadings are not closed.

B. Appeal proceedings

25. Following the 2005 amendments, Article 178 of the COCP, regarding the signing of pleadings, read as follows:

Article 178

“The written pleadings and the applications whether sworn or not shall be signed by the advocate and also by the legal procurator, if any.”

C. Notification

26. According to Maltese practice, once an advocate or legal procurator pays the dues relevant for the notification (*notifika*) of an act, the bailiff will attempt to deliver notification to the address indicated. Subsequently, the bailiff must record the outcome of his attempt in the court file. Thus, an individual can learn whether the bailiff has successfully notified the other party or otherwise by virtue of a note (*ir-riferta*) that the bailiff sticks on the back of the document in the case file, which may be consulted in the registry. In the event that notification was unsuccessful, the stamp on the back of the document will be in red (*riferta negattiva*). If notification is successful the stamp on the back of the document will be in blue (*riferta pozittiva*). In the case of a “*riferta negattiva*”, the bailiff normally notes down the reason why notification was unsuccessful. Further notification will require payment and the relevant instruction depending on the bailiff’s written comments. Article 188 (1) of the COCP reads as follows:

“The officer charged with the service of an act shall, on the same day when he serves or unsuccessfully seeks to serve the act, or, at the latest, on the following day, draw up a certificate stating whether the service was effected or not. In the

affirmative, the certificate shall state the name and surname of the person on whom service was effected and, if the act was not served directly on the person on whom service was to be effected, the name and the surname of the person to whom the copy was delivered and the place where the act was served; in the negative, the certificate shall state the reason why service was not effected.”

D. Legal aid

27. Article 925 of the COCP, concerning the duties of legal-aid representatives, reads as follows:

“(1) The advocate or legal procurator assigned to the person admitted to the benefit of legal aid shall:

(a) act in the best interest of the person admitted to the benefit of legal aid, and may not demand any form of payment from that party;

(b) appear in court when the case of the person admitted to the benefit of legal aid is called;

(c) make the necessary submissions and file the requisite notes, applications, replies, notices, applications, and other written pleadings as circumstances require.

(2) The advocate or legal procurator shall remain responsible for a cause assigned to him as aforesaid, until the same has been finally disposed of, even though the period of his appointment may have expired.”

E. Legal representation

28. In the judgments of *Nardu Balzan Imqareb v Commissioner of Police*, of 4 July 2006 and *Nardu Balzan Imqareb v the Registrar of Courts*, of 18 May 2006, both cases decided by the Civil Court (First Hall) in its Constitutional Jurisdiction, in the same single judge formation, the Civil Court entered into the admissibility and where necessary the merits of the applications, notwithstanding that the applications to the court had been presented by the claimant without the assistance of a lawyer. However, the Civil Court did not deal specifically with the respondents’ objection that the application was null and void, on the basis that it had not been signed by an advocate, as required by law and confirmed by the judgment in *Bruce Clark v The Registrar of Courts* of 28 March 2006.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

29. The applicant complained that as a consequence of the domestic courts' decisions he had been denied a fair hearing and an effective remedy, as provided in Articles 6 and 13 of the Convention, which read as follows:

Article 6

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

Article 13

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

30. The Government contested that argument.

A. Admissibility

31. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

32. The applicant submitted that the decision of 20 November 2003 and the subsequent decisions confirming it denied him his right to a fair trial, to legal assistance and to access to a court.

33. The applicant argued that on the basis of an error that was not imputable to him he had been denied access to court as a result of a restrictive application of the law. He submitted that there had been nothing preventing the court from applying Article 963 (3) of the COCP which would have allowed him to rectify the error and continue his case. Yet the court had opted not to do so. He was of the view that this would have been an action compatible with the aim of the Convention. Indeed, even Maltese

law had eventually changed to make the use of the said sub-article mandatory so as to avoid cases being dismissed as a result of procedural formalities or a failure to notify properly.

34. The applicant submitted that he was not to blame for this error, since it was the Assistant Advocate for Legal Aid who had signed the relevant appeal application. He submitted that in the present case he required representation, both because according to Maltese law the signature of an advocate was mandatory in all written pleadings, and because this field of law (emphyteusis) was complex and required experience to guarantee any chances of success.

35. The applicant complained generally about the system of legal aid in Malta. An individual had to first consult the Advocate for Legal Aid. Subsequently, if the request for legal-aid was granted, another lawyer and a legal procurator were assigned. It was then for the individual to enquire as to who had been assigned. The lawyer assigned would then wait for the date of the hearing and prepare the case file. He noted that in the present case the appeal was declared deserted without the applicant being present, as he had not been notified due to an error in the address. The applicant considered it paradoxical that in the interests of justice Article 152 (1) of the COCP laid down that appeals should be put on the list of hearings within six months, yet his case was only put on the list for 20 November 2003, one year after the appeal application had been lodged. Thus, while the courts were free to disregard the law, the applicant had not been given an opportunity to rectify his error following the lapse of the time-limit applicable to him.

(b) The Government

36. The Government submitted that to determine whether there had been a violation of Article 6 the proceedings had to be seen as a whole.

37. They submitted that the applicant had had full access to a court of first instance and to an appeal court. Indeed, his appeal application had no incurable procedural faults; the error in the address could have been rectified. The appeal application, however, had to be served on the respondent within one year. The applicant, who must have been aware that his appeal could be considered abandoned, had done nothing to rectify the error and pursue his interests. Indeed by 30 April 2003, the court marshal had noted in the file that the appeal had not been served and that no further attempt had been made to do so. The Government reiterated the Constitutional Court's argument that it was for the applicant and not his lawyer to ensure that the case was progressing, so quite apart from checking whether notification had been successful he could at least have kept in touch with his lawyer. However it transpired that the applicant never sought to find out who had been assigned to his case, and remained totally inactive. The Government made reference to the legal maxim *sua culpa damnum sentit, damnum non sentire videtur*.

38. They considered that the Court of Appeal's interpretation of procedural laws could not be considered restrictive in the present case. Rules of procedure were necessary to ensure order in the conduct of proceedings, and thus unjustified leniency could not be encouraged. The appellate court had rightly felt that the applicant had lost interest in his own appeal, given that he had attempted only one notification, which had proved unsuccessful, within the one-year time-limit established in the interests of justice and good order of proceedings. Moreover, he had failed to attend the first hearing of the appeal. They further noted that the applicant had tried to rectify the situation only ten months after the appeal had been declared deserted, namely one year and ten months after the lodging of the appeal. On that account the Court of Appeal was also justified in refusing to reactivate his appeal application following his subsequent requests for reinstatement.

39. The Government further submitted that while Maltese law was unclear, and no domestic judgments existed specifically on the issue of whether legal representation was mandatory, a lawyer did indeed have to sign all legal acts, including appeal applications, but an applicant could physically lodge the application with the registry. They noted however that in two judgments (submitted to this Court, see paragraph 28 above) the court had considered the applications made by the claimant, who had signed the application in his own name, and the law did not expressly prohibit such an action. However, the Government acknowledged that the assistance of a lawyer would improve prospects of success.

40. The Government, however, noted that during the first-instance proceedings the applicant had been represented by a lawyer of his choice (Dr S.). Following the first-instance judgment (31 October 2002), including the date the appeal was lodged, until he was granted legal aid, the applicant was assisted by Dr M. and Dr S. (who acted behind the scenes). From 28 January 2003, the date when the applicant was granted legal aid and assigned the services of Dr A., until 4 November 2004, the applicant was officially being represented by Dr A., and yet the applicant made no contact with him, but had kept in touch with Dr S. Thus, throughout the proceedings the applicant had had the assistance of a legal adviser, at times of two legal advisers, which constituted an abuse of the legal-aid system.

41. The Government submitted that the error in the appeal application could not be attributed to the Advocate for Legal Aid, since on that date no legal aid had yet been granted and no legal-aid lawyer had yet been assigned. Moreover, while it was true that Dr M. had signed the application in his capacity as Assistant Advocate for Legal Aid, it had been Dr S. who had drafted the application. The Government contended that the mistake had been deliberate, to avoid immediate eviction while also avoiding the embarrassment of putting forward manifestly unfounded claims. Indeed the applicant, who was not an *emphyteutae*, was claiming that he should not be

evicted, despite the fact that the actual emphyteutae (Caral Ltd) had been evicted and that the emphyteusis contract, to which the applicant had never been a party, had been rescinded. Moreover, the Government considered that the appeal would in any event have been declared deserted, since the applicant's own address did not allow for service (see paragraph 12 above). As a result, notice of the hearing could never have reached him. In reply to the applicant's argument the Government also noted that the period of six months for the setting down of a hearing was applicable following the closure of written pleadings (Article 151 of the COCP). In this case, this stage could not be concluded, since the appeal had not been notified.

2. *The Court's assessment*

(a) **General principles**

42. The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal. However, where such courts do exist, the requirements of Article 6 must be complied with, so as for instance to guarantee to litigants an effective right of access to court for the determination of their "civil rights and obligations". The "right to court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired (see *Mikulová v. Slovakia*, no. 64001/00, § 52, 6 December 2005).

43. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This applies, in particular, to the interpretation by courts of rules of a procedural nature such as time-limits governing the submission of documents or lodging of appeals. The Court's role is, however, to ascertain whether the effects of such an interpretation are compatible with the Convention (see, among other authorities, *Pérez de Rada Cavanilles v. Spain*, § 43, 28 October 1998, *Reports* 1998-VIII). In deciding, on the basis of a particularly strict construction of a procedural rule, not to examine the merits of a case, domestic courts may undermine the very essence of an applicant's right to a court, which is part of the right to a fair trial guaranteed by Article 6 § 1 of the Convention (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 51, ECHR 2002-IX, and *Perez de Rada Cavanilles*, cited above, § 49).

44. The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the principle of legal certainty. That being so, the rules in question, or the manner in which

they are applied, should not prevent litigants from using an available remedy (see *Miragall Escolano and Others v. Spain*, nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41787/98 and 41509/98, §§ 33 and 36, ECHR 2000-I). However, those concerned must expect those rules to be applied (see *Nakov v. the Former Yugoslav Republic of Macedonia* (dec.), no. 68286/01, 24 October 2002). It is incumbent on the interested party to display special diligence in the defence of his interests (see *Teuschler v. Germany* (dec.), no. 47636/99, 4 October 2001, and *Sukhorubchenko v. Russia*, no. 69315/01, § 48, 10 February 2005).

45. The institution of proceedings does not, in itself, satisfy all the requirements of Article 6 § 1. The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. The right of access to court includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court. It would be illusory if a Contracting State’s domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case was determined by a final decision in the judicial proceedings. It would be inconceivable for Article 6 § 1 to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined (see *Multiplex v. Croatia*, no. 58112/00, § 45, 10 July 2003, and *Kutić v. Croatia*, no. 48778/99, § 25, ECHR 2002-II).

46. There is no obligation under the Convention to make legal aid available for all disputes (*contestations*) in civil proceedings, as there is a clear distinction between the wording of Article 6 § 3 (c), which guarantees the right to free legal assistance on certain conditions in criminal proceedings, and of Article 6 § 1, which makes no reference to legal assistance (see *Del Sol v. France*, no. 46800/99, § 21, ECHR 2002-II). However, despite the absence of a similar clause for civil litigation, Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable to effective access to court, either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). In discharging its obligation to provide parties to civil proceedings with legal aid, when it is provided by domestic law, the State must display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (see, *inter alia*, *Staroszczyk v. Poland*, no. 59519/00, § 129, 22 March 2007; *Siałkowska v. Poland*, no. 8932/05, § 106, 22 March 2007; and *Bąkowska v. Poland*, no. 33539/02, § 46, 12 January 2010). An adequate institutional framework should be in place

so as to ensure effective legal representation for entitled persons and a sufficient level of protection of their interests (ibid, § 47). There may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. It will depend on the circumstances of the case whether the relevant authorities should take action and whether, taking the proceedings as a whole, the legal representation may be regarded as “practical and effective”. Assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see, for example, *Siałkowska*, and *Staroszczyk*, both cited above, § 122 and § 100 respectively).

(b) Application to the present case

i) Restrictive application of the law

47. The Court notes that in the present case the matter at issue is not the interpretation of a procedural rule as such, but its application. There appears to be no doubt that the Court of Appeal, at the time of the present case (as opposed to later, following the relevant amendments), had a discretion as to whether to declare the case deserted or to order that the case be listed again with causes whose pleadings had not yet been closed, according to Article 963 (3) (see Relevant domestic law). It is therefore for the Court to examine whether the application of such a procedural rule in the circumstances of the case was compatible with Article 6 § 1.

48. In the instant case the Court notes that the applicant was penalised by the decision of the Court of Appeal of 20 November 2003, owing to the failure to serve the notification of his appeal on the respondent, with the consequence that the written procedure was not concluded within the legal time-limit.

49. The Court notes that domestic legislation requires court documents to be served by court bailiffs and that arrangements for this are primarily the latter's responsibility, following the instructions of the interested party. In the present case, the bailiff attempted notification; however, it was unsuccessful because the address for service of the appeal had turned out to be a derelict site. The bailiff subsequently marked the notification as undelivered and noted the reason for such failure (see paragraph 12 above). Thus, in the Court's view, in the present case, the failure to serve the notification cannot be imputable to the bailiff who while acting as a State representative followed domestic practice to the letter in the exercise of his official duties (see, conversely, *Platakou v. Greece*, no. 38460/97, § 39, ECHR 2001-I, and *Société Anonyme Thaleia Karydi Axte v. Greece*, no. 44769/07, § 26, 5 November 2009). However, the Court observes that the Maltese legal system makes no provision for the service of a notice on the interested party informing him or her that notification had not been

successful. For the Court, such notice is desirable and, in the present case, would have enabled the applicant to rectify the relevant error within the deadline. Nevertheless, the Court finds that the system as it currently operates cannot be considered flawed to the extent that it denied the applicant access to court in the present case for the reasons which follow.

50. In the present case, the failure to serve the notification on the respondent was primarily due to the use of an incorrect address. Quite apart from the question of who prepared or signed the appeal application, it was undoubtedly for the appellant party (namely, the applicant and his lawyer) to supply the correct address for notification, and therefore the original error was imputable to them.

51. The Court notes that the error in question was one which could have been remedied, since the Court of Appeal could have decided not to declare the case deserted and to allow for the rectification of the error by means of a further extension of the time-limit (see *Kadlec and Others v. the Czech Republic*, no. 49478/99, § 27, 25 May 2004, and conversely, *Edificaciones March Gallego S.A. v. Spain*, 19 February 1998, § 36, *Reports of Judgments and Decisions* 1998-I). In consequence, the decision to declare it abandoned could be construed as a restrictive one, tainted with excessive formalism. However, the Court must have regard to all the circumstances of the case, and the proceedings as a whole, within the context of Article 6 § 1.

52. The Court notes that, as mentioned above, on 29 April 2003 the bailiff had correctly noted that notification had been unsuccessful. However, in the subsequent months the appellant party had not checked the file in order to verify whether the relevant notification had been served. The Court considers that such an action was within the appellant party's remit and in its interest, not only for the progress of the case, but also for enabling it to understand that there had been an error and to attempt a new notification, based on the correct address. In such circumstances the Court cannot but conclude that the appellant party had been negligent (see, conversely, *Saez Maeso v. Spain*, no. 77837/01, § 29, 9 November 2004; *Pérez de Rada Cavanilles*, cited above, § 47; and *Yagtzilar and Others v. Greece*, no. 41727/98, § 27, ECHR 2001-XII). Bearing in mind the aim of ensuring a proper administration of justice and legal certainty including the protection of the rights and interest of others, the Court considers that the court's assumption that the appellant had lost interest in pursuing his claim had a sufficient basis and that the decision of 20 November 2003 cannot be said to be tainted with excessive formalism. It therefore did not as such violate the applicant's right of access to court (see, *mutatis mutandis*, *Sukhorubchenko*, cited above, § 48).

53. Similarly, the domestic courts' subsequent decisions (dated 15 September 2004 and 4 November 2004) refusing the applicant's request for the case to be reinstated were also based on the fact that the error had been imputable to the appellant and that over the entire period of time no

steps had been taken to rectify it. Indeed, it appears that it took the applicant nearly two years from the lodging of the appeal application to enquire about the progress of his case and to discover that it had been declared deserted. The fact that he was not present at the hearing of 20 November 2003 and was not notified of any decision in respect of his appeal was again imputable to the same error in the address.

54. It follows that the authorities cannot be reproached for refusing to reinstate the appeal given that the appellant failed to take the necessary steps to ensure receipt of the relevant notifications and decisions (see, *mutatis mutandis*, *Hennings v. Germany*, 16 December 1992, § 26, Series A no. 251-A).

55. The Court further notes that under the relevant domestic legislation (see paragraph 23 above), the decisions in issue, particularly that of 20 November 2003, could be regarded as foreseeable in the context of the proceedings (see, conversely, *Pérez de Rada Cavanilles*, cited above, § 47). Moreover, it considers that a time-limit of one year within which to close the written procedure at the appeal stage cannot be considered disproportionate.

ii) Effective representation

56. The Court reiterates that a State cannot be considered responsible for every shortcoming of a lawyer (see *Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168). Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal-aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see *Artico v. Italy*, 30 May 1980, Series A no. 37, § 36; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI; and *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002). The Court makes further reference to the general principles in paragraph 46 above. It further observes that within the ambit of criminal proceedings, the competent national authorities are required under Article 6 to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way (see *Kamasinski*, cited above, § 65). While reiterating that imposing on the State, for the purposes of civil proceedings, a more far-reaching procedural obligation in respect of legal aid than that applicable to criminal cases would be incompatible with the Court's case-law (see *Smyk v. Poland*, no. 8958/04, § 61, 28 July 2009), as inferred from the Polish cases mentioned above (see, for example, *Sialkowska* and *Staroszczyk*) the Court does not exclude that State responsibility within the ambit of civil proceedings may also be engaged in exceptional circumstances in respect of a failure of a legal-aid lawyer or of the system itself.

57. In the instant case, the Court notes that, as to the original error (the incorrect address), the domestic courts were unable to establish whose fault it was. It notes that irrespective of who took down the addresses or drafted the appeal application it was the Assistant Lawyer for Legal Aid who had signed the application at the time. The Court considers that while it would have been at least desirable for Dr M. to check whether the information it contained was correct, it cannot ignore the fact that the person best disposed to check this type of information was the applicant himself.

58. The Court further notes that, in the instant case, quite apart from the original error in the relevant address, failure to check over a number of months whether notification had been successful, and if not to order a new notification to be served, constituted the crucial failure leading to the appeal being treated as lapsed. The domestic courts held that this failure was the applicant's fault, since it was up to him and not the lawyer to check that notification had taken place and to carefully track his appeal "*as the case is the applicant's and not the lawyer's*". The Court does not share this reasoning in full. In particular, it notes that Maltese law specifically states that responsibility for the case rests with the legal-aid lawyer whose duty it was, *inter alia*, to make the necessary submissions and file the requisite notes, applications, replies, notices, and so on as circumstances may require (see paragraph 27 above). However, it is highly significant that, in the present case, the applicant failed to make any contact with Dr A., the legal-aid lawyer appointed. This matter has not been contested by the applicant and no explanation, let alone a plausible one, has been given in this respect. Indeed, it is also unclear whether the applicant, who acknowledged that it was for the interested party to enquire about the name of the newly appointed legal-aid representative (see paragraph 35 above), ever took any steps to do so. In these circumstances, the Court cannot consider that the responsibility for pursuing the appeal lay with the appointed legal-aid lawyer.

59. Bearing in mind that it is incumbent on the interested party to display special diligence in the defence of his interests, and that in the present case the applicant did not follow his case conscientiously or maintain contact with his nominated representatives, the Court concludes that the applicant had at his disposal a potentially effective legal representation which he failed to make use of.

iii) Conclusion

60. Bearing in mind the findings in paragraphs 49, 52, 54 and 59 above, the Court considers that the applicant has not been denied effective access to court.

61. Accordingly, there has been no violation of Article 6 § 1.

62. For the same reasons the Court considers that there has not been a violation of Article 13 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been no violation of Article 13 of the Convention.

Done in English, and notified in writing on 17 July 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President