PROVINCIAL COURTROOM
Section 5
MALAGA

"*Dr. MARIA CRUZ MATILLA ORTEGA.* Attorney-at-law of the Department of Justice of the Investigation Court No. 2 of Marbella. I BEAR WITNESS: That on the original court records followed before this Court, there are those in which the following details appear, and which read as follows."

Investigation Court Clerk No. 2. Judicial Public Faith

MARBELLA

[Illegible signature]

Case file no. *523/98*

SEE LAST PAGE FOR RULING

Dear Sir:

I am returning the attached original court records no. *334/bis/93* of that Court to Your Honor, along with evidence of the decision entered therein for its execution and compliance, involving an acknowledgment of receipt.

Malaga, on *September 4th of (illegible)*

THE PRESIDENT

[Illegible signature]

(Illegible)

YOUR HONOR, JUDGE OF FIRST INSTANCE No. *ONE FROM MARBELLA*

523/98
Large Claims
1st Instance 5 Marbella

Investigation Court Clerk No. 2. Judicial Public Faith

MARBELLA

PROVINCIAL COURT OF MALAGA. FIFTH SECTION
COURT OF FIRST INSTANCE No. 5 OF MARBELLA
LARGE CLAIMS LAWSUIT No. 334/93
CIVIL APPEAL PROCEEDINGS No. 523/98

RULING No. 403

Dear sirs /
President /
Wenceslao Diez Argal /
Magistrates /
Hipolito Hernandez Barea /
Maria Jose Torres Cuellar /

In the city of Malaga, on the twenty-seventh day of the month of June of the year two thousand.

Whereas as an appeal, before the Fifth Section of this Provincial Court, the large claims declaratory judgment proceedings no. 334/93 coming from the Court of First Instance number five of Marbella, regarding several court rulings at the request of Hans Bernard Friedli Von Muhlenen, now his wife Anna Rosa Friedli Von Muhlenen acting in her capacity as his only heir, and represented in the appeal by the Attorney General Carlos Aranguren Echevarrìa against Giuseppe Giudice, failing to appear at both instances, and against Kelvin John Fischer and the entity Motorauto Marbella, S.L., who filed a counterclaim against them; pending before this Court in virtue of the appeal filed by the plaintiff and counterclaim defendants against the ruling pronounced in the abovementioned trial.

FINDINGS OF FACT

FIRST.- The Court of First Instance no. 5 of Marbella passed sentence dated March 10th of 1998 in the large claims declaratory judgment number 334/93 from which this court proceedings arise, and whose enacting terms read as follows:

"That dismissing the lawsuit issued by the Attorney General Leal Aragoncillo, on behalf and representation of Hans Bernard Friedli Von Muhlenen, against Giuseppe Giudice, Motorauto Marbella, S.L. and Kelvin John Fischer, I must absolve and do absolve the same from the lawsuit intentions contained in said lawsuit against them, with an order to pay costs to the acting party.

That dismissing the counterclaim lawsuit issued by the Attorney General Roldan Perez, on behalf and representation of Motorauto Marbella, S.L. and Kelvin John Fischer, against Hans Bernard Friedli Von Muhlenen, I must absolve and do absolve the same from the lawsuit intentions contained in said counterclaim lawsuit against them, with an order to pay costs to the counterclaim defendants."

SECOND.- The main plaintiff and counterclaim defendants filed an appeal in due time and proper form against the abovementioned ruling, which were accepted for processing. Having the parties being summoned to appear before this Court and only appearing the acting party Friedli Von Muhlenen, the appeal from the other party was declared void by court proceedings dated on February 3rd of 1999, and the investigative court proceedings were delivered during fifteen days, thereupon indicating the day and time for the hearing of the appeal accepted on February 16th of 2000, in which the attorney-at-law of the appellant informed in support of his revocation claim, not appearing the attorneys-at-law of the remaining parties.

THIRD.- In the proceeding of the appeal, the applicable legal requirements have been observed, being Your Honor Maria Jose Torres Cuellar the Reporting Judge.

LEGAL GROUNDS

FIRST.- Being the main acting party, which is the only appearing party in this appeal, in disagreement with the instance judgement, it appears trying to contest, in an unsuccessful manner, the correct reasonings in which the *a quo* Judge relies to dismiss all its requisitions. Primarily, and according to the allegations expressed by the appellant at the hearing of the appeal, it was possible, at its discretion, and through assumptions, to conclude that a verbal sale and purchase was effectively agreed by mutual consent between the co-defendant *in absentia* Giudice and the acting party, through which the latter sold four collection Ferrari cars to the first for a price of 1,900,000 American dollars. It is unnecessary to point out that the action is directed against said defendant in his capacity as buyer of the vehicles, the subject of the lawsuit, which in some way whatsoever is recorded as credited. It is a widely known procedural doctrine that failure to appear by the defendant does not imply the

admission of the acting party's allegations, but the same has to prove the reality of the alleged facts on which its suit was based, meaning, those that are necessary to justify the exercised action, pursuant to the obligations imposed by article 1214 of the Civil Code, and to contribute the elements necessary to establish the truthfulness of the same; and in that sense, the appellant today had to credit all those relevant to the execution of the sale and purchase agreement based on which it is acting, as an evidence that it must be convincing enough and in compliance, since it is impossible, or extremely difficult for the defendant to prove a negative fact, such as the one related to the fact that the agreement was not admitted. Such purpose was not accomplished, as the appellant itself acknowledged during the hearing that, indeed, no concluding evidence had been collected about said case. It is true that in our procedural system, not only a direct evidence is admitted, but also indirect evidence through signs, being the certainty of the alleged facts convincingly admitted, so that the Judge, through a presumptive mechanism recorded by article 1.253 of the Civil Code, can infer from the base-evidence the consequential fact, if among the first (with the condition that they are undoubtedly credited) and the second (deduced) there is a precise and direct link pursuant to the rules of logic and sound judgment. But, it is also true that for this presumptive mechanism to not take effect it is enough to just destroy the conviction about the certainty of any of the signs, or else, to even introduce a reasonable doubt about this certainty.

SECOND.- In the case at hand, as rightfully reasoned by the *a quo* Judge, there is no direct evidence, in the terms provided by article 1.214 of the Civil Code about the real existence of the abovementioned verbal agreement, nor there is any strong evidence sufficient to make the judge feel certain that a sale and purchase was carried out between said parties, being all that is contained in the second legal grounds from the decision on appeal sufficient, and which is considered as completely reproduced to avoid repetitions, in order to destroy the evidence that may exist in favor of the certainty of the thesis supported by the acting party. Therefore, and before the lack of support by the plaintiff, the rejection of its thesis was correct.

THIRD.- Just as it is the second option which we now choose pursuant to the alternatively interested petition in the application, for the sake of achieving a minimum judgment, as it is literally referred. Because the own pleadings defended in first instance

cannot be ceased to be acknowledged because of that, when it totally denied the existence of any contractual relation, and even worse of sale and purchase with Mr. Fischer and Motorauto Marbella, S.L., counterclaim codefendants, so as to keep paradoxically altering the factual and legal components of its intention that it was with them that the sale was executed, giving rise, in their opinion, to all the essential elements of said legal relationship pursuant to article 1.261 of the Civil Code. That way it is claimed that there was consent, because both parties, as established in this appeal, "declared the reality regarding the execution of said agreement", when it is truer that it has always been denied, pursuant to its only version that the buyer was Mr. Giudice, always head on opposing to all that is pleaded in the counterclaim lawsuit also before the first legal body, among which pronouncements was requested the declaration of the existence of said business, and for an agreed price at a total of 350,000 American dollars, amount which it not being discussed before the 1,900,000 American dollars that were defended originally. All which necessarily leads to the dismissal of the appeal which arises from the own declarations of the appellant in the development of that which, as previously recorded, resorts to other formulations, altering the terms of the matter in a clear contradiction to its initial formulations and lawsuit intentions, because its case for asking is both the historical narrative as well as the legal basis which are applicable.

FOURTH.- And lastly, it battles the details of the verdict of the ruling appealed which condemns it to the payment of the costs incurred in its instance, ruling which is accepted to be kept since the same must appear in all rulings, complying not with a petition made by the parties, but as an imperative obligation of the legal mandate expressed in article 523 of the Spanish Law of Civil Procedure, pursuant to the criteria in force in the legislation under which the process that orders that "costs of first instance shall be imposed on the party whose lawsuit intentions had been completely rejected..." is followed, with the exception of the exceptional circumstances that justify its non-imposition, which is not concurrent here. And considering that given the result of the dispute, the lawsuit was dismissed completely, the applicable was and is to condemn in costs to the acting party, being at the moment of its levy and reimbursement when the procedural expenses of the other litigant parties, if there were any, are quantified.

FIFTH.- Given the dismissal of the appeal filed and as required by article 873 of the Spanish Law of Civil Procedure, the costs caused by this appeal shall be imposed on the appellant.

[OFFICIAL COAT OF ARMS]: DEPARTMENT OF JUSTICE

Having had at sight all the articles quoted, as well as other general and relevant information regarding the application of the case

WE RULE

That, having dismissed the appeal filed by the Attorney General of the Courts, Mr. Garcia-Recio Gomez, on behalf and representation of Mrs. Anna Rosa Friedli Von Muhlenen against the ruling pronounced on March 10th of 1998 by the Court of First Instance number five of Marbella in its court proceedings no. 334/93 from which this case file arises, we shall confirm, and indeed completely confirm said resolution, considering as reproduced as many pronouncements as there are contained in the enacting terms, with the express imposition of the costs incurred in this appeal on the appellant.

Be this resolution legally notified, making it known to the parties regarding the appeals that may be admitted against the same.-

Be the original court proceedings returned, with evidence of the same, to the Court of their origin for its effects.-

Thus, as per our definitely judging ruling, we pronounce, send and sign it.-

[Illegible signature]

PUBLICATION.- Having the above resolution being read and published by Your Honor, Speaker Judge of this Court, and which was ruled by celebrating a public hearing on the day of the date. I bear witness.

The foregoing is a faithful and true transcription of the original to which I refer to, and for the record and corresponding effects, I issue and sign this document in Marbella on the *7th day of February of 2018*

July 10

[Illegible signature]