Court of Appeal

JUDGES

THE HON. MR JUSTICE GIANNINO CARUANA DEMAJO (President)
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR. JUSTICE NOEL CUSCHIERI

Sitting of Friday 24th October 2019

Number 16

Application number 234/17 RGM

Gernot Schmid

v.

Cornelia Astrid Schmid

Preliminary

1. This is an appeal filed by defendant, Cornelia Astrid Schmid [Defendant] from the judgment [the appealed judgment] delivered by the Civil Court [Family Section] [First Court] on the 31 October 2018, whereby that court decided as follows:

> "1. Plaintiff's request to be entirely exempted from paying maintenance to defendant is rejected.

> 2. Plaintiff's request for a reduction in the quantum of maintenance payable by plaintiff to defendant is being accepted as follows: the Court orders that with effect from the 23rd October 2017 the maintenance payable by plaintiff to defendant personally be reduced to two thousand Euros [€2,000] per month, payable on the first day of each month; the Court terminates plaintiff's obligation to pay defendant maintenance for the children.[1]
>
> Each party to bear his or her own costs".

The Facts

2. The parties married on the 4 July 1987 and they had five children during their marriage, the youngest of whom Cèline born on 15 March 1998 still resides with defendant. They eventually divorced on 17 December 2015 after reaching an amicable settlement which was endorsed by the Decree [Decree] of 10 December 2015 given by the Höfe District Court[2]. This Decree was eventually accepted and rendered enforceable in a Malta by a judgment of the 12 December 2017 of the First Hall of the Civil Court[3]. Plaintiff Gernot Schmid commenced mediation proceedings[4] claiming that he was no longer in a position to pay the amount of maintenance agreed upon but that he wishes to reach an amicable agreement with defendant. However no agreement was reached between the parties and by a decree of the 23 August 2017 the Court authorized them to institute the present legal proceedings[5].

[1] Appl. 523/2017, **Cornelia Schmid vs Gernot Schmid**.
[2] Pg. 70 of Court file.
[3] Pg. 98.
[4] See pg. 30 and 31.
[5] Pg. 14.

The Merits

3. Plaintiff instituted proceedings by means of a sworn application before the First Court requesting that court to decide that: [i] he is not required to pay maintenance to defendant, whether in her favour or in favour of the children or said maintenance should be revised downwards; [ii] if any maintenance is due, to fix the amount that should be paid to defendant or to the children with the assistance of court experts; and that [iii] he shall pay defendant the amount so established; with costs against defendant.

4. Defendant though duly and personally served with plaintiff's application failed to file a reply to present a sworn reply giving the reasons for opposing the plaintiff's claims[6].

The Appealed Judgment

5. The judgment of the First Court is being reproduced in its entirely and reads as follows:

> "Having seen the sworn application by virtue of which plaintiff premised that :-

[6] See pg. 26.

"The applicant and the defendant got married on the 4th of July 1987 and got divorced on the 17th of December 2015 as shown in the document attached and marked Dok A;

"The applicant had started mediation proceedings according to law, by letter 498/17RGM and informed the Court Registrar that the parties were married and divorced and that five children were born during marriage, Steven [21.12.1989], Terrence [05.03.1991], Darline [23.10.1992], Desiree [11.03.1994], and Celine [15.03.1998], and that the applicant was no longer in a position to pay maintenance.

"The applicant had submitted an application during the mediation proceedings whereby he pleaded to stop paying maintenance to the defendant or to pay a lesser amount since he was no longer in a position to pay the agreed amount since he no longer had an income, besides having paid bills which were due by the defendant.

"The mediation proceedings ended without the parties having reached an agreement. The applicant was authorized to proceed by filing a court case, and the Court refrained from deciding the application dated 17th May 2017 so that it would be decided in the eventual case as shown in the attached document, marked Dok B;

"The applicant is no longer in a position to pay the agreed amount since he no longer has an income, besides having paid bills which were due by the defendant;

"The applicant is presenting an affidavit with these procedures whereby he explains his story in detail and the reasons which confirm this as shown in the attached document marked Dok C; on the strength of the above plaintiff is requesting that this Court decides that he is not required to pay maintenance to the defendant, both in her favour or in favour of the children due to reasons justifiable at law, or that the said amount of maintenance in her favour or in favour of the children should be reduced; to decide an amount of maintenance, if any is due, payable to the defendant or the children, with the assistance of court experts; to order the applicant to pay the defendant the said amount.

"Having seen plaintiff's affidavit, confirmed on oath on the 23rd October 2017;

"Having seen that defendant had been duly and personally served on the 21st December 2017 but failed to file a reply to contest plaintiff's claims;

"Having seen this Court's decree of the 11th January 2018 whereby plaintiff's request that the proceedings be conducted in the English language was acceded to; Having seen the documents filed by plaintiff attached to a note filed on the 5th February 2018;

"Having seen plaintiff's evidence tendered at the hearing of the 1st March 2018;

"Having seen the minute registered at the hearing of the 11th April 2018 when the case was adjourned for the 31st May 2018 for judgement.

"Having seen the application filed by defendant on the 30th May 2018 requesting that judgment is not delivered and that she be authorised to file her sworn reply.

"Having seen the decree of the 31st May 2018 suspending the delivery of the judgment and adjourning the case for the 10th July 2018 to hear the testimony of defendant in respect of her application of the 30th May 2018.

"Having seen that defendant failed to appear during the hearing of the 10th July 2018.

"Having seen that the case was adjourned for today for judgment.

"**The Evidence.**

"In his sworn affidavit, confirmed on the 23rd October 2017,1 plaintiff declared that he married defendant, C D B on the 4th July 1987. They divorced on the 17th December 2015. Plaintiff states that his wife has been an alcoholic for many years and suffered from a heavy depression but she never agreed to a treatment of her medical condition. Her strong emotional eruptions, caused by many years of alcohol abuse had a negative effect on the whole family. Plaintiff declares that the process leading to the divorce agreement was a long and tiring process during which he claims to have been emotionally threatened and verbally abused by his wife. Finally he had agreed to pay his wife maintenance in the amount of nine thousand swiss franks (CHF 9,000) per month. He had agreed to pay this considerable amount as at the time he had a Pension Fund and he was eligible to request the payment of the amount of CHF 1.25 million. This amount was divided equally between the parties, they received CHF 625,000 each. Plaintiff declares to having been too kind and under pressure he agreed to pay all pending bills including taxes amounting to CHF 150,000, legal fees, credit cards, housing, cars and school fees a total of CHF 1 Fol 15. 4 549,000 as well as maintenance and other non-justified payments to his wife amounting to about CHF225,000. Plaintiff declares that they should have both paid these bills in equal amounts and as he paid all these amounts unilaterally he was left with only CHF76,000 which he needed to set up a new company. At that same time around May 2015 his wife received the amount of CHF 225,000 over and above the initial payment of CHF 625,000 a total of CHF 850,000. He lost his job with UBS in April 2015. He sued his employers for unfair dismissal but lost the case. He tried to move on as a self-employed person and set up his first company called "Planefiller" immediately after he ended his

employment with UBS. He was confident that he would manage to start a successful new career. Unfortunately however, his then business partner pulled out as he was unable to pay his initial share of the capital investment and plaintiff had to give up on this project and try to set up another company. After incurring all these losses, in March 2016 his wife sued him for the payment of an additional CHF 70,000 which she claimed was part of their divorce agreement. Plaintiff declares that they had a verbal agreement that this additional amount would only be due if he won the court case against his former employer. Never-the-less, his wife sued him and he had to pay in total the amount of CHF73,000. Plaintiff stated that at the time of their wedding, in July 1987 his wife had debts amounting to CHF120,000, a considerable amount of money at the time and she had been found guilty of defrauding her former employer more than CHF 50,000 and she got a suspended sentence. He paid all her debts in the following years by sheer hard work as she got pregnant soon after their wedding and never returned to work again. Plaintiff declares that he has tried amicably to convince his wife that he is no longer in a position to pay such a huge amount of monthly maintenance, but her reaction was always the same. As a result of the cash drain he suffered during the last three years, at present, he is not able to pay any maintenance. 5 His new company is slowly making progress and in his view this year 2018 he will be in a position to receive a salary and to discuss a new agreement regarding payment of maintenance. Until then he declares that he is not in a position to pay maintenance to his wife. Plaintiff insists that taking into account all the payments he made to his wife since they divorced it will still be perfectly possible for her to live her usual life-style for a number of years, without depending on his maintenance. He paid her the most he could when he was in a position to do so but now he has come to a point where he has no assets and that they both have to cope with this new situation as best they can. Even their children who have now become adults, have greatly suffered from the very hostile attitude of their mother towards their father. She invariably insults them every time they try to contact him. Plaintiff declares “This once very lovely family with strong bonds has become a group of individuals who are struggling with the situation between their parents”. It was always his intention to keep the children out of the unpleasant details of the divorce, but his wife never did. He has, in vain, repeatedly pleaded with his wife to be less vicious ‘to act as adults and parents for our children’. Defendant has been personally served with plaintiff’s sworn application on the 21st December 2017,2 but she did not file a sworn reply to contest plaintiff’s claims. Plaintiff filed a note on the 5th February 2018 and attached the following documents: Attachment 1: 30th January 2017. First application to the Registrar to start mediation proceedings. Attachment 2: 12th April 2017. Second application to the Registrar to start mediation proceedings. Attachment 3: Mediation Notice to appear for 31st May 2017. Wife did not attend and did not justify her absence. Also wife did not attend for the meeting of the 12th July 2017. 2 Fol 26 a tergo. 6 Attachment 4: Schedule of Deposit by Bank of Valletta of the amount of €2,873.55 from plaintiff’s bank account. Attachment 5: Garnishee

Order Advice dated 28th June 2017 for €78,059.28. Attachment 6: Inland Revenue Department Tax Statement 2016 confirming that plaintiff's company Servizo made no profit and no tax was due. Attachment 7: Servizo Annual Report 2016, page 13: no wages paid, no profits made. Attachment 8: Statement of Account Bank of Valletta confirming the payment from said account following the garnishee order. Attachment 9: Bank Account Statement UBS Switzerland dated 5th February 2018 showing an available balance of CHF 802.30. Attachment 10: Copy of maintenance payments for 2016, last payment on 21st November 2016. Plaintiff filed a note on the 5th March 2018 attaching bank documents confirming receipt of payments from his sister Birgit Ropitsch, and attached a legal copy of the case referring to the execution of a foreign judgement[523/17SM] with a note filed on the 6th March 2018. Plaintiff tendered his evidence at the hearing of the 1st March 2018.3 He declared that when he realized that his Pension Fund was running out of money at the end of 2016 he informed his wife and tried to reach an amicable settlement with her. She, however refused to meet to discuss the matter. He filed to initiate mediation procedures, first in January 2017 and in April 2017. They had another mediation meeting in July 2017 but she did not turn up. He referred to the documents he had attached to the note filed on the 5th February 2018, particularly the bank documents confirming the payment made by Bank of Valletta from his bank account following the garnishee order, and the documents relating to the financial position of his company. 3 Fol 56. 7 He declared that at present he has no income as his company has only just been set up, and he has one technician as an employee who does all the work. The company is called Servizo Wireless Solutions Limited. At present he has found support from a new partner and he sold part of the company to his sister for €3,000 and he also borrowed from her between February and May 2016 the amount of €20,000. On being questioned by his attorney, plaintiff declared that in the divorce agreement he had agreed to the payment of such a considerable amount for maintenance as at the time, in 2014, he had a good job in Switzerland and he had a lot of pressure during the last 10/15 years of their marriage, his wife being a heavy drinker was difficult to handle emotionally as she was suffering from a depression. Unfortunately, he lost his job in Switzerland in 2015 and being a 55 year old ex-banker it was practically impossible for him to find a job. He tried to give his wife a lot of money to keep her happy, but at the time he had the money, and now he realized that he should never have accepted to pay such a substantial amount.

"**Considerations of the Court.**

"First of all reference is being made to the fact that the defendant did not file a sworn reply although being notified personally with the sworn application and the notice of the hearing. As was held in the judgment Joseph Vella noe v. John Vella, (Court of Appeal, 21st May, 1993):- ".....il-presuppost li l-konvenut bin-nuqqas tieghu wera contumelia u dispett ghas-sejha tal-Qorti. Meta huwa gie konvenut fl-avviz,

citazzjoni, rikors, libell jew petizzjoni u hija din id-dizubbidjenza animata psikologikament b'dawk il-fatturi ta' contumelia u dispett li lligi trid tirreprimi u timponixxi. In kwantu contumelia bhal dik hi element ta' disordni socjali." 8 Mill-banda l-ohra l-Qorti ghandha tqis illi kontumacja hija ekwivalenti ghall-kontestazzjoni u mhux ammissjoni. In the present case Plaintiff is requesting the Court to vary and amend the provisions of the Divorce Decree of the District Court of Hofe, Switzerland of the 10th December 2015, a decree which has been rendered enforceable in Malta, by a judgement of the Civil Court First Hall of the 12th December 2017 in the names "C B vs A B" Application number 523/2017SM. Plaintiff admits that he had agreed to pay his wife maintenance of CHF 9,000 per month and that at the time there were various factors that conditioned such a decision namely that they divided the accumulated funds in his Pension Fund which amounted to CHF 1.25 million, they received CHF 625,000 each, and he had a good job in Switzerland with UBS Bank earning a very good salary. His wife was an alcoholic and suffered from a depression and refused to be treated, and the divorce proceedings were a long and tiring process and plaintiff felt being emotionally threatened and verbally abused. In April 2015 he lost his job with the Bank, he sued for unlawful dismissal but lost the case. Furthermore, he paid all the bills himself totaling to CHF 549,000, such as taxes, common bills and expenses, credit cards and school fees, when according to plaintiff these bills should have been paid by them both in equal portions. In a relatively very short period of time, plaintiff's financial situation changed dramatically, having lost his job and spent practically all his savings, he could hardly make ends meet, so much so that he was forced to borrow money from his sister who also bought shares of his company to alleviate his financial hardship. 9 As regards the couple's children, it is to be noted that the youngest one, Celine was born on the 15th of March 1998, she is now 20 years old. Her brothers and sisters are older as they were born between 1989 and 1994. Celine was still a minor when the parties divorced, and in para 2.5 of the Divorce Decree,4 plaintiff undertook to pay 'monthly maintenance contributions of CHF 1000 (plus any statutory or contractual child benefits) to the costs of the daughter Celine's maintenance and upbringing to the petitioner [mother] as from when the divorce decree becomes legal and binding'…… Maintenance to the wife is specifically referred to in para 3.1 of the Divorce Decree,5 which reads as follows: "The petitioner [father] undertakes to pay monthly maintenance contributions within the meaning of article 125 Swiss Civil Code[ZGB] of CHF 9,000 to the petitioner [mother] personally, as from when the divorce decree becomes legal and binding until 30 June 2025". In the calculation of maintenance, para 3.2, the decree states: This agreement is based on the Parties' following financial circumstances: Petitioner's [father's] earned income (monthly, net, incl. 13th month's wage, plus child benefits) CHF 25,000. Petitioner's [father's] need CHF 8,000 Petitioner's [mother's] with daughter Celine's need CHF 10,000. Our Courts, in various judgements, have commented on the different legal implications in cases where maintenance is agreed to between the parties in a

consensual personal separation contract on the one hand, and maintenance determined by the Court in its judgement in a personal separation case, on the other. In this particular case, however, although the parties have obtained a Divorce Decree on the 10th December 2015, which is tantamount to a judicial decision, the conditions which regulate the divorce have been agreed to by the parties. 4 Fol 72. 5 Fol 73. 10 Particularly relevant to this case is Article 54(9) of Chapter 16 of the Laws of Malta which reads as follows: "Where there is a supervening change in the means of the spouse liable to supply maintenance or the needs of the other spouse, the Court may, on the demand of either spouse, order that such maintenance be varied or stopped as the case may be. Where, however a lump sum or an assignment of a property has been paid or made in total satisfaction of the obligation of a spouse to supply maintenance to the other spouse, all liability of the former to supply maintenance to the latter shall cease. Where instead, the lump sum or the assignment of property has been paid or made only in partial satisfaction of the said obligation, the Court shall when ordering such lump sum payment or assignment of property, determine at the same time, the portion of maintenance satisfied thereby and any supervening change shall in that case be only in respect of the part not so satisfied and in the same proportion thereto". Parties refer to 'Pension rights adjustment' in para 6 of the Divorce Decree and to 'Matrimonial property regime' in para 7, Fol 74, wherein they specify the payments of substantial amounts by the husband to the wife. These payments however, do not refer to maintenance, which is specified in detail in para 3 under the heading ' Post-marital maintenance'. Case law has established that a distinction has to be made between cases claiming a revision of maintenance which has been determined by a Court judgement and similar cases where the maintenance had been mutually agreed to by the parties in a separation contract. In the case "Saviour Galea vs Carmela Galea" decided on the 29 th January 2016, the Court of Appeal made reference to various judgements on this issue, particularly the case "Mary Vella vs Mario Vella " decided by the Court of Appeal on the 11th January 1996 which held that: "…….hu minnu li l-ligi illum ma taghmel l-ebda distinzjoni bejn ilmanteniment 'ex lege' jigifieri dak determinat b'sentenza tal-Qorti, jew dak 'ex contractu', in kwantu tezisti l-possibilita' ta' min hu 11 obbligat li jhallas il-manteniment li " jitlob li jkun mehlus millobbligu jew ikun mnaqqas skont ma jkun il-kaz jekk jigi fi stat li ma jkunx jista' jaghti aktar il-manteniment kollu jew bicca minnu". The Court further declared that in the case of a consensual personal separation, the Courts adopted a more rigid view when faced with a claim to revise maintenance than in other cases where maintenance had been determined by a Court judgement. In the case "Alfred Grech vs Pauline Grech" decided by the Court of Appeal on the 6th April 2004 the Court held that: "Huwa minnu li l-ligi civili taghna ma toqghodx tiddistingwi bejn manteniment impost jew ordnat mill-Qorti minn iehor patwit bejn ilkonjugi nfushom ghall-fini ta' varjazzjoni. Imma l-appellant messu jaf ukoll li fejn si tratta ta'ftehim per via ta' kuntratt ghandu wkoll jghodd firmament il-principju ta' Pacta sunt Servanda. Il-Qrati taghna, minkejja li fil-bidu jirrizulta li addottaw

posizzjoni rigida, anzi wahda inflessibbli,, meta gew rinfaccati b'talbiet ghal revizzjoni u/jew varjazzjoni ta' retti alimentari li jkunu gew miftehma bejn il-konjugi stess, mal-milja taz-zmien hassew n-necessita' li flinteress tal-ordni pubbliku, li hu suprem u aqwa minn kull ligi jew ftehim bejn il-partijiet, kellhom jikkoncedu li taht certi cirkostanzi li gew ikkwalifikati bhala ta' natura gravi, eccezzjonali jew indipendenti mill-volonta' tal-attur li gabuh fl-impossibilta' li jhallas ir-retta alimentari, allura f'kazi simili jista' jkun hemm lok ghall-varjazzjoni. Fil-fehma konsidrata ta' din il-Qorti, din il-linja flesibbli fil-kazi propizji hija wahda ferm gusta mill-posizzjoni addottata qabel. Effettivament, din il-Qorti jidhrilha wkoll li hemm u mhux ma hemmx,differenza bejn manteniment ordnat mill-Qorti 'ope legis' minn iehor miftiehem volontarjament mill-konjugi stess. Fit-tieni kaz wiehed ghandu jipprezumi li trattandosi hawn ta' ftiehim ta' separazzjoni bonarja u mhux ko-atta jew forzata, li l-partijiet ftehmu fl-ahhjar interess taghhom it-tnejn". In the case "Gloria Beacom vs Anthony Spiteri Staines" decided by the Court of Appeal on the 5th October 1998 the Court held: "Il-principju regolatur huwa l-Pacta sunt Servanda, u cioe' dak li ftehmu l-partijiet liberament jikkostitwixxi ligi bejniethom, u ma jistax jigi varjat jekk mhux bil-kunsens taz-zewg partijiet, jew fil-kaz ta' impossibilita' reali tal-esekuzzjoni tal-obbligazzjoni". 12 In the case "Jean Pierre sive Jean Borg vs Nicole Borg" decided on the 30th November 2012 the Court of Appeal held that: "Fil-waqt li l-principju 'Pacta sunt Servanda'ghandu jirregola lkuntratti kollha tas-separazzjoni personali bhal kull kuntratt iehor, izda f'cirkostanzi gravi, eccezzjonali jew indipendenti mill-volonta' tal-parti li gabuha fl-impossibilta' li tkompli tezegwixxi l-obbligi ta' hlas ta' manteniment patwit bejn il-partijiet, il-Qorti ghandha ilfakolta' li tirrevedi dan l-obbligu. Dan il-principju jsib il-bazi razzjonali tieghu fl-interess tal-ordni pubbliku, li hu suprem u aqwa minn kull ligi jew ftiehem bejn ilpartijiet. Fi kliem iehor, f'materja ta' revizzjoni ta' manteniment pattwit, fil-waqt li ghandu japplika l-principju generali regolanti lmaterja tal-kuntratti, ghandu japplika wkoll, bhala deroga mill-istess, il-principju 'ad impossibilia nemo tenetur', li jifforma r-ratio legis taddispost tal-Artikolu 985 tal-Kap 16 li, inter alia, jistipula li hwejjeg impossibbli ma jistghux ikunu oggett ta' kuntratt". In this particular case it results that at the time when the parties were negotiating the divorce conditions, plaintiff was employed as a banker with UBS Bank in Switzerland earning a salary of 25,000 Swiss Francs per month; he was definitely in a position to pay maintenance to his wife in the amount of 9,000 Swiss Francs per month, which represents slightly more than one third of his monthly salary. He lost his job shortly afterwards and now he is in a very difficult financial situation as although he set up his own company to trade as a self-employed, at least at present the income generated from his business activity is very limited, even though he is optimistic that in the near future his financial situation should improve substantially. Even if plaintiff's financial situation should improve in the not too distant future, it has been sufficiently proven that at present plaintiff is not in a position to pay his wife maintenance in the amount of CHF 9,000 per month. Plaintiff is, in these special and exceptional circumstances, beyond his control, justified in claiming a reduction in the amount of maintenance

> he is obliged to pay his wife in terms of the Divorce Decree, but not a complete exemption from such an obligation. After taking into account all the facts of the case as result from these proceedings, the Court is of the view that the amount of maintenance payable by 13 plaintiff to defendant should be reduced to two thousand Euros (€2,000) per month"

The Appeal

6. Defendant felt aggrieved by the judgment delivered by the First Court and is asking this Court to revoke that judgment on the grounds that [1] the First Court did not have the opportunity to examine her needs in terms of sub-article 20[1] of the Civil Code; [2] the First Court failed to establish whether the maintenance due to her in respect of their daughter Celine Schmid was still due in terms of the divorce agreement reached with her husband in 2015; [3] plaintiff was not truthful when he gave evidence about his financial situation; [4] the First Court had failed to give its reasons as to the computation of the monthly payment due by way of maintenance.

The Reply

7. Plaintiff contends that the appeal filed by defendant should be rejected and that the appealed judgment should be confirmed by this Court whilst costs of the procedures before both the First Court and this Court should be borne by defendant. He submits the following in respect of each ground of appeal put forward by defendant: [1] he had proved

beyond doubt that his income had decreased drastically and therefore he could not pay maintenance; [2] their daughter Céline Schmid had not resided with defendant continuously and that she is no longer studying but is employed on a full-time basis; [3] he had always been honest with the Court as to his difficult financial situation; and [4] it is wrong to state that the First Court had failed to give its reasons as to the manner it established the amount of monthly maintenance due; on the contrary that Court had examined his financial situation at length.

The Court's Considerations

The First Ground

8. In her appeal application defendant submits that, because she had not been in a position to present her evidence before the First Court, namely that she is unemployed and that she maintains the youngest of their children Céline who is still studying, and this as a result of a number of serious shortcomings by the persons assisting her, the First Court did not have the opportunity to examine the 'needs' of defendant in accordance with sub-article 20[1] of the Civil Code.

The Second Ground

9. Another reason put forward by defendant explaining why she feels aggrieved by the First Court's decision is that the decision to stop the

maintenance due in respect of their daughter has been taken without due investigation considered in the light of the Divorce Settlement reached in 2015. Defendant declares that Céline is still studying and living with her.

The Third Ground

10. Defendant's third reason for feeling aggrieved by the First Court's decision is that Plaintiff made false representations before the said court regarding his financial situation.

The Fourth Grievance

11. Lastly, defendant submits that the First Court has failed to explain why maintenance payable to her was to be reduced to €2,000 and how this amount had calculated.

12. Plaintiff on his part submits that defendant's first grievance is based upon the alleged default of lawyers who had assisted her previously during the mediation proceedings and before the First Court and that defendant never really wanted to reach an agreement with him; her only intention being to hinder court proceedings. In any case, the First Court had founded its decision on sub-article 20[1] of the Civil Code. As to the second ground of appeal, he states that their daughter Céline is in full time employment and is no longer pursuing her studies. Plaintiff contests the third grievance by submitting that he was always transparent with the

First Court and provided all that was requested of him to prove his difficult financial situation. The submission put forward by defendant as her last ground is unfounded as the First Court had examined at length his financial situation and therefore had satisfied sub-article 54[9] of the Civil Code.

13. At this stage it is not amiss to point out regarding defendant's claim that the First Court did not have the opportunity to investigate her needs according to article 20 [1] of the Civil Code, the Court points out that defendant, though having the right to present a sworn reply, had failed to do so and, though the First Court had given her the opportunity to justify her state of *'kontumacja'* by adjourning the case to hear her evidence, defendant had failed to turn up for the scheduled sitting. So her complaint in this regard is unfounded. It is true that, in terms of Art. 158 (10) of The Code of Civil Procedure, the court ought to have allowed defendant a short time within which to make submissions in writing, which the court failed to do. However, in view of the final outcome of this appeal, defendant did not suffer any prejudice thereby.

14. On the merits the Court considers relevant to the issue of child maintenance and to the maintenance due to defendant the following clauses in the divorce settlement:

"2.5 Child maintenance contributions

> "The petitioner [father] undertakes to pay monthly maintenance contributions of CHF 1,000 [plus any statutory or contractual child benefits] to the costs of the daughter Céline's maintenance and upbringing to the petitioner [mother] as from when the divorce decree becomes legal and binding, payable in advance on the first day of each month in each case up until the regular completion of an appropriate initial training, including beyond the age of majority.
>
> "The maintenance contributions [excl. education and training costs] are payable to the petitioner [mother] as long as the daughter Céline lives in her household and does not file any claims of her own resp. specify any other payee…….
>
> "3. Post-marital maintenance
>
> "3.1 Amount
>
> "The petitioner [father] undertakes to pay monthly maintenance contributions within the meaning of article 125 Swiss Civil Code [ZGB] of CHF 9,000 to the petitioner [mother] personally, as from when the divorce decree becomes legal and binding until 30 June 2025.
>
> "A modification of this maintenance amount is excluded.
> ……
> "9. Full settlement clause
>
> "Upon the fulfillment of this Agreement, the Parties declare with regard to their divorce and marital and property rights tht their mutual claims are fully and finally settled.".

15. This Court observes that in the light of the above clauses, particularly the clause excluding a modification of the maintenance agreed upon, plaintiff's demand that no child maintenance is due and that maintenance due to defendant should be reduced to €2,000 per month should not have been acceded to. Plaintiff contended before the First Court[7] that he is no longer in a position to pay maintenance because he no longer receives an income and that he had settled a number of debts

[7] See Sworn Application pg. 5.

made by defendant. He explained in more detail in his affidavit[8] and in his testimony before that Court on the 1 March 2018[9], how he had lost his job with UBS in April 2015, and his subsequent difficulty in trying to start up a business with the aim of creating an adequate income. Finally, after his second effort at setting up of a new business/company, he could confidently claim as stated in his affidavit that he would be receiving a salary early in 2018 and that he would then be open to discussing a new agreement with his wife for maintenance. In his testimony of the 1 March 2018 he declares that till that date he had no income. As to the wife's alleged debts, he explains that these were due some 30 years ago also as a result of fraud committed by her and that he had slowly during the first phase of their marriage paid them off.

16. The Court observes that when the First Court had decided the present case in October 2018, according to plaintiff's own declaration in his affidavit he should have been receiving an income. However plaintiff has failed to bring forward any evidence of his financial situation. He has presented an annual report and financial statements[10] prepared by a Certified Public Accountant for the year ending on 31 December 2016 for the second company he had set up but no further proof regarding his financial situation after that date has been produced. Plaintiff also states

[8] Pg. 20.
[9] Pg. 56.
[10] Pg. 38.

in his evidence of the 1 March 2018 in first instance, that he was 55 years old when he lost his job with UBS and that no one would employ an ex-banker at that age. However he fails to produce evidence of his attempts to find employment whether with an income similar to the one he received previously or otherwise. As to the issue of child maintenance, he has not produced any evidence at all corroborating his allegation that the parties' daughter Céline is as alleged by him gainfully employed full-time and that she is no longer pursuing her studies.

17. The Court observes that it is an established legal principle that whoever alleges a fact has the burden of proving that fact to the satisfaction of the Court on a balance of probabilities. This remains so, even though the defendant chose to remain *'kontumaci'* and has thereby failed to produce any evidence. The plaintiff still has the obligation to prove his claims and to produce the best evidence possible.

18. In the circumstances of the case at issue where the parties had agreed on the terms of the settlement of maintenance as reflected in the Decree, the Court is obbliged to adhere to the terms of that Decree on the strength of the principle *pacta sunt servanda* reflected in Article 992 of the Civil Code. Regarding the rigid application of this principle, recent jurisprudence has developed in the sense that, notwithstanding that maintenance between the spouses has been agreed upon, there may be

circumstances of a serious, grave and exceptional nature independent from the will of the person obliged to pay maintenance which make it impossible for that person to continue honoring his obligation. In that case the Court may consider it necessary, to intervene and provide for a variation to the agreed terms[11]. The First Court followed this line of reasoning in its judgment but in this Court's belief and contrary to what was declared by the First Court, plaintiff has not shown that there are such circumstances beyond his control that justify a variation to the divorce agreement endorsed by the Decree, as would have been the case if, by way of example, he is prevented from working as a result of an accident or for health reasons. The mere fact that for some time plaintiff has, as he claims, been unable to find a suitable job, making payment of maintenance difficult or uncomfortable is not sufficient to exempt him from honouring an obligation freely entered into by him. In the present case, the plaintiff has failed to satisfy the principle of *impossiblia nemo tenetur,* and more specifically he has failed to prove that he had tried to find work, even on a temporary basis, to earn sufficient income enabling him to honour his obligation; *multo magis* considering that in the divorce settlement the parties had expressly excluded the possibility of a variation in the amount of maintenance which according to clause 3.1 of the settlement is due till the 30th June 2025.

[11] Civ.App. 2479/1996, **Alfred Grech v. Pauline Grech pro et noe,** 16 April 2004 and Civ.App. 24/2015, **Moses Briffa v. Natalina Briffa,** 31 May 2019.

19. For the above reasons this Court finds the first and second ground of appeal to be justified and therefore accepts them.

20. Since this Court is upholding defendant's first and second grounds of appeal, there is no need to continue dealing further with the next two grounds.

Decide

For these reasons, the Court decides by upholding the appeal, revokes the appellate judgment and rejects plaintiff's requests.

Costs of the entire proceedings before the First Court and before this Court shall be borne by plaintiff.

Giannino Caruana Demajo President	Tonio Mallia Judge	Noel Cuschieri Judge

Deputy Registrar
mb