FIL-QORTI CIVILI

(SEZZJONI TAL-FAMILJA)

L-ONOR. IMHALLEF ANTHONY VELLA

Hearing held on Wednesday 9th December, 2020

Application No. 67/2011 AGV

AB C as special attorney or and on behalf of DEF

vs

GHF.

The Courts;

Having seen Plaintiff's application wherein he humbly submits as follows:-

1. That the applicant DEF and the respondent GHF got married on the 12th February, 1993 in Switzerland, from which marriage two children were

born, namely IG and JK currently aged sixteen years and fourteen years respectively.

2. That the applicant had requested the Pretura di Lugano in Switzerland to dissolve her marriage with respondent by divorce and to regulate all matters ancillary thereto, amongst which issues relating to maintenance, which request was decided upon by means of a judgment delivered by Il segretario Assessore della Pretura di Lugano, Switzerland Avv. Francesca Signorelli Somaruga in the name of Repubblica e Cantone del Ticino dated 27th September, 2007, which judgement became final and res judicata on the 5th October, 2007, as can be attested from the copy of the apostilled judgement that is being presented together with this sworn application.

3. That as an integral part of the operative part of this judgement, as stated in fol. 4 of the same judgement aforementioned, the Court in Lugano approved a contract signed between the parties to regulate all matters ancillary to the divorce - in the words of the same court "3. E omologata la convenzione annessa quale parte integrale del dispostivo. » This same contract which was signed between the parties on the 2nd July, 2007 specifies amongst other things, that the respondent DEF is to pay maintenance for his minor children in the following manner : between seven and twelve years, the sum of 1, 645 Swiss Francs [equivalent to €1, 416, 22] and this every fifth of the month in advance.

4. That the respondent has defaulted in the payment of maintenance dues from January of the year 2009 and to date, the maintenance arrears due to the applicant amount to 37, 694.20 Swiss Francs [equivalent to twenty eight thousand, eight hundred and four Euros and forty two cents [€28,804.42].

5. That the applicant has an interest to enforce this judgement as delivered by the Pretura di Lugano, including the contract aforementioned included as an integral part of the operative part of this same judgement, in the Maltese Island and this in virtue of the fact that the respondent is currently residing in Malta and specifically at Tas-Sellum Residences, Flat 511, Dawret it-Tunnara, Mellieha and has an interest to recover the money owed to her in terms of the same judgement referred to above and representing arrears due to her by the respondent by way of maintenance for her two minor children.

Thus, the applicant humbly requests this Honourable court to:-

1. Declare that the judgement delivered by the Pretura di Lugano, Switzerland, in the names DEF vs GHF dated 27th September, 2007, including the contract that was signed by the parties on the 2nd July, 2007 in order to regulate matters ancillary to the divorce and which is declared to form part of an integral part of the operative part of the judgement of the 27th September, 2007, as enforceable in Malta and hence to order their enforcement in terms of Articles 825A- 828 of the Code of Organisation and Civil Procedure.

2. Consequently, declare that the respondent DEF is a debtor of the applicant in the amount of twenty eight thousand, eight hundred and four Euros and forty two cents [€28,804.42], which amount represents arrears in maintenance money owed to the applicant for her two minor children IG and JKF from January 2009 to date.

3. Liquidate the sum of money that the applicant is entitled to from today till the day the final judgement is delivered by way of maintenance for her two minor children IGF and JKF.

4. Order the respondent GHF to pay in a short and peremptory period the sum of twenty seven thousand, nine hundered eighty Euros and fifty one cents (€27,980,51) and any other payment due to the applicant by way of maintenance in the course of the proceedings till the date of the judgement as is liquidated by this Court in terms of the third claim.

   With expenses and with the highest interest rates permissible by law till date of effective payment against the respondent who is being summoned as of now in that a reference to his oath may be made.

Having seen Defendant's Reply wherein he states as follows:-

1. That preliminarily, in terms of the provisions of Article 2© of Chapter 189 of the Laws of Malta, the proceedings in this lawsuit must be conducted in the English Language in view of the fact that the respondent is an English-speaking person and neither of the parties are Maltese- speaking persons, and consequently, in terms of Article 5 of the said Chapter 189, respondent must also be notified with a translation into the English language of the acts of these proceedings.

2. That moreover, also in a preliminary manner, respondent pleads that applicant's second, third and fourth demands are superfluous and unnecessary and as such, respondent should not be made, in any event,

to bear the costs of these demands since, according to the provisions of Article 826 of Chapter 12 of the Laws of Malta, in the event that applicant's first demand is upheld, the judgement of which applicant is demanding the enforcement may be enforced in the same manner as judgements of the competent court in Malta, in terms of Articles 253 and 273 of the said Chapter 12.

3. That in the merits, and without prejudice to the foregoing, applicant's claims are unfounded in both fact and law and must be rejected with costs against applicant in view of the fact that no amount is due to the applicant as requested since she has already appropriated payment of any amount due by way of maintenance, from the proceeds of the insurance policy Skandia Life Number MIP 003585080 that were deposited in a bank account in Lugano for the minor children's needs. Respondent withdrew the amount of circa GBP 18, 749 from the aforementioned bank account for purposes that were not authorised in terms of the contract dated 2nd July, 2007 and furthermore, without respondent's authorisation as required.

4. That moreover, and without prejudice to the foregoing, in the merits, respondent pleads that the amount claimed by applicant by way of arrears of maintenance contributions, is in any event not due, and applicant must moreover prove what amount could be due to her, also in the light of the fact one-half of the amount due by way of maintenance is paid to the applicant every month from an escrow bank account that was opened specifically so that applicant deposits, as he did, one half of the capitalised amount of maintenance for both minor children between July 2007 and such time as they reach 18 years of age.

5. That furthermore, and always without prejudice to the foregoing, it results that DEF misappropriated funds pertaining jointly to both spouses, which funds had to be shared equally between them in terms of the contract dated 25th March, 2004, a copy of which is herewith attached, exhibited and marked as Doc TAB 1, and as shall further result during the course of these proceedings, and consequently, no amount can be due to applicant for any purpose, not even by way of maintenance for the minor children, since she is already in possession of sufficient funds pertaining to respondent to make good any amount claimed or that may result to be due by way of maintenance.

6. That without prejudice, no amount is due as claimed by applicant for the reasons abovementioned as well as for other reasons that will result during the course of these proceedings.

7. That in any event, and without prejudice to the foregoing, respondent pleads that the amount of maintenance established in the contract dated 2nd July, 2007 is by far excessive in relation to his means and income at present and therefore, this amount must be revised in order to reflect the respondent's new financial circumstances which have changed substantially from the time when the contract dated 2nd July, 2007 was negotiated and concluded, as may result further during the course of these proceedings. Infact, in this context, respondent is contemporaneously filing a counter-claim for the reduction of the amount due by him by way of maintenance for the parties' minor children in virtue of the contract dated 2nd July, 2007.

   Saving additional pleas.

Having seen Defendant's Counter-Claim who humbly states as follows:-

1. That the parties were married on the 12th February, 1993 in Switzerland, from which marriage two children were born, IG who is today 17 years old and JK who is today 14 years old.

2. That in virtue of a judgement awarded by "Il Segretario Assessore della Pretura di Lugano" in the name of the "Repubblica e Cantone del Ticano, dated 27th September, 2007 (Doc. CHB 2 attached to the sworn application), the Court in Lugano, while it pronounced the divorce between the parties upon the request of DEF, also approved the contract concluded between the parties on the 2nd July, 2007 that regulates issues ancillary to the divorce.

3. That in virtue of the aforementioned contract dated 2nd July, 2007, it was agreed that GHF is to pay the monthly sum of one thousand eight hundred Swiss Francs (SFR 1, 815) due by way of maintenance for his minor children between the ages of 13 to 18 years, for each child, which sum is equivalent to circa €1, 417 and is payable on the 5th of each month in advance.

4. That one-half of the amount due by way of maintenance for the parties' minor children as aforesaid, is paid each month directly to DEF from an escrow account that was opened specifically for this purpose so that the amount of SFR 907.50 will be guaranteed for the entire time that maintenance is due in terms of the contract dated 2nd July, 2007.

The Reasons for the Claim.

5. That the financial circumstances and means of GHF have changed drastically over the years since the negotiation and conclusion of the parties' divorce and infact today GHF is unemployed and has not been gainfully employed for the past few years.

6. That therefore, GHF is no longer in a financial position to keep up with the monthly payments due by way of maintenance contribution as stipulated in the contract dated 2nd July, 2007, and consequently, the sum of SFR 1, 815 payable monthly in respect of each child, must be reduce in order to reflect this change in his circumstances.

7. That these facts are personally known to GHF.

The Claims

DEF is therefore requested to state why this Court should not, save for any declaration or provision that may be necessary:-

1. Declare that the change in the financial means and circumstances of respondent GHF, justifies the variation of the contract dated 2nd July, 2007 concluded between the parties and the consequent reduction in the amount established by way of maintenance contribution due by him in respect of the parties' minor children.

2. Authorise the variation of the said contract dated 2nd July, 2007 in so far as concerns the respondent's obligation in clause 3 ("Mantenimento") for payment of the monthly sum of SFR 1, 815 due in respect of each child.

3. Consequently, liquidate the amount that is due by respondent by way of maintenance contribution for his two minor children.

4. Appoint a Notary Public to publish the relative Act as varied by this Court in consequence of the preceding demands and deputy curators to represent the applicant on the Act as amended, for all intents and purposes.

With costs against applicant DEF whose oath is hereby made reference to.

Having seen the Plaintiff nomine's Reply to Defendant's Counter-claim wherein he humbly states as follows:-

1. That preliminarily, the applicant submits that the counter-claim is null and void due to the fact that it is procedurally defective, hence this Honourable Court should thus proceed to abstain from taking further cognisance of the same counter-claim. Although the counter-claim is connected with the principal action brought forward by the applicant DEF in that it relates to a foreign divorce judgement and a contract that regulates matters ancillary to the divorce approved in the same judgement by the foreign tribunal, which judgement and contract the applicant is seeking to enforce, the counter-claim deals with the variation of a clause in the same contract that regulates the maintenance due by the respondent GHF for his two minor children. According to the procedure established by the Legal Notice 397/2003 and particularly, Article 9(1) of the same, where any person desires to proceed before the Court to request the variation of an agreement or a judgement of personal separation as well as any variation in an agreement between the parties regarding maintenance of the children, the obligatory procedure of mediation must first be followed. It is only in the event that there is no agreement in the mediation regarding the same

request for a variation that a court case can be opened to request such a variation. In no instance did the respondent start the procedures for mediation as contemplated in the law and that would thus justify the requests his counter-claim.

2. That subordinately and without prejudice to the above, the counter-claim of the respondent is unfounded in fact and at law and hence should be rejected in its entirety with costs against the same respondent for the reasons hereunder.

3. That through his counter-claim and as can be attested in the list of witnesses provided therein, the respondent is seeking to re-discuss the merits of the divorce concluded between the parties. The principal action relates to the enforcement of the divorce judgement of the 27th September, 2007 and the contract of the 2nd July, 2007 approved in the same judgement, and hence the function of this Court is limited and circumscribed by the law in terms of the provisions of Articles 826 et seq. of Chapter 12 of the Laws of Malta and hence this Court cannot investigate the merits of the procedures before the swiss courts that led to its judgement dated 27th September, 2007.

4. That by virtue of his counter-claim, the respondent is seeking to vary a contract and hence as it is well established, the general principles regulating contracts should apply, particularly the principle of pacta sunt servanda, to the effect that it is not possible for the respondent to attempt to revise a contractual clause that was accepted freely by him at the time he signed the contract of the 2nd July, 2007, except where such revision is contemplated in the same contract. In the contract dated 2nd July, 2007, of which the respondent is requesting the variation, there is absolutely no

provision allowing a revision of maintenance due by the respondent to his minor children.

5. That subordinately and without prejudice to the above, the applicant contests the fact that the respondent's financial situation has changed drastically over the year from the negotiation and conclusion of the divorce, and this in view of the fact that the respondent in these years worked and works for various foreign companies and that obtained a substantial divorce settlement of circa 2 million to 3 million Swiss Francs, of which nine hundred thirty five thousand [935, 000.00] Swiss Francs were paid to him by the applicant in July 2007 in accordance with the same contract dated 2nd July, 2007 in clause IV.2 thereof and this over and above other sums of money and property given to the respondent and this as will be amply proven throughout the course of the proceedings.

6. That subordinately and without prejudice to the above, the applicant submits that the maintenance for her minor children is of vital importance, particularly in connection with the minor son IGF and this in view of the fact that he is a special needs person who cannot even take care of himself on a daily basis, notwithstanding being seventeen years old, and this will be amply proven throughout the course of the proceedings.

7. That subordinately and without prejudice to the above, should the Court accept the requests of the respondent for a variation of maintenance clause towards his two minor children, any such variation, and hence any amounts due to the respondent ass maintenance till the date of judgement delivered must be paid by the respondent in accordance with clause 3 of the contract dated 2nd July, 2007 as it presently stands.

8. Saving any other pleas that are admissible at law.

Having seen all the acts and documents exhibited in this case.

Having seen the partial judgment delivered in the 28th April, 2016.[i]

Having been determined that this case is solely limited to the Defendant's counter-claim, since the abovementioned partial judgement was given on Plaintiff's claims.

FACTS

1. DEF married Defendant on the 12th February, 1993 and from this marriage they had two children, I and JK , both minors. On the 27th September, 2007 a judgment of divorce was delivered by Advocate Francesca Signorelli Somaruga, Segretario Assessore della Pretura di Lugano and it became res iudicata on the 5th October, 2007.

   She explains, that prior to the divorce judgment, she and her husband entered into an agreement to regulate matters ancillary to the divorce such as care and custody, access and maintenance of their minor children as well as the division of the property held in the marriage, was entered into and signed on the 2nd July, 2007. In the divorce judgement of the 27th September, 2007, the Court of Lugano declared the agreement to be an integral part of the operative part of this same judgement.

   It was agreed that on the fifth day of every month, Defendant was to obliged to pay maintenance in advance, in favour of the children in that for children between 7 and 12 years, 1645 Swiss Francs and children between 13 and 18 years – 1815 Swiss Frances, all to be paid monthly. This was due as from the 5th July, 2007.

Until the year 2008, Defendant satisfied his obligations of paying maintenance. However, from the very beginning of January, 2009, problems started as Defendant would either pay a small amount of the monthly maintenance due by him, which in this case, at the time, both minors fell under the second category and hence this amounted to 1815 Swiss Francs per month.

Defendant paid irregularly, there were times he paid nothing at all for months and then he would pay part of the sum and since there were arrears Plaintiff had to open a court case and to date, he has kept on failing to pay maintenance. He last met the children in the UK in March, 2011 and yet he still refuses to pay for them.

In all she states that Defendant made the following payments:-

i) Between February 2009 and May 2009 - 1730 Swiss Francs each month and there was a shortage of 85 Swiss Francs every month;
ii) In June 2009 – 1264.90 Swiss Francs and there was a shortage of 550.10 Swiss Francs
iii) In July 2009 - 232.55 Swiss Francs and there was a shortage of 1582.45 Swiss Francs

From August 2009 she never received any maintenance again.

Plaintiff states that following the divorce agreement of the 18th October, 2005 and the divorce sentence of 27th September, 2007, Defendant received the following assets:-

- CHJF 472’535.00 first payment after selling the house Villa Violetta in Lugano – Castagnola on the 4th November, 2005 according to the divorce agreement.[1]
- CHF 935’000.00 when Villa Violetta was sold, which payment was effected to his lawyer Fabio Soldati and this according to the divorce sentence.[2] Plaintiff states that this is CHF 326’667 more than 1/3 of the net value of Villa Violetta.
- A Ferrari360 Modena with a net value of CHF 125’000.00 and a Triumph TR 6 with a net value of £5, 500.00
- All the shares of C. Bird Fashion Ltd. with its seat in Hong Kong, with a net value of approximately £459’823.
- The office building in 5th Roman Way, Droiwich (UK) with a net value of £180’000.00

Thus, in total Plaintiff confirms that Defendant has received CHF 1’532’535 plus £645’323.00 which add to CHF 3’078’001 equivalent to EUR 1’867’706.40.

As to Casa Collina, better known as Villa Vilerta, she states that this was registered with the land registry of Lugermo in her name. She was responsible for its sale at 9 million Swiss francs. She admits that in the deed there was a different price and a separate agreement for the difference and this together with Defendant and his lawyer.

There was a difference of 2. 5 million Swiss Francs as the divorce contract only stated 6.5 million Swiss Francs and this was approved by Defendant. He also received the monies from both amounts. From the 6. 5 million Swiss Francs she states that Defendant received 472, 535, Swiss Francs after the mortgage, interest

[1] Vide Dok. A a fol. 445
[2] Vide Dok.B a fol. 460

and fees were paid. From the 2. 5 million Defendant received 935, 000 Swiss Francs and Plaintiff insists that she had overpaid him because she had miscalculated the tax. She had paid his tax because it wasn't deducted from his share.

2. GHF confirmed his marriage to DEF and the birth of his two children. He also confirms that they divorced in 2005.

   He added that they signed an agreement on the 25th March, 2004, when they were already *de facto* separated. In the said agreement, they had agreed that in the even that a debt due to them personally would be recovered, the proceeds would be divided between them equally. The amount of this debt was due by a company known as Hansen and it amounted to 255, 343.07 USD.

   It transpired through information given to him by his lawyer Gianni Cattaneo, that the debt was recovered from Hansen via a third party intermediary Ralph Lin and the amount of 175,000 USD had been paid directly to his wife. He confirms that this amount was paid to his wife's offshore company 40 Degrees North Limited through Time and Secretarial Consultants Limited, Hong Kong. To date he admits that he has not received his share of this sum, as was duly agreed in their private agreement. The share was equivalent to cirka 87,500 USD (€67, 000).[3]

   In the divorce settlement there was an agreement that he would pay 1,645 Swiss Francs for each child monthly until the age or 13 and the sum of 1,730 Swiss Francs for each child monthly until the age of 18. Defendant admits that he wanted to pay up in the form of a lump sum payment half

[3] VIDE Dok. TAB 2

the amount due as maintenance for the entire period and in fact he had deposited in advance an escrow with his lawyer Fabio Soldati representing half of the entire capitalised amount of maintenance. Following clause 3 of the said divorce agreement, one half of the amount due as maintenance is paid by Fabio Soldati monthly, so presently his wife is receiving 1, 815 Swiss Francs monthly. A sum of CHFL645 per month was paid through the escrow with Fabio Soldati, his lawyer in the divorce proceedings, from which he pays his wife every month one half of the amount of maintenance due and therefore today she received the sum of 1, 815 Swiss francs.

When the children were under the age of 13, he was obliged to pay a total monthly sum of CHF 1645 by way of maintenance and an identical sum of CHF1645 was paid through the escrow per month, amounting to a total of CHF3, 290 and this was always paid in full every month. This then amounted to CHF 3, 630 for both children when they both reached the age of 13. Therefore, he denies what his wife states that J was entitled to the sum of CHF 1815 as from January, 2009, because at the time she was not yet 13 years old. The amount would have been due as from January, 2010 and therefore the amount that was paid from his escrow account, in the sum of 1,730 Euros between January, 2009 and January, 2010 was correct.

He also denies that he wasn't paying his wife maintenance as from August, 2009 as each month she was still receiving money from the escrow account the amount of CHF 1, 730 until the 5th January. 2010, when the amount was increased to CHF 1, 815.

He explains that he had taken out a savings policy with Scandia which had matured in the amount of GBP 18, 749 (€25, 000), which amount was placed in UBS Lugano in a joint account in the name of his wife and I.

According to their divorce agreement, his wife was entitled to withdraw from these funds exclusively to cover the extraordinary costs for I, provided she informs him beforehand of the necessity to withdraw the funds. The same applied if she needed to withdraw funds for their daughter J. He confirms that his wife had withdrew all the funds, but she had never informed him what these extraordinary expenses were, he requests that these funds are set-off with any amount as maintenance for the children.

He later learnt that his wife had placed this money from this account in a fund with the same bank in order to invest on the Stock Exchange, which amount was later devalued and she lost considerable sums of money through this investment.

Following a court case in Switzerland, where it resulted that his wife had made a double-claim for dental treatment expenses for the children from himself and from the health insurance policy covering the children, the Court had dismissed his wife's case and ordered her to pay part of his costs. Since she had failed to pay him these costs, the Court, upon the application of his lawyer entitled him to deduct these costs from the maintenance payments due to her for the children. He did this in 2 amounts, in June, 2009 he deducted the amount of CHF 1, 408.25 and in July 2009 he deducted the amount of 317.66 CHF from the maintenance.

Defendant claims that the bank statements that his wife had exhibited were not complete as they did not show the payments she received from the escrow account.

Up to 2002, he and his wife operated various companies C. Bird Fashion Limited, Cornelia Bird Fashion Consultants Ltd. and C. Bird Fashion SA,

which eventually they liquidated. As a result he did nor receive any income and had to rely on his capital, which at the time was quite substantial.

He also added that he was still incurring the accountance expenses in Switzerland for liability he had for payment of substantial taxes and penalties. Equivalent to 810, 00 Euros. He is therefore living off the financial proceeds from the liquidated capital assets following the divorce agreement. He lived in a rented apartment in Malta, where he paid a €100 monthly rate. As a result, he cannot meet his financial commitments towards his children, and they are only receiving half the amount due to them from the escrow account.

Defendant explains that he has no residence and that he no longer lives in Malta. Since 2012 he has been looking for a new employment, but he could no longer work in the textile industry since the divorce, but he got qualified, following a Masters course, to work in a new profession. He says that he has attended various training courses. Whilst in Malta he used to live off the proceeds of the assets from his divorce, but he denies that it was in the amount of €1,870, 000, he states it was more like 1,250, 000 Swiss Francs.

With regards the property in Mellieha, he says there was a loss of around €80, 000.

Having considered:-

Plaintiff raised a number of pleas to Defendant's counter-claims. The first plea he raised is the nullity of the said counter-claim, in that the action filed by him was not preceded by the necessary mediation procedure in terms of Article 9(3) of Legal Notice 394/2003 (Today Article 10 (1)(c) as

renumbered under Act XIII of 2018 (Subsidiary legislation 12.20 under Cap. 12 of the Laws of Malta) to request a variation of an agreement or a judgement of personal separation as well as a variation in any agreement between parties relative to the maintenance of the children.

Thus, the law necessitates mediation proceedings to take place, in order for the parties to attempt to reach a consensual decision, failing which in terms of Article 11(1), the Court is obliged to authorise the parties to proceed to litigation within 2 months from the date of decree of such authorisation.

Parties had, prior to their divorce settlement, entered into an agreement signed on the 2nd July, 2007 between them regulating the care and custody of the children, access as well as maintenance payments and the division of the property held in the marriage. This said agreement was then adopted and declared to be an integral part of the operative part of the divorce judgement dated the 27th September, 2007 by the Court of Lugano.

Defendant is now, through his counter-claim, attempting to vary the said agreement alleging that he no longer has the financial means to continue paying maintenance towards his children since he is unemployed and thereby requests a reduction of payment of maintenance.

The said counter-claim by far and large is nothing more than a claim to vary the agreement that he had reached with his wife on the 2nd July, 2007. Further to the counter-claim and the Plaintiff's pleas to the same, Defendant went on to open mediation proceedings requesting a mediation on the same claims. This was done on the 25th November, 2011 and therefore after the preliminary pleas by Plaintiff had been raised.

This by no means can be an acceptable way of rectifying any shortcoming from Defendant's end, even more so, when as Plaintiff pointed out and also proved, that in the mediation acts presented by Defendant, at no point did he refer to the court that there were already ongoing proceedings before the Civil Court (Family Section) and that a counter-claim had already been lodged by him requesting a variation in his agreement with Plaintiff, without first instituting mediation proceedings as requested at law. This only leads to one conclusion, that Defendant wanted to mislead the Court into thinking that this was a fresh and new mediation intended to lead to either an agreement or to authorise him to proceed before the said Civil Court (Family Section) requesting a variation to the his agreement with Plaintiff as incorporated into the divorce judgment dated 27th September, 2007, so much so that on the 28th November, 2011, the Court went on to authorise Defendant to proceed with the relative court case, something that ironically he had already done and premeditated. He even failed to request that the authorisation be applicable retroactively.

On a final note, the Court finds it deplorable that this case took nine years to be concluded.

DECIDE:

Thus, on these grounds alone the counter-claim of Defendant is being rejected *in toto*, whereas;

Plaintiff's pleas are being upheld.

All costs are to be borne by Defendant.

Hon. Mr. Justice Anthony J. Vella **Registrar**

[i] Vide fol. 39