CIVIL COURT
(FAMILY SECTION)

THE HON. MADAM JUSTICE
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Today, 13th May 2024

Sworn Application no. : 161/2023 JPG
Case : 16

AG

Vs

JG

The Court:

Having seen the sworn application filed by Plaintiff dated 12th July 2024 *a fol 1 et seq* of the acts wherein it stated:

1. *That the parties married on the fourth (4th) July of the year nineteen ninety three (1993) after having been in a relationship for a bit over a year;*

2. *That one child, AG was born of this marriage, which child was born on the X;*

3. *That the marriage was declared null via a judgment of the Tribunais Primae IStantiae of the 28th April, 2021 (Doc A), which judgment was published on the 6th September, 2021 (Doc B). Given that no appeal was filed within the fifteen*

days allowed at law against this judgment[1] *a Decree was issued rendering the judgment executive at law. This decree was issued on the 11th October, 2021;*

4. *That although no appeal against the decision to declare the marriage null was filed, the respondent filed an appeal against the decision finding 'fault' and this given that the Tribunal had concluded on the most explicit terms that she was unable "to reason". The said, via a decree given by the Metropolitan Tribunal of the Second Instance on the 21st March, 2022 that Tribunal rejected the appeal "and instead CONFIRMED the said decision in terms of canon 1680/3;"*[2]

5. *That via a judgment given by the Court of Appeal (Superior Jurisdiction) given on the 6th June 2022, the annulment was registered in terms of Article 23 and 24 of the Marriage act, Chapter 255 of the Laws of Malta;*

6. *That from the evidence ditherers before the Metropolitan Tribunal of Archdiocese of Malta, and if necessary it will be proved again in the course of these proceedings, it transpired that the Plaintiff was in good faith when he married the Respondent, and whilst the Respondent was not when marrying him;*

7. *That consequently, according to law, the effect of a marriage validity contracted between the parties apply solely in favour of the Plaintiff but do not apply with respect to the Respondent;*

8. *That the Respondent acquired and enjoyed, during her putative marriage to the Plaintiff, various rights and advantages which she was not entitled to according to law;*

9. *That the putative marriage of the parties meant that the Respondent enjoyed. directly and indirectly, several payments, benefits and other advantages of different natures all acquired by her from the Plaintiff, and to which she was not entitled given that she acquired and enjoyed them solely as a result of her putative marriage and her status as wife to the Plaintiff;*

[1] It is noteworthy that the respondent had filed an appeal against the conclusion of the Tribunal about the nullity o f the marriage.

10. *That the Respondent should be condemned by the Court to repay to the Plaintiff all the monies, benefits and advantages which she has directly and indirectly enjoyed as a result of her putative marriage to the Plaintiff, doing so following the Court's liquidating the comprehensive value of the same in one figure which is to be repaid by the Respondent to the Plaintiff;*

11. *That this suit is thus being filed for the liquidation of such sum as must be repayable by the Respondent to the Plaintiff;*

12. *That the Plaintiff declares to know such facts personally;*

Consequently, the Respondent is called upon to state why this Honourable Court should not, saving any declaration which may be necessary and opportune and for all the reasons above premised and for those which may be adduced in the course of these proceedings:

1. *Declare and decide that the Respondent did not marry the Plaintiff in good faith and that therefore she does not benefit from the effects of a valid marriage.*

2. *Declare and decide that the payments, benefits and other advantages that the Respondent has directly and indirectly acquired from the Plaintiff in course of her putative marriage to him, are the result of the putative marriage between the parties and therefore the Respondent was not entitled to the at law and must return them to the Plaintiff.*

3. *Liquidate into one global sum all the payments, benefits and other advantages of every nature, acquired directly and indirectly by the Respondent from the Plaintiff.*

4. *Condemn and order the Respondent to pay such sum to the Plaintiff.*

With costs and interest against the Respondent who is as of now called upon to testify with reference to her oath.

Having seen the sworn reply filed by Defendant *a fol 65 et seq* of the acts, wherein it stated:

1. *That primarily because the judgement of annulment was registered civilly at the demand of the same plaintiff on the 6th of June 2022 – as it results from the documents exhibited by the plaintiff himself with his sworn application – nothing can be decided by this Honourable Court that goes against what has been decided by the Ecclesiastical Tribunal, in this sense and in relation to these effects the defendant is bringing up the plea of* ***res judicata****;*

2. *That in the second place, from the judgement delivered by the Metropolitan Tribunal of the Archdiocese of Malta, nowhere does it result that the Defendant was in any way not in good faith when she contracted her marriage with the Plaintiff. Therefore, the dispositions of article 20(3) of Chapter 255 of the Laws of Malta can never be applied against the Defendant;*

3. *That in the third place, good faith is presumed automatically and whoever alleges that a person did not marry in good faith, needs to prove this to the extent required by law;*

4. *That in the fourth place, the marriage of the parties was declared null by means of a definitive judgement of the Ecclesiastical Tribunal on the 28th of April 2021, for two (2) reasons – the first reason being "on the ground of lack of due discretion of judgement on the part of the Petitioner Husband" and the second reason being "on the ground of Inability to assume marital obligations on the part of the respondent wife". That moreover the costs of the annulment proceedings were ordered to be paid only by the Plaintiff and being the 'petitioner'.*

5. *That the psychiatrist appointed by the tribunal found that on the part of the Defendant she suffered from Histrionic Personality Disorder. The fact that the*

Defendant allegedly suffered from mental health problems can never mean that she was not in good faith when she contracted marriage;

6. *That finally the demands made by the Plaintiff are absolutely not made according to Law and therefore should be rejected in toto, with costs against the Plaintiff, who is repeatedly filing these lawsuits only in order to break and shatter the Defendant, his wife, financially and emotionally;*

Save further pleas.

With expenses against the Plaintiff, who is from now summoned with reference to his oath.

Having seen that during the sitting of the 15th of November 2023, Counsel to Plaintiff requested that the presiding judge abstains from hearing the case given that the Court as presided is already seize with another case between the parties, that is, the case with number 188/2005, and therefore there was a possibility that the Court might pronounce itself on the merits of one or the other case or issue findings and declarations which may impinge on the eventual judgment given in both cases and it would be in the interest of all parties involved to avoid such possibility. Counsel to Plaintiff informed the Court that he shall be filing an application elaborating the reasons for said recusal;

Having seen that counsel to Defendant objected to the plea raised by Plaintiff and requested that the Court orders that he be served with Plaintiff's application and with a reasonable time to respond.

Having seen Plaintiff's application dated the 2nd of January 2024 *(vide fol 66 et seq)* wherein having made the declarations there in contained requested the Court to:

1. *Find that there are sufficient grounds at law to order that the presiding Judge, Madame Justice Jacqueline Padovani Grima, be recused from hearing the case and, consequently, to order such recusal.*

2. *Order that the acts of proceedings be remitted to the Registrar of the Civil Courts and Tribunals so the case may be assigned to a new Judge in order that the case continues to be heard on the merits.*

Having seen that the application and this Court's decree have been duly notified to Defendant in accordance with the law;

Having seen Defendant's reply to said application dated the 29th of January 2024 where Defendant objected to the demands made by Plaintiff for reasons therein cited:

Having heard oral submissions by counsel to both parties;

Considers:

This is a decree following a request filed by Plaintiff for the recusal of the presiding Judge. In his application, Plaintiff contends that this request, is motivated as a result of the fact that the presiding judge is also the judge who is currently presiding over the personal separation proceedings pending between the parties. *(Vide Sworn App.No.: 188/2005 JPG JG pro et noe vs AG.)* In his application Plaintiff elaborates that there is a high degree of potential for overlap between the judicial pronouncements which may be made in the course of the action for personal separation and this action pertaining to the effects of a putative marriage being imputed to the Respondent, especially since in both actions the Court as presided is being called upon to examine the behaviour of the parties immediately before and during the marriage, their intentions and actions.

Plaintiff adds that the findings of the Court in one case will have a direct impact on the same Court's considerations in the other case, with the Court necessarily being bound to the findings made in one or the other. If one of the actions is to be decided before the other one, the Court will find itself bound to considerations and findings which it would have already made, thus influencing in a most determining manner its considerations in the case which would still be pending. Plaintiff affirms that it would be in both the parties' best interest to avoid such potential for controversy and for this action, being the second one brought of the two in issue, to be assigned to a different judge, as this Court will not and cannot remain impartial in the

second of the two judgments which it is called upon to deliver. Applicant also adds that our Courts have always held that article 734 does not provide an exhaustive list of grounds on the basis of which a request for recusal may be made.

On the other hand, Defendant argues that Plaintiff's request should have been raised in open court and that said demand is causing difficulty in comprehension Defendant also adds that a request for recusal can only be acceded to in cases strictly contemplated within the law and that the motives alleged by Applicant may never lead to the abstention or recusal of a judge. Defendant affirms that not only does the Legislator not forbid overlap, but the law in fact provides that cases which overlap shall be heard concurrently by the same judge. This can be seen through the order for connection of suits in terms of article 402 of Chapter 12 of the Laws of Malta and also through the Institute of counter claims. Hence, Defendant states that it is rather clear, that the Legislator, rather than providing that an overlap should lead to a recusal, takes mandatory steps for the hearing of such suits by the same judge. Moreover, even had such overlap possibly been a ground for the recusal of the presiding judge, the mere potential of such overlap is insufficient to ground a recusal or abstention.

Defendant in her reply points out that the Honourable Judge Antonio Giovanni Vella has already been constrained to abstain from hearing the suit; The institute of recusal/abstention cannot be invoked to enable a party to actively select which judge that party wishes to preside over its case, or even more sinister, whether it is intended as a means of advising a judge in advance that the judge's impartiality is suspect and the judge should be effected by that suspicion.

Considers:

The Court obiter recognizes that it is particularly odious that the question of a judge's recusal is left to the judgement of the same judge whose recusal is being sought. Such a determination ought to be made by a different judge, however the current legal system in Malta does not permit this. The Court notes furthermore that the law does not even permit an appeal from a decision regarding recusal, albeit there are other remedies at the disposal of the parties.

The Court recognizes furthermore that with regards to complaints relating to impartiality, the Court has to protect not only the parties' interests, but also that of the public in general. This

is because the impartiality of the members of the judiciary is fundamental not only to guarantee the right to a fair trial but also for democracy and the rule of law. It is oft said that justice must not simply be done, but it must also be seen to be done. It is for this reasons that a complaint of lack of impartiality can be based either on a lack of subjective impartiality on the part of the presiding judge or on a lack of objective impartiality, where the fear stems from the objective circumstances of the case which, independently of the actual convictions or personal interests of the judge, do not sufficiently guarantee the impartiality that the Court ought to have, and ought to appear to have. In a democratic country, it is crucial that the public has faith in the judiciary and the impartiality of judges, both actual and perceived, is a sine qua non requisite for such faith to exist.[3]

A comparative study of the procedures adopted by other different states in relation to the procedure adopted for the recusal of a judge, conveys that in states which embrace the common law system, it is the presiding judge whose recusal is being sought that must determine said request as opposed to other States, wherein the law stipulates that such requests are to be determined by another judge or by another Court. In fact, Italian civil procedural law a request for recusal is decided by a different judge or judges depending on the case. This is also the case in Germany, unless the said request is deemed to be a delaying tactic, in which case, it is the same presiding judge whose recusal is being sought, that determines the request.

The Courts of Law of the United Kingdom, of course, have a system which is akin to ours, bar one difference. The UK system allows for the possibility of filing an appeal from such a decision.

The European Court of Human Rights has held that:

> ***"Impartiality normally denotes absence of prejudice or bias and its existence or otherwise can be tested in various ways. The Court has thus distinguished between a subjective approach - that is endevouring to ascertain personal conviction or interest of a given Judge in a particular case and an objective approach that is***

[3] See for example, Castillo Agar v Spain, ECHR decided on 28 October 1998: "…even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public."

***deterring whether he or she offered sufficient guarantees to exclude any legitimate doubt in this respect."*[4]**

When the Strasbourg Court sought to apply its subjective test, it consistently affirmed that:

***"The personal impartiality of a Judge, must be presumed until there is proof to the contrary."*[5]**

Subjective impartiality may, by way of example, be ascertained when a judge manifests some form of hostility or will for personal reasons" towards one of the parties. The European Court also stated that:

***"This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular Judge lacks impartiality, the standpoint of the Applicant is important but not decisive. What is decisive is whether this fear can be held to be objectively justified."*[6]**

This Court concedes that the transposition of the European Convention has ultimately also introduced a new source of law which ranks superior to the local procedural code, in such a way that in addition to the dispositions of article 733, there are an indeterminate number of other reasons which may serve as the basis for a request for the recusal of a judge. However, it stands to reason that not every fear of impartiality ought to lead to the recusal of a judge.

Professor Phun warns:

" the law of judicial recusal contributes to the quality of the justice system but at the same time can be manipulated by a party to a litigation who is disappointed by the outcome and who is seeking an opportunity to have another bite at the cherry."

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[4] *Vide inter alia* Piersack v. Belgium, judgment of 1 October 1982, Series A no. 53, § 30 and Grieves v. the United Kingdom [GC], no. 57067/00, § 69, ECHR 2003-XII)

[5] *Vide inter alia* Hauschildt v. Denmark, judgment of 24 May 1989, Series A no. 154, p. 21, § 47

[6] *Vide inter alia* Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 30).

The same line of reasoning was adopted by the Honourable Judge J Zammit Mckeon ***in Cecil Pace vs Prime Minister*** decided on the 6th of October 2011, which judgment was also confirmed by the Constitutional Court:

> ***"r-rikuża mhux ħaġa ta' konvenjenza iżda ta' Ġustizzja u għalhekk sabiex wieħed jirrikorri għaliha, ir-raġuni trid tkun fondata; altrimenti tagħti lok għall-abbuż."***
>
> ***….mhux kwalunwke cahda ta' xi talba maghmula minn parti f'kawza tista' twassal ghal konkluzjoni illi l-gudikant huwa pregudikat kontra dik il-parti, u li inoltre l-gudikanti m'humiex qeghdin hemm sabiex jissodisfaw il-partijiet billi jaccettaw it-talbiet kollha taghhom ikun xi jkun il-kaz, izda qieghdin hemm biex japplikaw il-ligi u jaghmlu gustizzja mal-partijet fil-kawza.***

In *subjecta materia* this Court makes reference to the considerations made by the Honourable Judge Dr J Zammit Mckeon in his judgment: ***Nadia Vella vs Attorney General***, decided by the First Hall Civil Court in its Constitutional Competence, decided on the 30th of May 2019.

> ***Dwar l-ilment tar-rikorrenti relatat ma` l-indipendenza u l-imparzjalita' tal-Imhallef, l-Avukat Generali jirrileva li jekk digrieti provvizorji ma joghgbux parti, ma jfissirx li jkun qed issir xi preferenza jew xi att ostili lejn parti jew ohra. Kull imhallef ghandu dritt u l-obbligu li jasal ghal konkluzjonijiet tieghu (ara : Andrew Ellul Sullivan et vs Kummissarju tal-Pulizija et deciza mill-Qorti Kostituzzjonali fit-18 ta` Gunju 2008 ; u Joseph Portelli vs Pulizija (Spettur Mallia) et deciza mill-Qorti Kostituzzjonali fil-10 ta` Novembru 2008).***

This Court shall also cite the gurisprudence of the Constitutional Court following a constitutional reference from the Family Court in the acts of the sworn application with number 125/18 AL in the names ***Carmen Grixti vs Ivan Grixti*** wherein the Court held that:

> ***"Fid-deċiżjoni tal-Prim'Awla (sede Kostituzzjonali) fl-ismijiet David Aquiliana vs. L-Onor. Prim Minsitru et (Rik Nru 42/2006 JRM)16 deċiża fil-31 ta' Mejju 2007 ġie ritenut illi :-***

> ***"Minħabba li teżisti l-presunzjoni li ġudikant huwa imparzjali sakemm ma jintweriex mod ieħor, min jallega l-parzjalita' ta' ġudikant irid jipprova tali parzjalita' fil-fatt u mhux biss iqanqal dubju leġittimu b'inferenza jew sempliċi biżgħa;***
>
> ***Illi dwar dan ikollu jingħad li m'huwiex biżżejjed li dan il-kriterju ta' imparzjalita' jissemma bħala sempliċi suspett: jeħtieġ li jkun ippruvat kif imiss. Kulħadd jista' jidħollu suspett li l-ġudikant li jkun ta sentenza li l-eżitu tagħha ma jintgħoġobx minn xi parti, sata' ma kienx imparzjali. Imma dan m'huwiex biżżejjed biex iwassal għas-sejbien ta' ċirkostanza ta' imparzjalita' jew ta' smigħ xieraq." (enfasi mizjuda)***

The Court notes that the current proceedings were filed by Plaintiff on the 12th of July 2023 and were originally assigned to the Family Court as presided by the Honourable Judge Antonio Giovanni Vella who by means of a decree dated 27th September 2023 (vide page 60 of the acts), abstained from hearing the case and remitted the acts of the proceedings to the Registrar for them to be assigned to another Judge in accordance with article 734.

His Honour the Chief Justice, by means of a decree dated 29th September 2023, assigned the case to this Court as presided. (Vide decree at page 61 of the acts.)

During the sitting of the 15th of November 2023, (vide minute at page 70 of the acts) Counsel to Plaintiff requested the recusal of the Presiding Judge. Thus the procedural requisite *ad limine lite* indicated in article 737 of Chapter 12 of the Laws of Malta have been adhered to.

With regards to the pending separation proceedings, the Court notes that these were filed in 2005; Following an abstention by the Honorable Judge Antonio Giovanni Vella dated 9th of October 2018, the separation proceedings were subsequently assigned to the Presiding Judge and are currently adjourned for Defendant's evidence.

After careful consideration, this Court holds that the motivations proffered by Plaintiff do not ground the recusal of the presiding judge. Indeed the apprehension or fear of potential "overlap" is evidently insufficient to request a recusal of the presiding Judge. Indeed, it this Court's considered opinion that on the contrary, Maltese Law provides, through Article 402 of

Chapter 12 of the Laws of Malta, for the connection of law suits making it mandatory for the same Judge to hear connected or "overlapping" cases. The Law similarly allows for counter-claims in terms of Article 396 of Chapter 12 of the Laws of Malta which evidently are heard by the same presiding Judge. This happens not only for reasons of expediency and to avoid unnecessary legal costs and waste of judicial time, but to eliminate the suspicion of Forum Shopping.

For these reasons, the Court denies the request for the recusal of the presiding Judge filed by Plaintiff and orders the continuation of both sets of proceedings.

Costs are reserved for final judgement.

Read.

Madame Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar