CIVIL COURT

(FAMILY SECTION)

THE HON. MADAM JUSTICE

JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)

Today, 29th January 2025

Sworn Application no. : 224/2021 JPG

Case number : 16

KM

Vs

SM

The Court:

Having seen the application filed by Plaintiff dated 13th of September 2021 at page 1, translated at page 5 et seq. wherein it was stated:

> *That the parties got married on the twenty-fourth (24) of August of the year two thousand and six (2006) and this in accordance with the marriage certificate hereto attached and marked as 'Doc A';*
>
> *That consequent to this marriage, they had a daughter named GM born on the X and this in accordance with the birth certificate hereto attached and marked as 'Doc B';*

That the parties separated by means of a separation agreement published by Notary Dr. Henry Vassallo dated the tenth (10) of April of the year two thousand and eighteen (2018) hereto attached and marked as 'Doc C';

That according to the separation agreement, the minor chose to reside with her father;

That in August of the year two thousand and twenty (2020) the atmosphere inside the residence where the minor GM was residing changed drastically and in fact, she chose to go and live with her mother;

That from August of the year two thousand and twenty (2020), the minor did not receive any financial assistance (maintenance) from her father anymore and this, till this very day; the child solely depends on her mother's limited salary;

That the Plaintiff initiated a fresh mediation procedure, through which mediation the parties did not reach an agreement with respect to the father's duty to pass on a proper maintenance amount together with health and education expenses to the minor;

That by virtue of a court decree (hereto attached and marked as 'Doc D'), the Parties were authorised by the court to proceed with this cause;

That by means of a reply in the acts of the divorce bearing application number 118/20 tabled in front of Hon. Judge Jacqueline Padovani Grima (hereto attached and marked as 'Doc E'), the Plaintiff strictly followed payments relative to the divorce proceedings

Therefore, in view of the foregoing, the Plaintiff request the Honourable Court to:

1) Order the Defendant to transfer the amount of five hundred euro (€500) per month in favour of the minor, GM ;

2) Order the payment of the maintenance from August 2020 since the minor moved to reside with her mother at the rate of one hundred and fifty euro (€150) a month, in accordance with the separation contract as mentioned above;

3) Authorise adequate access for the father as agreed between the minor and the father.

4) Order the payment of half the educational and health expenses in favour of the minor.

With costs.

Having seen that the sworn application and this Court's decree, been duly notified according to law;

Having seen SM 's reply dated 25th of October 2021 at page 50, wherein it was stated:

1. *Whereas on a preliminary basis these proceedings are contrary to procedure and unsustainable. Plaintiff cannot ask the Court to pronounce itself on the first, second and third request as these are already regulated by a deed of personal separation entered into between the parties, dated the 10th of April 2018. Moreover it was imperative for the Plaintiff to make a sui generis request for this Court to revoke and cancel*

all contractual provisions in relation to the residence of the minor child, maintenance and access rights. Without such request the Court cannot uphold the first, second and third requests and the parties would finish off in a situation of legal and factual confusion, with two different versions regulating the same rights and obligations. In her requests, the Plaintiff never mentions or requests changes/amendments to the contract of the 10th of April 2018 and therefore, "Din il-Qorti trid toqghod fuq il-kawzali u t-talbiet li ndirizza l-attur stess fir-rikors guramentat. L-ghazla ta' kif jimposta l-kawza kienet tal-attur. Ghalhekk mhuwiex lecitu ghal din il-Qorti li tistharreg 'l hinn mill-kawzali li ghazel l-attur[1]".

2. *Whereas without prejudice to the above the Court is to abstain from taking cognizance of the fourth request since it is already regulated by means of the above mentioned separation deed.*

3. *Whereas it is false to state that the minor child was asked to leave the Defendant's residence. GM freely chose to move in with her mother purely to be free to live her life as she wanted to. It therefore came as no surprise when she failed all her A levels since she moved to the Plaintiff's residence; whereas she had passed all her O levels whilst residing with her father, the Defendant. Moreover she smokes and drinks even in her mother's house – something which was never tolerated when she lived under her father's roof.*

4. *Whereas Plaintiff has to prove that the legal requisites which warrant payment of maintenance for the parties' minor subsist.*

5. *Whereas without prejudice to the above, prior to the institution of mediation proceedings, Defendant always*

[1] *Adrian Theuma vs RLR Limited*, Rik Nru: 471/12JZM, deciza 8 ta' Jannar, 2013

offered to pay maintenance however, Plaintiff insisted that he should be paying not less than €550 per month, besides expenses related to the daughter's education, health and extra curricular activities.

6. *Whereas without prejudice to the above, the amount requested by way of maintenance is exorbitant. In terms of law and local jurisprudence it is widely accepted that each party is expected to contribute according to his/her means. Before the minor chose to move to her mother's residence, the said Plaintiff was paying the sum of €150 per month. The moment the minor started to reside with Plaintiff these expenses somehow blew out of proportion. The parties have the same spending power, as shall be confirmed throughout the course of these proceedings.*

7. *Whereas without prejudice to the above if this Court were to uphold the request for the payment of arrears in maintenance, this is to be fixed at the rate of €150 per month, namely, the same rate which the Plaintiff herself used to pay before the minor child moved in with her.*

8. *Whereas moreover, the applicant is also expecting the respondent to pay half of the expenses which he is not bound to pay at law, including but not limited to interior embellishments to the applicant's residence.*

9. *Whereas the fifth request simply cannot be upheld. This Court cannot assume the role of the Court of Appeal. Divorce proceedings were terminated in virtue of a judgment dated the 6th of October 2020, whereby the Court decided that no official bill of costs was to be issued. Had the Plaintiff wished to contest this part of the decision she had all the right to do so and appeal requesting the judgment to be reformed*

accordingly. Given that she chose not to appeal, applicant cannot now try and take advantage of separate proceedings to claim the costs related to a different lawsuit.

10. *Costs and fees in relation to these proceedings are to be borne by applicant.*

Saving further pleas.

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Having heard the testimony on oath;

Having examined all acts of the case;

Having heard oral submissions on the preliminary plea during the sitting held on 10th October 2024;

Considers:

This Court has before it a cause by which Plaintiff is requesting that the parties' responsibilities towards their minor child as stipulated in the contract of personal separation are superseded by a Court decision in view of the fact that the minor child left the residence of the Defendant and had been residing with the Plaintiff when the cause was filed. Nowadays the minor child is residing oversees in view of her studies. The Defendant has objected to the demands and has raised a preliminary plea to the effect that no request for the revocation of the contract was put forward and thus, should this Court uphold the Plaintiff's requests, it would lead to a situation where there are two conflicting maintenance obligations.

This Court has examined thoroughly the applicable law and case law relating to the variation of contracts, including the following:

In relation to the legal doctrine known as *pacta sunt servanda*, and the fact that the requests filed by Plaintiff relate to the variation of the clauses in the separation contract

of the parties, legal doctrine has made it clear that the point of departure is always that whatever is agreed to between the parties is tantamount to law between them. This legal principle of *pacta sunt servanda* is enshrined in Maltese law in Article 992 of Cap. 16 of the Laws of Malta which states:

> ***992. (1) Contracts legally entered into shall have the force of law for the contracting parties.***
> ***(2) They may only be revoked by mutual consent of the parties, or on grounds allowed by law.***

This is considered as a cardinal principle regulating the institution of contracts under Maltese law and thus the will of the parties to enter into binding contracts is to be respected[2]. At the same time, it has to be noted that whatever is agreed to in a contract cannot be impugned simply by the unilateral will of one of the parties. In fact Maltese law requires that a contract be varied only with the consent of both parties or for reasons stipulated at law. The Court makes reference to the judgment in the names **John Debono vs Carmela Debono illum Xerri,** decided by the **Court of Appeal** of the 24th April 2015 where it was held as follows:

> ***"Huwa certament minnu li mill-punto di vista etiku u anke legali li l-kuntratti ghandhom jigu esegwiti in bona fede u jobligaw mhux biss ghal dak li jinghad fihom izda ukoll ghall konsegwenzi kollha li ggib maghha l-obligazzoni skont ixxorta taghha bl-ekwita', bl-uzu jew bil-ligi kif qalet is-sentenza ta' din il-Qorti fil-kawza Cefalu et vs Gauci nomine LXXX.IV.1359). F' dan il-kaz ma tidhol ebda kwistjoni ta' xi malafede u il-gurisprudenza nostrali hi kostanti filli irriteniet illi mhix ammissibbli li prova testimonjali kontra jew in aggunta ghall kontenut ta' att miktub u hi talvolta ammessa biex tikkjarifika l-intenzjoni tal-partijiet meta din hija espressa b' mod ambigwu. (Beacom vs Spiteri Staines – Appell Civili - 5 ta' Ottubru 1998) – Fil-kaz in kwistjoni ma hemm ebda ambigwita fil-kuntratt u l-attur qed jinvoka tibdil fic-cirkostanzi tal-partijiet. "Fis-sentenza ta' l-Prim Awla fl-ismijiet General Cleaners Limited vs***

[2] Grace Spiteri vs. Carmel sive Lino Camilleri et, deċiza mill-Prim' Awla tal-Qorti Ċivili nhar it-30 ta' Mejju 2002.

> ***Accountant General et (29 ta' Novembru 2001) intqal li bhala principju generali l-ligi u senjatament l-artiklu 1002 tal-Kodici Civili jghid li 'meta l-kliem ta' konvenzjoni, mehud fis-sens li ghandhu skont l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghal ebda interpretazzjoni. Il-principju kardinali li jirregola l-istitut tal-kuntratti jibqa dejjem dak li l-vinkolu kontrattwali ghandhu jigi rispettat u li hi l-volonta' tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata – pacta sunt servanda".***[3]

However when the Court is seized of matters relating to minors, it is irrelevant whether the particular Agreement regulated solely the aspects regarding the minors or whether such aspects were contained in a separation agreement. Jurisprudence dictates that in matters relating to minors, the Court has the authority to vary the Agreement of the parties as long as this is according to the supreme interests of the minor children. In the judgment **Walter Borg St John vs. Christine Borg St John** decided on 31st May 2002 by the First Hall Civil Court, it was held that :

> **"*Fl-obbligazzjonijiet purament personali bhal ma hija l-kwistjoni tal-kura u kustodja tal-minuri ma hemmx dubbju illi, anke fl-interess suprem tal-***

[3] "It is certainly true that from both the ethical and the legal point of view, contracts have to be followed in good faith and are binding not only in relation to what is stated in them but also in relation to all the consequences that the obligation in them brings about depending on its nature in its equity, use and legal aspect as was stated in the judgment delivered by this Court in the cause **Cefalu et vs Gauci nomine LXXX.IV.1359**). In this case there was no question of bad faith and local jurisprudence in consistent that testimonial evidence is not admissible against or in addition to the contents of a written deed and is only admissible to clarify on the intention of the parties when this is expressed in an ambiguous manner (**Beacom vs Spiteri Staines – Civil Appeal – 5th October 1998**). In the present case there is no ambiguity in the contract and the Plaintiff is invoking change in the circumstances of the parties,. "In the judgment of the First Hall in the names **General Cleaners Limited vs Accountant General et 29th November 2001** it was stated that as a general principle at law and specifically article 1002 of the Civil Code it is stated that when the '*words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear, there shall be no room for interpretation.'* The cardinal principle that regulates the institute of contracts remains always that the binding element has to be respected and that it is the will of the contracting parties as expressed in the agreement that prevails and has to be observed – ***pacta sunt servanda***.

minuri, il-Qorti tista' fi kwalunkwe hin tbiddel anke dak pattwit mill-partijiet fejn ic-cirkostanzi hekk jirrikjedu"[4].

In addition to this, in the more recent judgment of ***Joseph Caruana vs Claudette Camilleri,*** decided by this Court on the 27th May 2021 (Ref 23/2015AL) this principle was amplified and the Court stated that:

"dawk il-kwistjonijiet naxxenti miz-zwieġ izda li jolqtu ulied il-mizzewġin, u ċjoe' l-kura, kustodja, l-aċċess u l-manteniment, appena dawn jiġu deċizi mill-mizzewġin fil-kuntratt tal-firda personali tagħhom, <u>dawn ma jistgħux jitqiesu bħala kwistjonijiet definittivi,</u> għaliex jista' jkun hemm tibdil fiċ-ċirkostanzi li ma jkunx qiegħed jagħmel ġid lill-interessi tal-ulied, u b'hekk ikun meħtieġ li l-klawsoli tal-kuntratt tas-separazzjoni jerġgħu jiġu riveduti abbazi tal-bdil taċ-ċirkostanzi in kwistjoni. Il-Qorti ma tarax xieraq u f'loku illi sabiex tiġi applikata rigorozament il-prinċipju tal-pacta sunt servanda, għandha taljena lilha nnifisha mill-interessi supremi tal-ulied. Dan zgur ma huwiex l-obbligu ta' din il-Qorti, u lanqas ma huwa fl-interess tagħha li tara li l-ulied ikunu l-vittmi tal-ġenituri tagħhom stess. Fl-aħħar mill-aħħar huwa proprju għalhekk li ai termini tal-Artikolu 149 tal-Kodiċi Ċivili l-leġizlatur pprovda lil Qorti tal-Familja bid-diskrezzjoni assoluta li tiddeċiedi skont kif jidrilha xieraq fiċ-ċirkostanzi meta si tratta l-ulied, għaliex minħabba ir-reziljenza ta' bejn ġenituri li ma baqgħux flimkien bħala koppja, mizzewġa o meno, jista' jagħti l-kaz li l-interessi tal-minuri jiġu skartati minħabba l-ego".[5]

[4] "Purely in personal obligations as is the matter relating to the care and custody of minors there is no doubt that, even in the supreme interest of the minors, the Court can at any time change what was agreed to by the parties where the circumstances so require."

[5] "those matters arising from marrige but that affect the children of the spouses and thus the care and custody, access and maintenance, once these are decided by the spouses in their contract of personal separation, they still cannot be considered as definite because there could be change in the circumstances which would not be contributing well to the interest of the children and thus it would be necessary that the clauses in the contract of separation are revised based on those change in circumstances. This Court does not deem it proper and just that to apply rigourously the principle of pacta sunt servanda, it moves away from the supreme interests of the children. This is for sure not the duty of this Court, and neither is it in its interest to see the children as victims of their own

Moreover, this Court makes reference to the judgment in the names **Cedric Caruana vs Nicolette Mifsud** decided by the **Court of Appeal** on 4th March 2014 wherein it was stated that where minors are involved, Article 149 of Cap. 16 of the Laws of Malta may be applied in an absolute manner which article of the law grants this Court the authority to give any order in the supreme interests of the minors involved. That Court stated:

> ***"Fil-fehma tal-Qorti l-Artikolu 149 tal-Kap 16 jagħmilha ċara illi fejn jikkonċerna l-interess suprem tal-minuri idejn il-Qorti m'hiex imxekkla b'regoli stretti ta' proċedura. Hija għalhekk tal-ferma konvizzjoni illi fejn jidħlu d-drittijiet u l-interess suprem ta' minuri, il-Qrati tagħna għandhom diskrezzjoni wiesgħa ħafna u ma humiex imxekkla minn regoli ta' proċedura rigoruża. Addirittura l-Qorti tal-Familja għandha s-setgħa li tieħu kull provvediment fl-aħjar interess tal-minuri anke jekk ħadd mill-partijiet ma jkun għamel talba fir-rigward (ara A sive BC vs D sive EC deċiża minn din il-Qorti fit-30 ta' Ġunju 2015). (Ara wkoll A Micallef vs Lesya Micallef deciza mill-Qorti tal-Appell fl-14 ta' Dicembru 2018)"***[6]

parents. At the end of the day it is for this reason that in terms of article 149 of Cap. 16 of the Civil Code the legislator provided the Family Court with the absolute discretion to decide as it deems necessary in the circumstances when it comes to the children, because owing to the resilience between the parents that did not stay together as a couple, married or not, it could be that the interests of the children is put aside replaced by their ego."

[6] "In the opinion of this Court, Article 149 of Cap. 16 makes it clear that where the supreme interest of the minors is concerned, the hands of this Court should not be hindered by strict procedural rules. It stands in firm conviction that where the rights and supreme interests of minors are concerned, our Courts have a very wide discretion and are not hindered by rigourous procedural rules. So much so that the Family Court has the authority to give any order in the best interest of the minors even netiher of the parties would have made a plea in such regard (see A sive BC vs D sive EC decided by this Court on 30th June 2015. See as well A Micallef vs Lesya Micallef decided by the Court of Appeal on the 14th of December 2018)."

Considers:

This Court notes that the preliminary plea raised by the Defendant is to the effect that the first three requests filed by Plaintiff could not have been put forward since these had been agreed upon by the parties as per their separation contract.

This Court embraces the pronouncements made in the judgments above cited and therefore rejects this part of Defendant's plea, as Plaintiff's requests relate to aspects relative to the daughter of the parties. The preliminary plea also stated in the second part that it was imperative for the Plaintiff to make a specific request to this Court to revoke and cancel all contractual provisions in the contract before making judgment on the merits of this cause. Defendant argued that having the contractual obligations still in place with a possible judgment of this Court providing otherwise, will lead to a "situation of legal and factual confusion"[7].

This Court does not agree with this line of reasoning. Whilst it would have been more procedurally correct and accurate for Plaintiff to have requested the revocation of the clauses in the separation agreement binding between the parties, this Court deems that any order given by this Court that varies one of the parties' contractual obligations in relation to their daughter, will automatically supersede the obligation in the contract. Thus as from date of judgment, only the order of this Court will be legally binding thereby avoiding any legal confusion that the Defendant makes reference to.

The parties reached the agreement signed and published between them on 10th April 2018 (fol. 12) with the understanding that their daughter was to reside with the father with the mother paying maintenance. When in 2020, the daughter decided to reside with the Plaintiff mother, for whatever reason, this brought with it, the need for the contract to be revised and amended for the obligations to be varied. The parties were not capable of reaching an agreement on the quantum of the maintenance that the father had to pay following the child's change of residence and it is for such reason that the Plaintiff had to proceed with this cause.

[7] Vide sworn reply filed at fol. 50

For the above reasons, this Court, rejects the preliminary plea raised by the Defendant and orders the continuation of the proceedings such that the Plaintiff is to proceed with the production of her testimony during the next sitting.

Expenses related to this judgment in parte to be borne by the Defendant.

Read

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

Nicole Caruana
Deputy Registrar