MALTA

QORTI TA' L-APPELL

S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO

ONOR. IMHALLEF
ALBERT J. MAGRI

ONOR. IMHALLEF
TONIO MALLIA

Seduta tad-29 ta' Frar, 2008

Appell Civili Numru. 375/2004/1

Andreas Wilhelm Gerdes

v.

Bettina Vossberg

The Court:
Having seen the writ of summons which, after having been translated into the English language, reads as follows:
"Whereas the parties are married but separated by public deed of separation dated twenty second (22) August two

thousand and two (2002) in the notarial acts of Notary Vanessa Pool;

"And whereas the parties had two children from their marriage and that is Maximilian who was born on the 26th October nineteen ninety five (1995) and Alexander who was born on the sixth (6) January of the year two thousand (2000);

"And whereas after the said consensual separation the minors remained in the joint care and custody of the parties;

"And whereas by public deed of the twenty second 22nd August two thousand and two (2002) the plaintiff was obliged to pay the defendant a monthly maintenance of six hundred Maltese pounds (Lm600) for every minor that was born, subject to an increase as stipulated in the said contract;

"And whereas, by the same public deed, every amount distributed by Perikles Trust to the defendant or to some party or entity nominated by it is to be considered as a payment on account of the obligation undertaken by plaintiff to pay maintenance as already premised above;

"And whereas the defendant had received the substantial amount of three hundred and ninety thousand American dollars (US$ 390,000) from Perikles Trust as premised;

"And whereas the defendant also received directly from the plaintiff another substantial sum by way of monthly payments of additional maintenance;

"And whereas the maintenance was paid in terms of Article 2 (d) of the same public deed and that is “in the interests of the children” and “as a contribution towards the daily maintenance requirements and towards the minor children's clothing, health, education costs and travel expenses’;

"And whereas the defendant when requested to render an account as to how the substantial amounts she received on behalf of the minors, children of the parties, were spent, failed to comply;

"And whereas it results to the plaintiff that the defendant appropriated herself of the funds she received on behalf of her children and applied them for her own benefit;

"And whereas it is manifestly not in the interest of the minor that the defendant remains entrusted with the joint custody of the minor;

"And whereas it is required that the care and custody of the minor remains solely in the hands of the plaintiff or else if it results as more opportune, that this Honourable Court appoints a person to represent the interests of the minor with the plaintiff;

"And whereas it is required that the amount of funds which were received by the defendant be liquidated and which were however not applied in favour of the minor and that the same funds be returned back to the person that can take care of the material interests of the minors, and that is the plaintiff himself, on his own account or together with the above-mentioned person nominated by this Honorable Court;

"And whereas the mediation in terms of law on the matter has failed and therefore the plaintiff was authorized to proceed by these proceedings by means of a decree number 864/04 of this Honourable Court;

"The defendant is to state why this Honorable Court should not for the above-mentioned reasons and subject to any other declaration it deems necessary to make;

"1. Order the defendant to render a complete and detailed account of all the maintenance that she received in the name of the minor children of the parties, including any maintenance that was paid beforehand, and as to how this maintenance was utilized;

"2. Declare that the defendant misapplied and converted in her own interests the funds or part of them paid to her on behalf of the minor by the plaintiff;

"3. Revoke the joint care and custody of the minor by the defendant;

"4. Consolidate the care and custody of the minor in the person of the plaintiff, or failing this to appoint a person or tutor to represent and take care of the material interests of the minor, alone or together with the plaintiff;

"5. Liquidate the maintenance paid by the plaintiff, directly or by means of Perikles Trust to the defendant and which was not used in the interest of the minor;

"6. Condemn the defendant to pay the plaintiff or the tutor that may be appointed according to the fourth demand, in the name of the minor, the sum thereby liquidated so that this can be applied in the interests of the minor under the terms and conditions that this Honourable Court may deem opportune to impose.

"With the reservation of any action at law, and expenses and interest, against the defendant that is hereby being summoned for her subpoena."

Having seen the note of pleas by virtue of which the defendant pleaded that:
"1. That this case was instituted subsequently to the precautionary garneshee order no 1463/04 in the same names (Dok. BV1 copy here annexed). The merits of this case is therefore the sum of LM 134,000 which was seized by this garnishee order. Therefore the Registry fee payment for this case owed to the Government of Malta should be based on the merits of LM134,000. This tax was not applied and preliminarily should be applied and paid so that the case can still be heard.

"2. The six (6) demands can be abbreviated logically and consequently in three issues (1-2 / 5-6; and 3-4).

"A If the payment of LM134,000 (US$390,000) made in 2000 to C Trust is to be considered as a payment on account of the maintenance owed by Gerdes to Vossberg according to the contract of separation of 22.8.2002. Consequently if in the negative Gerdes therefore has to pay maintenance to Vossberg – and the demand for a refund is to be refused.

"B If Vossberg is to render an account as to how she spent the maintenance that she received from Gerdes (after the amount of such maintenance is defined) for the needs of the children; and if used such maintenance is not in the interests of the children, this sum so liquidated is refunded.

"C. If the care and custody of the two common children Maximilian and Alexander should be given (a)(i) to Gerdes alone (ii) with the assistance of the tutor; (b)to Vossberg (i) alone; or (ii) with the assistance of the tutor; (c) to the tutor, an independent; third party;

"That the demands of Gerdes should be rejected because they are unfounded at law and in fact.

"3. The defendant denies categorically that the payment of LM 134,000 (USD390000) was paid by Perikles Trust to her on account of the obligation of Gerdes to pay the maintenance to her and her children according to the public deed of separation dated 22nd August 2002. In fact Vossberg in this case is presenting a counterclaim where she is requesting the condemnation of Gerdes for the payment of maintenance due from August 2004 to the present day in addition to a guarantee of future payment of maintenance.

"4. That she has no objection to the indication of how the maintenance paid – (and that is what has truly been paid i.e. from September 2002 to July 2004) for the children was used for the needs of the children, and this from the date of the consensual separation between them

to 22nd August 2002 till the present day, if the Court so orders her to do.

"5 That plaintiff's request to be awarded the care and custody of the children – by himself or with the tutor – should be rejected because the plaintiff is not the efficient person to be awarded the care and custody of the children. In this regard the defendant is presenting a counterclaim in this same case so that the care and custody of the children be awarded to her.

"Vossberg thus respectfully submits that plaintiff's demands should be rejected. With expenses."

Having seen the counter claim filed by defendant which reads as follows:
"A. Whereas according to the contract of separation Andreas Gerdes was obliged to pay maintenance to his wife Vossberg personally, as well as to his two common minor children – Maximilian and Alexander;

"Whereas that in fact for many months Gerdes did not honour his obligation to pay maintenance according to the contract; and as such a failure is a contractual violation of his obligations as such a situation entitles the plaintiff Vossberg to protect her interests;

"Whereas he has failed to pay this maintenance from 1st August 2004;

"Whereas Vossberg has a justified interest to request Gerdes not only to be condemned to pay the maintenance that is already due, but also to protect herself and her children, and to see that this future obligation of Gerdes is fulfilled and this also because the only effective means that she has to protect herself and her children for the future period stipulated in the contract – is to prohibit Gerdes from selling his house “Villa Margherita” Tas-Silg Road M`Xlokk, or from the sale of such house part of the proceeds goes so that the obligation of Gerdes is fulfilled *vis-a vis* Vossberg; and because Gerdes many a time

stated that he was going to leave and live with his girlfriend in America and furthermore could have already bought property there ;

"And as Gerdes was obliged – according to the same separation contract – to pay a pension to Vossberg – and he also failed to do so.

"Whereas these amounts are indicated in the annexed prospect Dok. MBV2.

"B. Whereas according to the contract of separation between the parties dated 22nd August 2002 it was agreed that the care and custody of the children should be " ……. under the joint custody and authority of both their parents" para. 2 – and as there stipulated.

"Whereas between the parties there is quite a good deal of divergence which indicates the total breakdown of their relationship between them – that they cannot decide on the welfare of the children.

"Whereas Gerdes is not the efficient person to be in 'joint custody' with Vossberg in the care and custody of the children because of various failures on his part as a result of contractual violations of his separation signed by him, as well as a failure of a moral ethical and emotional sense to take care of the children – as indicated in the declaration annexed to the writ of summons and as indicated in the affidavit of the same Bettina Vossberg and as will be proved further on during treatment of the case.

"Whereas these breakdowns are the responsibility of Gerdes;

"Whereas Gerdes is not the efficient person to be awarded the care and custody of the children but Vossberg is competent – as will be also proved during the proceedings.

"Requests that defendant Gerdes is to state why this Court:

"1. Should not declare that he has not paid the pension due to Vossberg as stipulated in the separation contract; and

"2. Should not declare that he has not paid the maintenance – for Vossberg as well as for the common children Maximilian and Alexander as obliged to do contractually from the 1st August 2004 till the present day.

"3. Should not liquidate the afore-mentioned amounts.

"4. Should not be condemned to pay the sums thus liquidated.

"5. Should not be ordered to provide a guarantee to Vossberg so that the obligations of maintenance and the payment of the pension as stipulated for the future in the same contract and as here premised should be eventually paid from the dates when due so that Gerdes honours his financial obligations with regard to Vossberg personally and in the name of the common children.

"6. Should not fix the amount of the guarantee.

"7. For the afore-mentioned premised should not order that the care and custody of the common children Maximilian and Alexander be awarded to Bettina Vossberg exclusively; with a right of access to Gerdes as already decreed by the Court.

"With the expenses and legal interests from the date of payment due, to the date of effective payment and those of the precautionary warrant of prohibitory injunction against the defendant who is from now summoned for his subpoena."

Having seen plaintiff's reply to the counter claim by virtue of which he pleaded that:
"1. Preliminarily the irrituality and consequent nullity of the demands of the defendant as her pretensions had in any eventuality to be deduced in the first place by means

of the procedure established in article 9 of Legal Notice 397 of 2003 which procedure is mandatory and not facultative;

"2. That preliminarily also and without prejudice to the above-premised the counterclaim of the defendant is null inasmuch as this Honourable Court did not authorize such a counterclaim in terms of Article 10 of Legal Notice 397 of 2003;

"3. That subordinately and without prejudice to the above-premised the first counterclaim is unfounded at fact and in law as on the contrary to what has been alleged by the defendant, the plaintiff paid what could have been owed by him by way of pension (vide Dok. X1);

"4. That without prejudice to the above-premised the second (2) third (3) and fourth (4) counterclaim are unfounded in fact and in law as

"a) in the first place, as premised in the instituted writ of summons and as will result during the treatment of the case the plaintiff paid as pre-payment of maintenance and additional payment of a sum that is much bigger than the amount that until today could have become due; and

"b) in the second place the plaintiff regularly deposited under the authority of the Court every amount pretended by the defendant (even if she had no right to it) so that this Honourable Court could decide who could have the right to withdraw such a deposit.

"5. That, without prejudice to the above-mentioned, the fifth and sixth counterclaims are unfounded in fact and at law as the separation contract does not provide for such a guarantee as pretended and so such a guarantee is not due on the grounds of pacta sunt servanda;

"6. That without prejudice to the above-mentioned, the fifth (5) and sixth (6) counterclaims are unfounded in fact and in law as there is nothing to justify the pretended guarantee, but on the other hand and it also results from

the voluntary deposit under the authority of the Court maintenance that is not due, that the plaintiff always sought the superior directions of this Honourable Court in every case where a conflict resulted;

"7. That without prejudice to the above-mentioned, the seventh (7) counterclaim is also unfounded in fact and in law as this can be motivated only by a vindictive purpose of the defendant who herself well knows how dedicated the plaintiff is towards his children."

Having seen the preliminary judgement delivered by the Civil Court - Family Section, on the 13th Day of July 2007, by virtue of which the said Court decided as follows:
"On the strength of the above the Court decides the action by, confirming that the defendant has received in maintenance a total of twenty five thousand, five hundred and sixty Maltese Liri [Lm25,560] till the 1st August 2004; and rejecting all plaintiff's other requests; the defendant is to bear one fourth [1/4] of the costs relating to request numbers (1) (2) (5) (6), whilst the rest is to be borne by plaintiff.

"The Court decides on the counter claim, by, rejecting plaintiff's pleas, and:

"[1] declares plaintiff to be non suited in respect of the first request;

"[2] accedes to the second request, declaring that plaintiff has not paid maintenance for defendant and their children from the 1st August 2004, in violation of the separation deed afore-mentioned;

"[3] in respect of the third and fourth request, the Court reserves judgement for a later stage; and appoints Doctor Ian Crockford to liquidate the amounts due to defendant in this respect at plaintiff's expense;

"[4] acceding to the fifth and sixth requests, limitedly in regard to the maintenance due; and appoints, at plaintiff's expense, the afore-mentioned Accountant to make the

necessary observations and calculations, as explained above, so that the Court will be in a position to quantify the amount of the guarantee to be given by plaintiff in this respect;

"[5] accedes to the defendant's seventh request, and, whilst revoking joint custody, grants to defendant sole and exclusive care custody of the two minor children Maximilian and Alexander; with rights of access for the father as agreed by the parties in the separation deed.

"The right of care and custody includes the right of defendant to travel abroad with the children, provided that at least one week prior to going abroad, a note is presented in the registry of this Court containing details of the date of departure and the place of destination with all the necessary information enabling the plaintiff to know the exact whereabouts of the children and their place of residence; in which case the plaintiff's access rights may have to be modified to suit the new situation, primarily in the interests of the children.

"The costs of the counter claim are being reserved for final judgement."

The said Court reached its decision after having made the following considerations:
"That in virtue of this action plaintiff is requesting this Court to order defendant to present a full and detailed account of all maintenance paid by plaintiff to defendant, in respect of the parties' common children, and consequently, to declare that defendant has misapplied these funds, or part thereof, in her own interests; to revoke the joint custody of the parties, order that care and custody of the children be granted solely to the plaintiff or to a tutor; to liquidate the amount of maintence paid by Perikles Trust to defendant, by way of maintenance for the children, and which have been misapplied, and to order the defendant to repay the amount liquidated.

"On her part defendant, is opposing plaintiff's claim basically on the grounds that [1] the payments made by

Perikles Trust to Bettina Trust were not maintenance payments; and [2] that it is not in the interests of the children that care and custody be granted to plaintiff.

"In her counter claim defendant is requesting this Court to order plaintiff to pay her the pension and maintenance due to her under the separation deed published on the 22nd August 2002, as well as the maintenance due in respect of the children as stipulated in the same deed; and that plaintiff be made to guarantee the payment of future maintenance payments. Moreover, defendant is requesting that she be granted sole custody of their children, with access rights in favour of plaintiff.

"On his part plaintiff is opposing defendant's counter claim on procedural issues, and on the grounds that maintenance for the children has been prepaid prior to the separation deed; that *pacta sunt servanda*, and the deed makes no mention of a guarantee on his part for future maintenance payments, and this apart from the fact that such guarantee is not warranted by circumstances since he has voluntarily deposited contested payments in the registry of the Court; that defendant's request for sole custody is not warranted, and is inspired by a spirit of vindictiveness on the part of defendant.

"The Facts

"The parties, both German nationals, got married on the 4th October 1996; and they have two children, Maximilian and Alexander, born on the 26th October 1995 and on the 6th January 2000, respectively. The parties have been living in Malta ever since, in their matrimonial home in Marsascala Tas-Silg.

"On the 22nd of August 2002 they signed a deed of personal separation in the records of Notary Doctor Vanessa Pool, agreeing on joint custody and access rights, separate maintenance payment programmes for the children and defendant, as well as savings in a bank deposit for the children. The parties agreed that maintenance payments were to be made to defendant

who was to continue having the effective care and custody of the children.

"After the publication of the above deed, plaintiff paid maintenance for the children for the months of August and September 2002, after which he ceased to make further payments; as a result, defendant had to resort to the Magistrates Court, in its criminal jurisdiction, to make plaintiff honour his obligations in this regard according to the deed of separation. After August 2004 no further payments were made, and in October 2005 he left the country after having filed a garnishee order in the hands of companies [trusts] which represented defendant's source of income, as well as the present writ of summons.

"Since then plaintiff has made no appearance in these proceedings, and he has left not mandatory to represent him in these same proceedings instituted by him. He has also failed to honour his obligation to pay maintenance for defendant, to deposit money in the children's savings account, according to the above deed.

"Following various criminal proceedings instituted by defendant in the Magistrates Court to compel plaintiff to comply with his obligation to pay maintenance for the children, and faced with court judgements ordering him to do so, plaintiff filed a garnishee order on the 11th August 2004 against defendant for the sum of LM134,000 and subsequently filed the suit in question.

"Basically, plaintiff' s contention on the maintenance issue, is limited to maintenance payable to defendant, in respect of the children, basing his argument on the fact alleged by him that defendant has misapplied funds paid to her by way of maintenance which funds are primarily made up of US$390,000 which Perikles Trust [of which the parties are the sole beneficiaries though in unequal shares] has made to Bettina Trust [of which defendant is the sole beneficiary].

"From the evidence it results that Perikles Trust has made two payments, one of US$150,000 on the 29th September

2000, and the other of US$240,000 on the 25th October 2000.

"According to plaintiff's version of the facts, these payments were made "as prepayment for the boys' future maintenance to buy a house for herself and the boys. The objective was that she could finish her house, and move over and begin her new life."[1] On the other hand, defendant, though not contesting the receipt of the afore-mentioned sum, in two payments one of US$150,000 and the other of US$240,000, is contesting plaintiff' s claim that these payments have been made on account of maintenance due by him; and is instead holding that the first payment represents her share from the sale of some of the shares of IWG made by Perikles Trust, whilst the second payment represent five years remuneration for services rendered by her in plaintiff's companies, including the sum loaned by her for the purchase of the matrimonial home.[2]

"In short, whilst defendant is claiming maintenance payments under the above deed, plaintiff's contention is that this has been prepaid in virtue of the above payments. This necessarily revolves round the wording of the relevant clause in the separation deed which was signed nearly two years after the above payments have been effected.

"According to the above deed, and more specifically, under clause 2[d] plaintiff undertook to pay defendant by way of maintenance "in the interests of the children" a monthly contribution of Lm600 per child "with effect from today" with a 5% inflationary increase on January of every second calendar year, which obligation is to be reduced to 50% if defendant is gainfully employed with an annual gross income exceeding Lm24,000. On these points there is no contestation, and the issue revolves round paragraph [v] of the afore mentioned clause, which reads as follows:

[1] Aff. plaintiff fol.146
[2] Dep.974 - 976

"“[v] any amounts distributed to the wife, or to any party or entity nominated by her, from the Perikles Trust shall be treated as being payments on account of the liability of the husband for maintenance as detailed in this clause [d]”.[3]

"Plaintiff is arguing that this clause refers to the payments made by Perikles Trust to Bettina Trust in 2000, amounting to US$340,000, and that therefore this amount is to be considered as prepaid maintenance “for the children”. On the other hand, defendant contends that this contractual clause refers to future payments distributed by Perikles Trust, since the contract refers to the future, indicated by the term “shall” and so any reference to past payments should result in a clear an unequivocal manner.

"Both parties, through their respective lawyers have presented detailed note of submissions, carefully worded and expertly drawn up.

"Plaintiff’s submissions

"[1] Plaintiff’s argument is based on article 1002 of the Maltese Civil Code which states that were the wording of the deed is clear there is no room for interpretation. He quotes case law in support of this legal basis, citing in particular the case “Carmelo Grech vs Julian Zammit Tabona et noe” wherein the Honourable Court of Appeal had observed that “fejn is-sinifikat tal-konvenzjoni ikun car, u fejn il-fatti sussegwenti ma jpoggux fid-dubju l-volonta’ tal-kontraenti ma kienx lecitu ghall-gudikant li jaghti lil dik l-iskrittura sinifikat divers minn dak liberament espressa mill-kontraenti.”

"[2] On the merits, plaintiff’s argument is to the effect that the phrase “any amounts distributed” as contained in the above clause is grammatically written in the past tense, and therefore necessarily refers to the past payments made prior to the deed of separation by Perikles Trust in

[3] Fol.140

favour of defendant or entity indicated by her for this purpose. Had the parties intended differently, that is, that the above clause was to refer to future payments made by Perikles Trust, the wording would have been 'any amounts to be distributed' whilst the clause as it stands, examined in ordinary day language, is clearly worded in the past tense.

"[3] Moreover, the fact that only Perikles Trust, from the various trusts held by plaintiff, is mentioned in the clause is supportive of the fact that this refers to the two payments made by the said Trust prior to the agreement. Plaintiff poses the question: why would he limit payments made on account of maintenance to payments made by Perikles Trust when he can also effect payment through other companies owned by him?

"[4] Plaintiff explains that the introduction of the clause in question has as its purpose that of including the substantial sums of money paid by him, through Perikles Trust, by way of maintenance for the children. He states that he had given that amount to defendant to buy a house for herself and her children, and he wanted this transaction to be registered in the deed. In his own words: " ... peress li kien jaf li din kienet somma sostanzjali, hu xtaq li jkopriha fil-kuntratt billi jinserixxi klawsola li tghid li hu ma jkollux l-obbligu li jhallas manteniment in vista tal-pagamenti li huwa wettaq."[4]

"[5] Furthermore, the fact that the above sum was in fact employed by defendant to buy a house, according to plaintiff's wishes, confirms this claim in this respect.

"[6] The evidence belies defendant's claim that part of the above amount represents remuneration for services rendered by her free of charge in IWorld Group, since there is evidence to the effect that she used to receive monthly payments on a regular basis. Moreover, defendant produced no evidence in support of this fact alleged by her.

[4] Fol.1287

"Defendant's submissions

"[1] Defendant submits that the clause in question is for plaintiff "at best ambiguous, at worst is clearly the opposite of what [he] is claiming". She argues that the essential verb "shall" used in this clause clearly refers to a future situation, and therefore logically, refers to payments to be made by Perikles Trust in the future; in default of clear and express reference made in the contract to the two payments made prior to the deed.

"[2] "The literal interpretation of a paragraph or a sentence on its own in a wider and more complex agreement is insufficient . The all overcomes the single, the more so since all the provisions in the separation deed [custody and financial] are described in detail and with the wording "shall be".

"[3] It is a fundamental principle governing the law of contracts that these must be entered into and executed in good faith. The fact that, though the issue is limited to the claim for the children's maintenance, plaintiff for no apparent reason has failed to honour his other financial obligations, manifests his bad faith in this regard. Defendant asks why plaintiff has stopped paying maintenance due for herself as of August 2004; why he stopped savings payments; and why the pension fund/life insurance was not established. The contestation at issue, does not concern these obligations, and still, plaintiff has failed to honour these contractual obligations to which he had agreed in the above deed.

"[4] The fact that the contract deals extensively and in detail with the payments to be made and the reductions thereof in case the defendant is gainfully employed, militates against plaintiff's arguments since "with all such detail how can it be argued that the parties agreed that no amount is in fact due and that all had been prepaid?"[5]

[5] Fol.1301 – underlined by Court

"Defendant argues that such “prepayment” of US$390,000 in effect removes potentially and practically all the amount of future maintenance payment for the child; thereby rendering “completely irrelevant and inapplicable” plaintiff’s obligation under this clause.

"[5] Considering that, after the above payments made in 2000, plaintiff has paid maintenance voluntarily since April 2002, and after the separation deed, for at least for one month; why would he have agreed to effect payment of such maintenance when he is claiming that he has prepaid maintenance? This consideration militates further against his prepayment theory.

"[6] Moreover, the clause [10] of the said deed shows that the parties had intended that the stipulations agreed in the separation deed were intended to be as watertight and effective as much as possible, even in the case of extreme eventualities such as divorce or annulment of the marriage.

"Considerations of the Court

"Maintenance

"[A] Basically, plaintiff’s claim in this respect, is that defendant has misapplied the sum of [i] US$390,000 paid by Perikles Trust by way of prepaid maintenance, as well as other [ii] substantial sums of money paid to defendant by way of “additional maintenance.”

"As stated above, the maintenance issue with reference to the payments made by Perikles Trust to Bettina Trust in September and October of the year 2000, revolves round the interpretation of clause 2[d][v] of the separation deed. The following considerations are relevant in this regard:

"[a] That, although according to article 1002 of the Civil Code, indicated by plaintiff, where the terms of the agreement are clear there shall be no room for interpretation, article 1003 states that: “Where the literal meaning differs from the common intention of the parties as clearly evidenced by the whole of the agreement,

preference shall be given to the intention of the parties." Also, article 1104 states that: "When a clause is susceptible of two meanings, it must be construed in the meaning in which it can have some effect rather than in that in which it can produce none."

"Also, local case-law, whilst asserting the legal maxim that *contra testimonium scriptum testimonium non scriptum non fertur*, has established that this rule suffers certain exceptions in the interests of justice and equity, basically in these cases where there is a manifest mistake or were the wording of the law renders the clause ambiguous.[6]

"Besides, in virtue of article 149 of the Civil Code, the above principle, as well as the principle *pacta sunt servanda* must give way if the interests of the children so dictate.

"[B] In the case at issue, the Court is of the opinion that there exists an ambiguity in paragraph [v], since though the words "any amounts distributed" seem to refer to the past, the paragraph in question essentially addresses a future situation, through the verb "shall". This is more so, when examined in the contest of the whole sub clause [d] which draws out a detailed programme maintenance to be paid by plaintiff for defendant and their children. Therefore, since this part of the contract is not clear, there is room for interpretation having regard to the intention of the parties at the time of agreement.

"[C] It is manifesting that paragraph [v] as part of sub clause [d] is to be interpreted in the light of the whole sub clause considered as a quid unum. In fact, paragraph [v] expressly refers to the whole sub clause by the terms "as detailed in this clause [d]".

"In the opinion of this Court the fact that a detailed maintenance programme has been drawn up in the paragraphs preceding paragraph [v] strongly militates

[6] Vide ***Appeal Carmelo Morana vs Nutar Dottor Joseph Spiteri et*** [1952][Vol.XXXVIB.I.] and the list of cases cited therein.

against plaintiff's claim that the above amount of US$390,000 represents prepaid maintenance; since, if this were so, it would mean that the monthly contributions of the children payable monthly in advance and, as expressly stated in the deed, "with effect from today" will in effect not be payable for more than 10 years from the deed. Plaintiff's argument is weakened further by the consideration that, as expressly stated in the deed, the monthly payments are to be considered "as a contribution towards the daily maintenance requirements and towards the minor children's clothing, health, education costs and travel expenses." This would be directly against the spirit of clause [d][i].

"Moreover, also plaintiff's claim that the above sum has been paid to defendant as prepayment "for the boys' future maintenance to buy a house, for herself and the boys", goes against the spirit of this sub clause according to which maintenance is to be made for daily requirements, schooling, clothing and health expenses, including travel expenses; as considering the high rise in the value of property in Malta, the Court has serious doubts as to whether the balance resulting from the purchase of a suitable house will suffice to meet the requirements listed in paragraph [i], taking into account the fact that the children are accustomed to a certain standard of living due to their father's very healthy financial situation, and also that both children attend a private school.

"Also, the fact that after the above payments had been made in September and October 2000, plaintiff had voluntarily [as distinct from payments made after September 2002 as a result of criminal proceedings] made to defendant monthly payments as maintenance for the months of May till the month of September 2002, continues to weaken plaintiff's claim that maintenance has been prepaid by the payment of the said sum, as it is a contradictory to state that a payment made in 2000 is to be considered as payment made in advance, and at the same time continue to pay maintenance.

"Therefore, this fact continues to support defendant's assertion that the payment of the above sum was made for reasons other than for maintenance, and that it was the parties' intention at the time of the contract that paragraph [v] refers to amounts which will be distributed by Perikles Trust in the future.

"Also, since it was the parties' intention to address in the deed a future situation, that is, their position and that of the children, after the 22nd August 2002, then it was up to plaintiff to state clearly that in paragraph [v] he was referring to the payments Perikles Trust had made two years earlier. However, instead of using specific terms to indicate the above payments, plaintiff had agreed to the use of the term "any" amounts. The more so when considering that in his note of submissions plaintiff stated that he had inserted this clause as he wished that the payment of the above substantial sum be mentioned in the contract by the insertion of a clause "li tghid li hu ma jkollux l-obbligu li jhallas manteniment in vista tal-pagamenti li huwa wettaq".[7] This continues to support defendant's contention.

"As regards plaintiff's argument that the prepayments were precisely the reason why the clause was inserted and only Perikles Trust was mentioned, the Court observed that the reason why this particular trust was mentioned seems to arise from the fact that defendant, through the Bettina Trust, owns 20% of Perikles, and therefore the parties wished to make it clear that payments made for future by this Trust to defendant personally or otherwise, are to be considered as payments made on account of the maintenance for defendant and her children, notwithstanding that Bettina Trust has a share in the above Trust. Besides, the fact that only Perikles Trust was mentioned does not exclude plaintiff to effect maintenance payments personally or through one of his companies.

[7] Supra – which in English translates in "stating that he will have no obligation to pay maintenance as the payments had already been effected"

"Lastly, on this point, it must be observed that the onus of proving that the above sum represents prepaid maintenance legally falls on the plaintiff who is alleging this fact. In this respect, having regard to the fact [a] that no formal receipt of the payments exist indicating the cause of the payments, [b] that these payments have been made two years prior to the deed, [c] that defendant is strongly contesting plaintiff's allegation, [d] that according to the legal norms of interpretation, as well as [e] the untenability of plaintiff's arguments examined on a logical level, it is observed that plaintiff has not managed to prove his case in this regard.

"On the strength of the above considerations, this Court is of the opinion that paragraph [v] of sub clause [d] of clause [2] of the separation deed does not refer to past payments made by Perikles Trust, but to payments made from the date of the deed onwards. In other words, the amount of US$390,000 paid by Perikles Trust in 2000 cannot be considered as prepaid maintenance, and therefore his requests in this regard cannot be acceded to.

"[D] The second limb of the maintenance issue concerns the "somma ohra sostanzjali in linea ta' pagamenti mensili ta' manteniment addizzjonali."[8] In his affidavit[9] plaintiff indicates this additional maintenance as being Lm18,420, whilst defendant in her affidavit states that since the date of the separation deed till the 1st June 2005 "albeit often late and only after judicial proceedings" the total maintenance paid amount to Lm25,560[10]. The plaintiff's contention in this regard is that defendant has turned these substantial funds to herself, and misapplied them instead of using them for the benefit of the children.

"In the first place the Court observes that nowhere in the agreement is it stated that defendant is to render an

[8] Writ of Summons – English translation: "a further substanital sum of money pay montly as additional maintenance"
[9] Fol.157
[10] Fol.192

account of the sums given to her by way of maintenance for her children.

"In the second place, considering that the amount in questions spans over a period of three [3] years, and considering that during this period, and to this very day, defendant has borne all the costs of maintaining their children, including sending them to a private school, and considering that her source of income has been frozen by a garnishee order filed by plaintiff in August 2004, and considering the legal and judicial fees defendant have and has to cover in view of the number of court cases filed by plaintiff against her, and considering that plaintiff has failed to honour his obligation to pay maintenance for defendant under clause three [3] of the deed; an annual expense of approximately Lm8,000 is not considered an unreasonable sum, and certainly does not justify plaintiff's claim of misappropriation of funds and a consequent call for defendant to be made to render a full and detailed account of how the maintenance' received by her has been used.

"[E] In her counter claim defendant made requests relating to a pension fund on the strength of clause [7] of the deed, as well as a request for plaintiff to guarantee his compliance with his, obligation to pay maintenance and make payments in support of this fund.

"In this respect the Court observes that from paragraph [7] of the separation deed, it emerges quite clearly that the right relating to the pension fund claimed by defendant arises out of a public deed dated 5th September 1996 and not from the separation deed which merely confirms that the contractual rights under that deed are to remain in force. Therefore a counter claim in this regard is legally unsustainable since it does not arise "from the same fact or from the same contract or title giving rise to the claim of the plaintiff".[11] In fact the above deed, made prior to the date of the marriage, and concerning an obligation starting on the date of the marriage, has in effect nothing

[11] Art.396 Chapter 12 of the Laws of Malta

to do with the case is issue, which concerns basically the payment of maintenance following the deed of separation.

"As regards the request for a security measure to be ordered by this Court in regard to plaintiff, the Court observes [1] that even though this is not specified in the separation deed, the law enables the Court under section 149 of the Civil Code “upon good cause being shown, to give such directions as regards the person or the property of a minor as it deems appropriate in the bests interests of the child”; [2] that from the evidence produced, and considering the litigious situation constantly prevailing between the parties, there is good reason for this Court to believe that the plaintiff, to spite defendant, may further try to avoid paying defendant maintenance due for the children.

"Therefore, in these circumstances defendant’s request is justified, and the Court is consequently appointing an accountant to serve as a judicial referee to examine the acts of the case, and particularly the financial statements in this regard presented by defendant and, after making the necessary observations, arrive at a total representing [1] the maintenance arrears due for defendant calculated on the basis of clause three [3] of the deed, [2] maintenance arrears due for the children calculated on the basis of clauses 2[d][i][ii] of the same deed; as well as [3] the sum due as future maintenance for the children, calculated on the basis of the latter clause, after which the Court will be in a position to arrive at an amount representing an adequate guarantee for the payment of maintenance in future by plaintiff.

"Regarding plaintiff’s first two pleas which are of a procedural nature, the Court observes that, since mediation on the maintenance issue has failed with the consequence that in virtue of court decree number 864/04 the plaintiff had been authorised to present a writ of summons in respect of his claim, there is obviously no need at law for defendant to proceed to mediation before filing her counter claim on the same merits on which the action is based. The spirit and purpose of Legal Notice

397/2003 is to afford to the parties an opportunity to solve any issue on any matter indicated therein arising between them with a view to preventing litigation proceedings. Once that stage has been surpassed, and the relative writ of summons have been filed, then it is lawful for defendant to present a counter claim in terms of article 396 of Chapter 12 of the Laws of Malta, together with her note of pleas, and without the necessity of going through mediation. In view of these considerations, these first two pleas are unfounded at law.

"Care and Custody

"This part of the judgement concerns the parties' two minor children: Maximilian born on the 26th October 1996 and Alexander born on the 6th January 2000.

"In the separation deed the parties agreed on "joint custody and authority" of both parents in the sense, that whilst day to day decisions are taken by their mother, important decisions concerning the children's welfare, education, health and issues of a similar nature, are to be taken by both parents jointly. The parties also agreed that the daily care of the minor children is to be primarily entrusted to their mother, with the father having extensive access rights regulated in detail in the deed.[12]

"However, subsequent to the deed it became evident that joint custody was not working well since the parties have failed to agree on most issues concerning their children, and this to the detriment of the children. Thus both are requesting the Court to revoke the joint custody and to grant exclusive custody to either of the parties, and in the case of plaintiff also with the help of a tutor if necessary.

"In her report the social worker observed that the father "is living in the United States with his partner Pauntea Morshedi and has been doing so for the last five [5] years" whilst the children have continued to live with their mother

[12] Deed [ibid] – Clause 2 - paragraphs.[a][b][c]

to this very day. Though the children love both parents and enjoy being in their company; however since “both minors expressed strongly their wish to live with their mother, and have access to their father ...” the social worker concluded that care and custody be given solely to the mother, with adequate right of access to the father. She observes that the mother “seems to be a warm and caring mother and it is surely in the best interest of the children to be brought up by her, and for the boys to have ample access with their father” whilst excluding the plaintiff’s request to have sole custody or shared by a tutor as not being in the boys interests.[13]

"This Court, after having examined the evidence in this respect, as well as having heard the two boys in chamber with a view to ascertaining their wishes, agrees with the conclusion that the mother is to be granted sole care and custody of the two minor children, with adequate access to the father.

"This conclusion is chiefly based on the following considerations:

"[1] that unfortunately the parties have been in constant disagreement over important matters, such as education, to the extent that they both admit that joint custody was not working well, and court intervention was being sought on most issues. This situation is certainly not in the interests of the children who must surely be negatively affected by this warring situation manifestly existing between their parents.

"[2] that the father is cohabiting with another woman, in the United States, which fact has not been denied by him, and has been confirmed by his partner Pauntea Morshedi who in her affidavit drawn on the 26th February 2007, states that she has been in a romantic situation with plaintiff for the past five years, living and working together. In fact in his affidavit he refers to his “new family”[14] and

[13] Fols.167 - 170
[14] Fol.17

complains that defendant is refusing to send the children abroad to meet his “new family”.

"On the other hand the mother, a professional in IT Communications continued to take good care of the children catering for all their daily needs even though this meant a decrease in her possibility of going abroad often with the consequent loss of favourable job opportunities.

"The Social Worker describes defendant as a warm and caring mother. This is also confirmed by witnesses; as well as by the undeniable fact that, notwithstanding the hardships she has gone through due to the breakdown of the marriage, and the constant litigation with plaintiff, she continued to take care of their two children; refusing also to work abroad or go abroad for long periods since at the moment she is impeded from leaving the Island with the children.

"Moreover, the children have expressed their wish to this Court to remain living with the mother even if this should entail that they live in Germany. They are adamant in this respect. Their strong attachment to their mother is understandable since they have been in her effective care since they were born; and also considering that their father has not managed to come to Malta to visit them since October 2005.

"On the strength of the above, the Court is convinced that it is in the best interests of the children to be in the sole and exclusive care and custody of the mother, whilst the access rights of the father as detailed in the separation deed are to be respected.

"Finally, on the matter of costs, the Court is of the opinion that, since this case arose in part from an ambiguous clause [paragraph [v] of clause 2[d] which has been agreed to by both parties, then it is just that defendant be made to bear part of the costs."

Having seen the two applications of appeal filed by plaintiff Andreas Wilhelm Gerdes by virtue of which, for

reasons set out in the applications, he requested, through his first appeal, that this Court revokes the judgement delivered by the first Court and decides instead by acceeding to all plaintiff's requests and by rejecting all defendant's pleas and this under those conditions and provisions which this Court may deem fit to impose, and through his second appeal, that this Court reforms that part of the judgement dealing with the counter-claim by confirming it in part where it declared that plaintiff to be non-suited in respect of the first request, and to reform it by accepting all plaintiff's pleas thereby dismissing all the defendant's requests, and this under those conditions that this Court may deem fit to impose - in both cases with costs to be incurred by the respondent;

Having seen the replies submitted by respondent by virtue of which, for reasons therein set out, she requested that the second appeal be declared to be procedurally incorrect and inadmissible and therefore null and void, and that in either case both appeals be dismissed;

Having seen that the two appeals filed by plaintiff were declared to have been abandoned by virtue of a decree issued by this Court on the 5th day of February, 2008;

Having seen the cross-appeal filed by defendant Bettina Vossberg by virtue of which, for reasons set out in the said cross-appeal, she requested this Court to amend the judgement delivered by the first Court by revoking the award of one-fourth (¼) costs against Vossberg and awarding that all costs be paid solely by Gerdes - with costs of both proceedings against plaintiff.

Having heard submissions by counsel with respect to defendant's cross-appeal;

Having seen all acts and documents submitted in this case;

Considers;

That the parties to this case had entered into a deed of personal separation dated 22nd August 2002, by virtue of which they regulated, among other matters, their continued relationship with their two minor children and the payment of maintenance. The parties had agreed that the children remain under their joint care and custody, and as to maintenance plaintiff agreed to pay defendant a monthly allowance of Lm600 for every minor, subject to periodical increases as stipulated in the contract. It was furthermore stated in paragraph [v] of clause 2(d) that:
"[v] any amounts distributed to the wife, or to any party or entity nominated by her, from the Perikles Trust shall be treated as being payments on account of the liability of the husband for maintenance as detailed in this clause [d]."

Apart from seeking sole custody of the children, by virtue of these proceedings, plaintiff sought a declaration to the effect that monies defendant or one of her companies received prior to the signing of the deed had to be credited to her claim for maintenance, arguing that the phrase, "any amounts distributed" is grammatically written in the past tense, and that, therefore, a payment he made of US$390,000 prior to the signing of the deed should be taken into account.

On this point, defendant disagreed and argued that the verb "shall" in the said clause clearly refers to a future situation and therefore logically refers to payments to be made in the future.

The first Court, after examining the evidence submitted by the parties and their respective submissions on the matter, agreed with defendant's arguments and held that defendant had only received the sum of Lm25,550 till the 1st August 2004, on account of maintenance. It decided and so stated that the amount of US$390,000 paid by Perikles Trust in 2000 cannot be considered as pre-paid maintenance. Due to the complexity of the matter, it also decided that costs on this issue be shared as to ¾ to be paid by plaintiff and ¼ by defendant.

Plaintiff had appealed from this decision of the first Court, but, as noted earlier, his appeal was declared to have been abandoned.

Defendant's cross-appeal refers to her being ordered to pay ¼ of the costs, with her grievances being that as the Court had accepted her interpretation of the clause in question, she should not have been mulct in any costs, even in the light of article 223(1) of Chap. 16 of the Laws of Malta which provides that "every definitive judgement shall award costs against the party cast".

The Court is aware of this general principle, but is also aware of local case-law in the sense that, in particular circumstances, the Court can depart from this principle and apportion costs among the parties. This Court in the case **Muscat v. Muscat**, decided on the 1st October 2004, noted that while the general principle is that the party cast is to pay all the costs of the case, there could be situations,
"li huwa tali li jissuggerixxi spartizzjoni ta' l-ispejjez jew adirittura jimmeritaw kapovolgiment ta' din ir-regola.... Fi kliem iehor, il-Qorti ghandha dejjem id-diskrezzjoni finali li tiggudika hi dwar il-kap ta' l-ispejjez skond il-fattispecie u l-implikazzjonijiet legali ta' kull gudikat."

This Court feels that, in this case, the first Court exercised its discretion correctly. The clause in question was open to interpretation, and as both parties had, in one way or another, participated in its drafting, it was just that defendant bears a portion of the costs related to the Court's interpretation. This Court agrees with the difficulty faced by the first Court, as described by it in the initial part of its considerations, when it identified the problem in this sense:
"[B] In the case at issue, the Court is of the opinion that there exists an ambiguity in paragraph [v], since though the words "any amounts distributed" seem to refer to the past, the paragraph in question essentially addresses a future situation, through the verb "shall". This is more so, when examined in the contest of the whole sub clause [d] which draws out a detailed programme maintenance to be

paid by plaintiff for defendant and their children. Therefore, since this part of the contract is not clear, there is room for interpretation having regard to the intention of the parties at the time of agreement."

Given this situation, and given the detailed analysis of the facts the Court had to undertake to unravel this "ambiguity", it was not unreasonable for the first Court to apportion the costs, the majority of which are, in any case, to be borne by the party whose interpretation was not accepted. This Court, thus, finds that the first Court correctly applied the principles in issue, and feels it should not interfere in the exercise of its discretion.

As a result, and for the above reasons, this Court dismisses the cross-appeal filed by defendant, confirms the decision of first Court, and orders that all costs relative to the cross-appeal are to be borne by defendant Bettina Vossberg.

The Court orders that the acts of the case be remitted to the first Court for it to continue to hear the case according to law.

< Sentenza Finali >

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