



**QORTI TAL-MAGISTRATI  
(GHAWDEX)  
(GURISDIZZJONI SUPERJURI)  
(SEZZJONI TAL-FAMILJA)**

**MAGISTRAT DR.  
PAUL COPPINI**

Seduta tat-30 ta' Jannar, 2009

Citazzjoni Numru. 14/2008

Oleg Gavrilenko

VS

Martin Tabone, u  
Sarouala Gavrilenko Tabone  
Mart l-istess Martin Tabone, u  
Id-Direttur tar-Registru Pubbliku għal Għawdex,  
U b'degriet tas-6 ta' Novembru, 2008,  
Dr. Kevin Mompalao ġie nominat Kuratur  
Sabiex jidher għal minuri.

Il-Qorti,

Rat ir-Rikors ġuramentat ta' l-attur li permezz tiegħu, wara  
li ppremetta illi:

Illi fil-wieġed u tletin (31) ta' Mejju 2008 twieldet minn Zarouala Gavrilenko Tabone bint li ngħatat l-isem ta' "Anastasia" u l-att tat-twelid tagħha ġie registrat fir-Registru Pubbliku ta' Għawdex bin-numru mija u tnejn u erbgħin (142) tas-sena elfejn u tmienja (2008) – Dokument "A";

Illi fl-att tat-twelid fuq imsemmi, l-omm iddikjarat illi bintha, Anastasia hija wild Martin Tabone tant li fl-ewwel kolonna taħt l-intestatura "Tagħrif dwar Missier it-Tarbija" hemm indikat li din hija bint Martin Tabone bin Paul Tabone imwieled il-Floriana u joqgħod l-Msida Malta u li għandu l-karta ta' identita numru 06856553 M;

Illi effettivament il-konvenut Martin Tabone, li huwa r-raġel ta' Zarouala Gavrilenko Tabone m'huwiex missier it-tarbija u fil-fatt missier it-tarbija huwa l-attur, Oleg Gavrilenko;

Illi fil-fatt il-konjuġi Tabone ilhom 'il fuq minn ħames (5) snin isseparati minn xulxin u fil-fatt il-konvenuta Zarouala Gavrilenko Tabone bdiet quddiem din l-istess Qorti proċeduri ta' separazzjoni minn ma' żewġha, Martin Tabone u għaldaqstant l-istess konvenuta Zarouala Gavrilenko Tabone kienet tgħix u tgħammar mal-attur Oleg Gavrilenko u kienet għalhekk f'impossibilita' fiżika illi tgħammar mal-konvenut l-ieħor Martin Tabone fiż-żmien bejn it-tliet mitt jum u l-mija u tmenin jum qabel it-twelid tat-tarbija Anastasia Tabone;

Talab lill-konvenuti jgħidu għaliex m'għandhiex din il-Qorti:

1. Tiddikjara illi l-konvenut Martin Tabone mhux il-missier tat-tarbija Anastasia li twieldet minn Zarouala Gavrilenko Tabone fil-wieġed u tletin (31) ta' Mejju tas-sena elfejn u tmienja (2008) u li l-att ta' twelid tagħha ġie registrat fir-Registru Pubbliku għal Għawdex bin-numru mija u tnejn u erbgħin (142);

2. Konsegwentement tordna l-korrezzjoni tal-att tat-twelid bin-numru progressiv mija u tnejn u erbgħin (142) tas-sena elfejn u tmienja (2008) – Dokument A fis-sens illi titneħħa kull riferenza illi hemm fl-istess att tat-

## Kopja Informali ta' Sentenza

twelid li juri li l-konvenut, Martin Tabone huwa missier it-tarbija hawn fuq imsemmija u minflok jitniżżel li t-tarbija bl-isem Anastasia hija wild Oleg Gavrilenhko, kif sejjer jirriżulta waqt it-trattazzjoni tal-istess każ.

Bl-ispejjeż u bl-ingunzjoni tal-istess konvenuti għas-subizzjoni li minn issa huma imħarrka.

Rat ir-Risposta ġuramentata tal-konvenut Direttur tar-Registru Pubbliku għal Għawdex li eċċepixxa illi:

1. Illi preliminarjament, bi ksur tal-artikolu 181B(3) tal-Kodiċi ta' Organizazzjoni u Proċedura Ċivili, Kap 12 tal-Liġijiet ta' Malta, l-Avukat Ġenerali ma ġiex notifikat b'dan ir-rikors;

2. Illi preliminarjament jeħtieġ illi l-minuri tkun parti fil-kawża u n-nuqqas tal-preżenza tagħha jirrendi dan ir-rikors null;

3. Illi preliminarjament fil-mertu l-esponenti mhux edott mill-fatti kif allegati fir-rikors ġuramentat u għalhekk jirrimetti ruħu għall-provi dwar it-talbiet, inkluż dawk it-testijiet xjentifiċi neċessarji, għal ġudizzju ta' din l-Onorabbli Qorti;

4. Illi jeħtieġ li tiġi ppruvata l-impossibilita' fiżika bejn il-konjuġi u cioè' bejn Zarouala Gavrilenko Tabone u Martin Tabone u illi r-rikorrenti dejjem ikkunsidra lil minuri bħala bintu;

5. Illi jeħtieġ li r-rikorrenti jispeċifika d-dettalji personali kollha tiegħu bħala allegat missier naturali tal-minuri sabiex jekk it-talbiet dedotti fir-rikors jintlaqgħu, dawn id-dettalji jkunu jistgħu jiġu inseriti fl-Att tat-Twelid in kwistjoni. Inoltré' huwa importanti li r-rikorrenti jispjega kif kunjomu 'Gavrilenko' huwa l-istess bħala tal-intimata Zarouala Gavrilenko Tabone;

6. Illi għandha ssir id-debita pubblikazzjoni fil-Gazzetta tal-Gvern ai termini tal-Artikolu 254 tal-Kap 16 tal-Liġijiet ta' Malta;

7. Illi fi kwalunkwe każ jirrizulta li l-att tat-twelid ġie redatt skond il-Liġi u t-tibdil rikjest fl-Att tat-Twelid mhux attribwibbli għal xi nuqqas ta' esponenti li għaldaqstant m'għandux jigi soġġett għall-ispejjeż ta' l-istanti;

8. Salv eċċezzjonijiet ulterjuri fid-dritt u fil-fatt.

Rat ir-riferta pożittiva tal-konvenuta Zarouala Gavrilenko Tabone, li ġiet notifikata b'dan ir-Rikors fis-17 ta' Settembru 2008, imma għażlet li tibqa' kontumaci.

Rat id-digriet tagħha tas-6 ta' Novembru 2008 fejn l-avukat Dottor Kevin Mompalao ġie nominat sabiex jirrapreżenta l-interessi tal-minuri Anastasia Tabone.

Rat ir-Risposta ġuramentata ta' l-avukat Dottor Kevin Mompalao nomine li eċċepixxa illi:

1. Illi l-esponenti qed idaħħal din ir-risposta ġuramentata, minkejja li sa dan l-istadju għadu ma ġiex notifikat bir-rikors promutur, iżda qiegħed għal finijiet u effetti tal-liġi jagħti ruħu notifikat bl-istess rikors illi huwa ottjena kopja tiegħu minn l-atti nhar l-1 ta' Dicembru 2008.

2. Illi l-esponenti fl-aħjar interess tal-minuri ma jhossx li għandu jopponi għat-talbiet tal-minuri sabiex jiġi verament dikjarat min huwa veru missierha naturali, salv dan jiġi pruvat skond il-liġi, u skond testijiet mediċi noti fix-xjenza moderna.

3. Illi din id-dikjarazzjoni qed issir u qed tiġi kkonfermata bil-ġurament minn l-Avukat Dottor Kevin Mompalao maħtur kuratur ex officio sabiex jirrapreżenta lil minuri Anastasia Tabone, li għandu konoxxenza vera u proprja tal-fatti li taw lok għal din il-kawża kif fuq esposti.

Salvi eċċezzjonijiet ulterjuri.

Kopja Informali ta' Sentenza

Innotat illi l-konvenut l-ieħor Martin Tabone, li ġie notifikat bil-proċedura tal-affissjoni u pubblikazzjoni, baqa' wkoll kontumaċi.

Rat il-verbal tagħha tal-15 ta' Jannar 2009 fejn ħalliet il-kawża għas-sentenza għal-lum.

Rat l-atti l-oħra tal-kawża.

Ikkunsidrat:

Illi permezz ta' din il-kawża qed jintalab:

(i) li jiġi dikjarat illi l-konvenut Martin Tabone mhux il-missier naturali ta' Anastasia Tabone, minkejja li ġie mnizżel bħala tali fuq iċ-ċertifikat tat-twelid tal-minuri; u konsegwentement

(ii) li jiġi kkoreġut l-istess ċertifikat tat-twelid billi titneħħa kull referenza għall-istess Martin Tabone bħala l-missier tat-tarbija, u minflok jitniżżel l-attur bħala l-missier tagħha.

Kif ġie ribadit diversi drabi mill-qrati tagħna f'kawżi bħal dawn, sabiex tirnexxi talba bbażata fuq l-artikolu 77 tal-Kodiċi Ċivili, kif għandna fil-każ in eżami, jrid jiġi ppruvat illi:

(i) **t-tarbija ma kienitx legittima u**

(ii) **li stat tagħha effettivament ma jikkorrispondix ma' dak li juri l-att ta' twelid tagħha.<sup>1</sup>**

Infatti f'kawża simili fejn l-attur talab li jiġi dikjarat il-missier naturali tat-tarbija, u ma ingħadx fiċ-ċitazzjoni li t-tarbija kellha stat differenti minn dak li jidher fiċ-ċertifikat tat-twelid tagħha, l-Qorti ma dehrilha li kien hemm ebda ostakolu biex tilqa' t-talba, għaladarba ż-żewġ rekwiżiti mitluba mil-liġi ġew ippruvati.<sup>2</sup>

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<sup>1</sup> A vs Direttur tar-Registru Pubbliku et. Prim'Awla (Sezzjoni Familja) RCP : 18.11.2004 .

<sup>2</sup> A vs B u C et noe. : Prim'Awla : 4.12.1998 FGC .

Minkejja li ma semmewhomx, huma xorta waħda dawn ir-rekwiżiti li jrid neċessarjament jipprova l-attur fil-kawża preżenti.

Dwar l-ewwel rekwiżit: **in-nuqqas ta' leġittimita' tat-tarbija.** L-artikolu 77 tal-Kodiċi Ċivili jirrikjedi li biex wieħed jirnexxi b'din l-azzjoni huwa għandu jipprova illi, fiż-żmien it-tliet mitt ġurnata u l-mija u tmenin ġurnata qabel it-twelid tat-tifel, ir-raġel kien fl-impossibilita' fiżika li jgħammar ma' martu minħabba li kien bogħod minnha. Fil-każ in eżami t-tarbija twieldet fil-31 ta' Mejju 2008.<sup>3</sup> Jirriżulta mill-provi illi l-konvenuti Zarouala Tabone u Martin Tabone sseparaw formalment minn ma' xulxin permezz ta' sentenza ta' din il-Qorti tad-9 ta' Diċembru 2008.<sup>4</sup> Madankollu kien ilhom ma jgħixu flimkien ta' l-inqas sa mis-sena 2002.<sup>5</sup> Fil-fehma tagħha għalhekk, jidher illi r-rekwiżit tal-lontananza bejn ir-raġel u l-mara ġie adegwatament sodisfatt.

2. Dwar it-tieni rekwiżit: **Stat differenti minn dak li jidher fuq l-att ta' twelid.**

A tenur ta' l-artikolu 81 tal-Kap. 16 "**ħadd ma jista' jitlob stat kuntrarju għal dak li jagħtuh l-att tat-twelid bħala iben leġittimu u l-pussess ta' stat li jaqbel ma' dak l-att;**" u similmement "**ħadd ma jista' jattakka l-istat tal-iben leġittimu ta' tifel li jkollu l-pussess ta' stat li jaqbel ma' l-att tat-twelid tiegħu.**" Għalhekk u kif hu aċċettat mill-ġurisprudenza lokali, l-azzjoni proposta mill-artikolu 77 tal-Kap. 16, hija waħda subordinata għall-artikolu 81.<sup>6</sup> Kif qalet il-Prim'Awla tal-Qorti Ċivili fis-sentenza tagħha fil-kawża: "Emanuela sive Lilian Diacono pro. et noe. vs. Massimo Alakkad et." (RCP. 2.10.2002) : "*....huwa ċar li l-ħsieb tal-liġi huwa li jipproteġi l-istat ta' leġittimita' tal-persuna, la darba din twieldet fiż-żwieġ, u la darba l-istat tal-istess minuri huwa konformi mal-istess deskrizzjoni wkoll tal-ħajja tiegħu, hekk miżmum fil-rejalta' soċjali bħala iben jew bint l-istess konjuġi.*"

<sup>3</sup> ara certifikat tat-twelid relattiv, esebit bħala Dok. A a fol. 5 tal-process .

<sup>4</sup> ara kopja tas-sentenza relattiva esebita a fol. 46 - 47 tal-process .

<sup>5</sup> ibid.

<sup>6</sup> Joseph Ellul vs Dr. Anthony Cutajar et noe. : Prim'Awla : 10.12.2002 .

Ir-Ricci jispjega f'dan ir-rigward illi:

“ (il legislatore) *ha osservato esistere nell'ordine stesso delle cose una presunzione che sta per la inviolabilita' del talammo e per il rispetto della fedelta' coniugale, la quale presunzione viene avvalorata dalla vita comune degli sposi e fa riguardare il marito come il padre dei figli concepiti da sua moglie durante il matrimonio*” ( vol. I. pt. II. 49 p. 63).

Infatti l-ligi tagħna wkoll tagħmel din il-preżunzjoni fl-artikolu 67 tal-Kap. 16: “***L-iben imnissel matul iż-żwieġ jittqies li hu bin żewġ ommu***”.

Fil-każ in eżami jirriżulta illi l-minuri għandha fil-fatt stat legittimu, u fiċ-ċertifikat tat-Twelid tagħha tidher illi ngħatat kunjom ir-raġel ta' ommha. Imma b'daqshekk ma jfissirx illi ma jistgħux jittressqu provi li jindikaw, fil-grad ta' ċertezza meħtieġa mill-ligi, illi hija għandha l-pussess ta' stat differenti minn dak li jidher fuq l-att tat-twelid tagħha. Il-prova ta' l-istat ta' iben legittimu hi magħmula minn ġabra ta' fatturi, ewlenin fosthom dawk elenkati fl-artikolu 80(2) tal-Kap. 16. Kif intqal fis-sentenzi “Concetta Conti noe. vs Angelo Camilleri (vol. XXXII. ii. 309) u “Jesmond Zammit vs Anthony Rapa et.: (P.A. 18.1.2000 RCP):

“... *Dan ifisser illi skond il-provedimenti tal-artikolu 82 tal-Kap. 16 tal-Liġijiet ta' Malta, jekk ikun hemm nuqqas ta' att ta' twelid jew ta' pussess ta' stat (u dan skond kif definit fl-Artikolu 80 tal-Kap. 16) inkella jekk it-tifel ikun ġie reġistrat taħt isem falz.... Il-prova tal-filjazzjoni tista' ssir b'xhieda oħra li tista' tingieb skond il-ligi. Fi kliem ieħor jekk il-pussess ta' stat ma jaqbilx maċ-ċertifikat tat-twelid il-prova li toħroġ miċ-ċertifikat tar-reġistru Pubbliku mhux insindakabbl” (sottolinear ta' din il-Qorti).*

Rilevanti wkoll dak li qalet l-istess Qorti fl-añhar kawża hawn fuq ċitata fis-sens illi:

“F'dan l-isfond wieħed jirreferi wkoll għas-sentenza fl-ismijiet “Pierre Travers Tauss vs Direttur tar-Reġistru Pubbliku” (FGC. 10.5.1996) fejn ingħad illi l-attur “għandu nteress li jattakka l-legittimita' tat-tifla minuri u dan jekk

*jipprova dak li hemm indikat fl-arikolu 77 tal-Kap. 16. Illi l-prinċipju "pater est quem justae nuptiae demonstrat" huwa rikonoxxut mill-ligi tagħna permezz tal-artikolu 67 li jgħid illi "l-iben imnissel matul iż-żwieġ jitqies li hu bin żewġ ommu," pero' madankollu wieħed ma jstax ma jikkonsidrax li, aktar ma jgħaddi ż-żmien, aktar qegħda taqbad l-għeruwq il-fehma li r-realtajiet bijoloġiċi u soċjali jipprevalu fuq il-preżunzjoni legali li 'pater est quem justae nuptiae demonsatrant.' Illi dan ġie rikonoxxut anke bis-sentenza mill-Qorti Ewropea tad-Drittijiet tal-Bniedem fis-27 ta' Ottubru 1994 fil-kawża fl-ismijiet "Kroon vs The Netherlands" fejn ġie rikonoxxut legalment l-eżistenza ta' 'family ties' anke bejn persuni li ma humiex miżżewġin, u għalhekk il-frott ta' l-istess, għandu jiġi rikonoxxut bħala tali, għaliex jirrispekkja l-verita' attwali f'din il-kawża. Ċertament li dan kollu ma jsib l-ebda ostakolu bl-artikolu 81." Huwa evidenti għalhekk illi l-provedimenti ta' l-artikolu 81 tal-kap. 16 ma jstgħux iżommu lil ġudikant milli jagħmel l-indaġini meħtieġa sabiex jiġi stabilit jekk jeżistix jew le l-pussess ta' stat ta' iben legittimu konformi ma' l-att tat-Twelid tiegħu.*

Il-każ in eżami, appartni r-riżultat ta' l-eżamijiet bijoloġiċi li saru fuq l-attur, il-konvenuta u l-minuri, li minnhom ħareġ indubbjament illi l-minuri huwa tassew l-iben naturali tagħhom,<sup>7</sup> jirriżulta wkoll illi din dejjem trabbiet u għexet magħhom minn mindu twieldet, ftit iżjed minn xahar biss qabel ma ġiet istitwita din il-kawża, u li t-tarbija qatt ma kellha xejn x'jaqsam mal-konvenut Martin Tabone, li baqa' ħadd ma jaf x'sar minnu. Huwa ovvju f'tali ċirkostanzi illi l-minuri mhux fil-pussess ta' stat konformi ma' dak li juri l-att ta' Twelid tiegħu, u għaldaqstant it-tieni rekwiżit ġie wkoll sodisfatt.

Għal dawn il-motivi, tiddeċidi l-kawża billi tilqa' t-talbiet attriċi u:

1. tiddikjara illi l-konvenut Martin Tabone mhux il-missier ta' Anastasia Tabone, li twieldet mill-konvenuta

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<sup>7</sup> ara DNA Paternity Test Report esebita bhala Dok. ZG 3 a fol. 41 (recto u verso) tal-process.



Kopja Informali ta' Sentenza

Zarouala Gavrilenko Tabone, illum, wara s-sentenza ta' din il-Qorti diversament preseduta tad-9 ta' Dicembru, 2008, Zarouwla Gavrilenko, fil-wieġed u tletin (31) ta' Mejju 2008, u li l-att tat-twelid tagħha ġie registrat fir-Registru Pubbliku għal Għawdex bin-numri mija tnejn u erbgħin tas-sena elfejn u tmienja (142/2008), imma li l-istess Anastasia Tabone hija l-bint naturali ta' l-attur;

2. konsegwentement tordna l-korrezzjoni ta' l-att ta' twelid indikat fis-sens illi titneħħa kull referenza illi hemm fl-istess att li juri lill-konvenut Martin Tabone bħala missier it-tarbija fuq imsemmija, u minflok jitnizzel li t-tarbija bl-isem "Anastasia" hija wild l-attur Oleg Gavrilenko.

L-ispejjeż għandhom jiġu ssoportati mill-attur u l-konvenuta Zaroula Gavrilenko Tabone bejniethom.

Fl-añħarnett tordna illi a kura tar-Registatur tagħha, kopja ta' din is-sentenza tiġi notifikata lid-Direttur tar-Registru Pubbliku għal Għawdex.

Translation:

Oleg Gavrilenko

vs

Martin Tabone, u  
Zarouala Gavrilenko Tabone  
Wife of the same Martin Tabone, and  
Director of the Public Registry for Gozo,  
And with a decree dated 6th November, 2008,  
Dr. Kevin Mompalao was nominated as Curator  
To appear for the minor.

The Court,

Having seen the application presented by oath of plaintiff by which, after confirming that:

That on the thirty first (31st) of May 2008 was born from Zaroulala Gavrilenko Tabone a daughter that was given the name "Anastasia" and her act of birth was registered at the Public Registry of Gozo bearing numer one hundred and forty two (142) of the year two thousand and eight (2008) – Document "A";

That on the act of birth aforesaid mentioned, the mother declared that her daughter Anastasia is the child of Martin Tabone, so that in the first column under the heading "details regarding the father of the child" it is indicated that she is the daughter of Martin Tabone son of Paul Tabone born in Floriana, and residing at Msida Malta, and bearing Identity card Number 06856553M;

That effectively defendant Martin Tabone, who is the husband of Zarouala Gavrilenko Tabone is not the father of the child, and in fact the father of the child is the plaintiff, Oleg Gavrilenko;

That in fact the couple Tabone had been over five (5) years separated from each other and in fact defendant Zarouala Gavrilenko Tabone had commenced before this same Court separation proceedings from her husband, Martin Tabone and so same defendant Zarouala Gavrilenko Tabone was living and residing with plaintiff Oleg Gavrilenko and so she was in the physical impossibility of living with the other defendant Martin Tabone in the time between the three hundred day and the one hundred and eighty day before the birth of child Anastasia Tabone.

So plaintiff is pleading defendants to say why this Court should not:

1. Declare that defendant Martin Tabone is not the father of the child Anastasia which was born from Zarouala Gavrilenko Tabone on the thirty first (31st) of May of the year two thousand and eight (2008) and that

her act of birth was registered in the Public Registry for Gozo bearing number one hundred and forty two (142);

2. Consequently orders the correction of the act of birth bearing number one hundred and forty two (142) of the year two thousand and eight (2008) – Document A in the sens that every reference there is in the same act of birth which shows that defendant Martin Tabone is the father of the child aforesaid mentioned and instead be written that the child bearing name Anastasia is the daughter of Oleg Gavrilenko, as it will result during the discussion of same case.

With costs and injunction of the same defendants for submission that are from now called.

Having seen the reply of defendant Director of Public Registry for Gozo duly confirmed by oath, saying that:

9. That preliminarily, by infringement of article 181B(3) of the Code of Civil Procedure, Chapter 12 of the Laws of Malta, the Attorney General had not been notified with this application;

10. That preliminarily there is the need that the minor should be part in the case, and the failure of her presence renders this application null;

11. That Preliminarily in the merit the exponent is not aware from the facts as attached in the application confirmed by oath, and there remits himself for the proofs as regards the demands, including those scientific necessary tests, for the decision of this Honorable Court;

12. That there is the need to be proved the physical impossibility between the couple, that is between Zarouala Gavrilenko Tabone and Martin Tabone and that the applicant always considered the minor as his daughter;

13. That there is the need that plaintiff specifies all his personal details as the alleged natural father of

minor so that his requests contained in the application will be accorded, these details can be inserted in the Act of Birth in question. Besides it is important that the applicant explains how his surname 'Gavrilenko' is the same as that of defendant Zarouala Gavrilenko Tabone;

14. That there should be the duly publication in the Government Gazette as per Article 254 of Chapter 16 of the Laws of Malta;

15. That in every case it results that the act of birth was written in line with the law and the requested changes in the act of Birth is not attributed for any failure of the exponent and for that reason he should not be subject for any expenses in these instances;

16. besides any other other demands in fact and by right.

Having seen the positive notification of defendant Zarouala Gavrilenko Tabone, who was notified by this application on the 17th of September 2008, but choose not to reply.

Having seen her decree dated the 6th November 2008 where lawyer Dr. Kevin Mompalao was nominated to represent the interests of minor Anastasia Tabone.

Having seen the reply of Dr. Kevin Mompalao nomine duly confirmed on oath, who said that:

1. That respondent is presenting this reply duly confirmed on oath although up to this stage he has not yet been notified with the original application, but he is for the aim and effects of the law gives himself as notified with the same application that he duly acquired a copy of it from the file on the 1st of December 2008.

2. that exponent in the best interest of the minor does not feel that he should oppose the requests of the minor to be truly declared who is her real natural

father, except this should be proofed as per the law, and as per the medical tests as known in the modern science.

3. That this declaration is being done and is being confirmed on oath by Dr. Kevin Mompalao as nominated as curator ex officio to represent the minor Anastasia Tabone, who has true and proper knowledge of the facts which took place for this case as aforesaid exposed.

Exept and other exceptions.

Having noted that the other defendant Martin Tabone, who was notified by means of the procedure of affixtion and publication, also choose not to respond.

Having seen the Court minute dated 15th January 2009, where the case was deferred for today for decision.

Having seen all the acts in this case.

Considered:

That by means of this writ of summons it is requested:

(i) to be declared that defendant Martin Tabone is not the natural father of Anastasia Tabone, although it was so written on the birth certificate of the minor; and consequently

(ii) to be corrected the same birth certificate by eliminating every reference to the same Martin Tabone as the father of the child, and instead be written the plaintiff as her father.

As it had already been in various occasions from our Courts in other cases similar to these, so that it can go through a plea bases on article 77 of the Civil Code, as we have in this present case, it should be proved that:

**(i) the child was not legitimate and**

(ii) **that her state effectively does not correspond with those that show her act of birth.**<sup>8</sup>

In fact in a similar case where the plaintiff asked to be declared the child's natural father, and it was not mentioned in the writ of summons that the child had a different state from that as it was shown in her birth certificate, did not seem to the Court that there was any obstacle to accept the demand, as long as both the demand requested by law had been proved.<sup>9</sup>

Although they had not been mentioned, they are also these requests that he should necessarily to the plaintiff to prove in the case.

As regards the first requisite: **the absence of legitimacy of the child.** Article 77 of the Civil Code imposes so that one can have success with this action, he has to prove that, in the period between the three hundred day and the one hundred and eighty day before the birth of the child, the husband was in the physical impossibility to live with his wife because he was far apart from her. In the present case, the child was born on the 31<sup>st</sup> of May 2008.<sup>10</sup> It resulted from the proofs that defendant Zarouala Tabone and Martin Tabone were formally separated from each other by means of a decision of this Court of the 9<sup>th</sup> December 2008.<sup>11</sup> After all these two had not lived together at least as from the year 2002.<sup>12</sup> So in the Court's opinion, the request about the partition between the husband and wife had been adequately satisfied.

**3. As regards the second requisite: The different state from that shown on the act of birth.**

With regards to article 81 of Chapter 16, "***nobody can request a state against to that which is given the act***

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<sup>8</sup> A vs Direttur tar-Registru Pubbliku et. Prim'Awla (Sezzjoni Familja) RCP : 18.11.2004 .

<sup>9</sup> A vs B u C et noe. : Prim'Awla : 4.12.1998 FGC .

<sup>10</sup> ara certifikat tat-twelid relattiv, esebit bhala Dok. A a fol. 5 tal-process .

<sup>11</sup> ara kopja tas-sentenza relattiva esebita a fol. 46 - 47 tal-process .

<sup>12</sup> ibid.

***of birth as a legitimate son and the possession of a state which corresponds with that act***", and similarly ***"nobody can attack the state of the legitimate of a child who have the possession of a state that corresponds with the his act of birth."*** So and as it is accepted from the local giurisprudenza, the proposed action by article 77 of Chapter 16, is one which is subordinated to article 81.<sup>13</sup> As the First Hall of the Civil Court said in its decision in the case: "Emanuela sive Lilian Diacono pro et noe. Vs Massimo Alakkad et" (RCP. 2.10.2002) : ***"...it is clear that the intent of Law is that to protect the legitimate state of the person, as long as this was born in marriage, and as long as the state of the minor is in conformity with the same description and also with his life, as so kept in social reality as son or daughter of the same marriage."***

The **Ricci** explains in this regard that:

***"(il legislatore) ha osservato esistere nell'ordine stesso delle cose una presunzione che sta per la inviolabilita' del talammo e per il rispetto della fedelta' coniugale, la quale presunzione viene avvalorata dalla vita comune degli sposi e fa riguardare il marito come il padre dei figli concepiti da sua moglie durante il matrimonio"*** ( vol. I. pt. II. 49 p. 63).

In fact our law also makes this presumption in article 67 of Chapter 16: ***"the child concepted during the marriage is considered to be the son of his mother's husband"***.

In this case in examination it results that the minor in fact has a legitimate state, and her birth certificate it seems that it was given the surname of her mother's husband. But by this it doesn't mean that it could not be proved that indicate, in a grade of certainty required by law, that she is in possession of a state different from that which is shown on her act of birth. The proof of a legitimate child is made from a collection of facts, and the first of all those gathered in article 80(2) of chapter 16. As it was said in

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<sup>13</sup> Joseph Ellul vs Dr. Anthony Cutajar et noe. : Prim'Awla : 10.12.2002 .

the decisions “Concetta Conti noe –vs- Angelo Camilleri (vol. (vol. XXXII. ii. 309) and “Jesmond Zammit vs Anthony Rapa et.: (P.A. 18.1.2000 RCP):

*“.... This means that as the provisions in article 82 of chapter 16 of the Laws of Malta, if there will be any failure of an act of birth or of a possession of state ( and this as it is defined in Article 80 of chapter 16), of if the child would have been registered under a false.... The proof of childhood can be done by means of other witnesses that can be brought as regards the law. In other words if the possession of a state does not correspond with the birth certificate, the proof that comes out from the certificate of the Public Registry is not unsindicable”. (underlined by this |Court).*

It is also relevant that the same Court had said in the last case above cited in the sense that:

*“In this background one also refers to the decision in the names “Pierre Travers Tauss –vs- Direttur tar-Registru Pubbliku” (FGC 10.5.1996) where it stated that the plaintiff “had the interest to attack the legitimacy of the minor daughter and this if he proves that what is indicated in Article 77 of Chapter 16. that the principle “pater est quem justae nuptiae demonstrat” is recognised by our law by means of article 67 which states that “the son conceived during the marriage, it is considered that he is the son of his mother’s husband,” but one in spite of all this one cannot not consider that, as time passes, more is getting roots the thinking that the biological and social realities prevail above the legal presumptions that ‘pater est quem justae nuptiae demonsatrant.’ That this was recognised also by the decision from the European Court of Human Rights on the 27th October 1994 in the case in the names “Kroon vs The Netherlands” where it was legally recognised the existance of ‘family ties’ also between persons who are not married, and so the outcome of the same, should be recognised as so, because it reflects the actual truth in this case. Certainly that all this does not find any obstacle by article 81.” So it is evident that the*



providents of article 81 of Chapter 16 cannot keep the judge from making any necessary findings to be stabilised if it does exist or not the possession of the state of a legitimate child in conformity with his act of birth.

The case in examination, apart from the biological examinations that were done on the plaintiff, the defendant and the minor, from which it undoubtedly resulted that the minor is truly their natural daughter,<sup>14</sup> it also results that this child had grown up and lived with them as from her birth, only a little bit more than a month before this case was instituted, and that the baby had never to do with defendant Martin Tabone, that up till now nobody knows what happened to him. It is obvious in such circumstances that the minor is not in the possession of a state in conformity with that is shown in her act of birth, and therefore the second requisite was also satisfied.

For this motive, the Court decides the case by accepting the plaintiffs demands and:

1. Declares that defendant Martin Tabone is not the father of Anastasia Tabone, who was born from defendant Zarouala Gavrilenko Tabone, today, after the decision of this Court differently presided of the 9th December, 2008, Zarouala Gavrilenko, on the 31st of May 2008, and that her act of birth was registered in Public Registry for Gozo bearing number one hundred and forty two of the year two thousand and eight (2008), but that the same Anastasia Tabone is the natural daughter of the plaintiff:

2. Consequently orders the correction of the act of birth indicated in the sense that every reference that there is in the same act of birth which shows the defendant Martin Tabone as the father of the daughter above mentioned should be deleted, and instead it should be written that the child bearing the name "Anastasia" is the daughter of plaintiff Oleg Gavrilenko.

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<sup>14</sup> ara DNA Paternity Test Report esebita bhala Dok. ZG 3 a fol. 41 (recto u verso) tal-process.

Kopja Informali ta' Sentenza

All costs should be supported by the plaintiff and defendant Zarouala Gavrilenko Tabone together.

Finally, the Court orders, through her Registrar, that a copy of this decision be notified to the Director of the Public Registry for Gozo .

**< Sentenza Finali >**

-----TMIEM-----