



Civil Court – Family Section

Mr. Justice Robert G. Mangion LL.D.
Dip.Tax (MIT), P.G.Dip. Mediation (Melit.)

Today the 28th day of April 2016

Sworn Application No. 67 / 11RGM

Number on list: 18

M S L
as special attorney for and on behalf of
D O F
vs
Q N F

The Court,

Plaintiff's Sworn application reads as follows:-

1. That the applicant D O F and the respondent Q N F got married on the 12th February 1993 in Switzerland, from which marriage two children were born, namely B Q and X currently aged sixteen years and fourteen years respectively;
2. That the applicant had requested the Pretura di Lugano in Switzerland to dissolve her marriage with the respondent by divorce and to regulate all matters ancillary thereto, amongst which issues relating to maintenance, which request was decided upon by means of a judgement delivered by Il Segretario Assessore della Pretura di Lugano, Switzerland Avv. Francesca Signorelli Somaruga in the name of Repubblica e Cantone del Tiegino dated 27th September 2007, which judgement became final and res judicata on the 5th October 2007, as can be attested from the copy of the apostilled judgement that is being presented together with this sworn application;
3. That as an integral part of the operative part of this judgement, as stated in fol. 4 of the same judgement afore-mentioned, the Court in Lugano approved a

contract signed between the parties to regulate all matters ancillary to the divorce - in the words of the same Court "3. E omologata la convenzione annessa quale parte integrale del dispositivo." This same contract which was signed by the parties on the 2nd July 2007, specifies amongst other things, that the respondent Q N F is to pay maintenance for his two minor children in the following manner : between seven and twelve years, the sum of 1,645 Swiss Francs [equivalent to €1,283.15] whereas between thirteen years and eighteen years, the sum of 1815 Swiss Francs [equivalent to €1,416,22], and this every fifth of the month in advance;

4. That the respondent has defaulted in the payment of maintenance dues from January of the year 2009, and to date, the maintenance arrears due to the applicant amount to 37,694.20 Swiss Francs [equivalent to twenty eight thousand, eight hundred and four Euro and forty two cents [€28,8042];

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

Thus the applicant humbly requests this Honourable Court to

1. Declare that the judgement delivered by the Pretura di Lugano, Switzerland in the names D O F vs. Q N F dated 27th September 2007, including the contract that was signed by the parties on the 2nd July 2007 in order to regulate matters ancillary to the divorce and which is declared to form part an integral part of the operative part of the judgement of the 2th September 2007, as enforceable in Malta and hence to order their enforcement in terms of Articles 825A-828 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta;

2. Consequently declare that the respondent Q N F is a debtor of the applicant in the amount of twenty eight thousand, eight hundred and four Euro and forty two cents [€28,8042], which amount represents arrears in maintenance money owed to the applicant for her two minor children B Q F and X F from January 2009 to date;

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

4. Order the respondent Q N F to pay in a short and peremptory period the sum of twenty seven thousand, nine hundred eighty Euro and fifty one cents [€27,980.51] and any other payment due to the applicant by way of maintenance in the course of these proceedings till the date of judgement as is liquidated by this Court in terms of the third claim;

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

The sworn reply filed by defendant reads as follows:-

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

2. That moreover, also in a preliminary manner, respondent pleads that applicant's second, third and fourth demands are superfluous and unnecessary and as such, respondent should not be made, in any event, to bear the costs of these demands since, according to the provisions of Article 826 of Chapter 12 of the Laws of Malta, in the event that applicant's first demand is upheld, the judgement of which applicant is demanding the enforcement may be enforced in the same manner as judgements of the competent Court in Malta in terms of Articles 253 and 273 of the said Chapter 12;

3. That in the merits, and without prejudice to the foregoing, applicant's claims are unfounded in both fact and law and must be rejected with costs against applicant in view of the fact that no amount is due to applicant as requested since she has already appropriated payment of any amount due by way of maintenance, from the proceeds of the insurance policy Skandia Life Number MIP003585080 that were deposited in a bank account in Lugano for the minor children's needs. Respondent withdrew the amount of circa GBP 18,749 from the aforementioned bank account for purposes that were not authorised in terms of the contract dated 2nd July 2007 and furthermore, without respondent's authorisation as required;

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

5. That furthermore, and always without prejudice to the foregoing, it results that D O F misappropriated funds pertaining jointly to both spouses, which funds had to be shared equally between them in terms of the contract dated 25th March 2004, a copy of which is herewith attached, exhibited and marked as Doc. TAB1, and as shall further result during the course of these proceedings, and consequently, no amount can be due to applicant for any purpose, not even by way of maintenance for the minor children, since she is already in possession of sufficient funds pertaining to respondent to make good any amount claimed or that may result to be due by way of maintenance;

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

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

Saving additional pleas.

Counter-claim of defendant.

Declaration of Facts

1. That the parties were married on the 12th February 1993 in Switzerland, from which marriage two children were born, B Q who is today 17 years of age, and X, who is today 14 years of age.

2. That in virtue of a judgement awarded by 'Il Segretario Assessore della Pretura di Lugano' in the name of the 'Repubblica e Cantone del Ticano', dated 27th September 2007 (Doc. CHB2 attached to the Sworn Application), the Court in Lugano, while it pronounced the divorce between the parties upon the request of D O F, also approved the contract concluded between the parties on the 2nd July 2007 that regulates issues ancillary to the divorce;

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

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

The Reasons for the Claims

5. That the financial circumstances and means of Q N F have changed drastically over the years since the negotiation and conclusion of the parties' divorce, and in fact today Q N F is unemployed and has not been gainfully employed for the past few years;

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

7. That these facts are personally known to Q N F.

The Claims

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

1. Declare that the change in the financial means and circumstances of respondent Q N F justifies the variation of the contract dated 2nd July 2007 concluded between the parties, and the consequent reduction in the amount

established by way of maintenance contribution due by him in respect of the parties' minor children;

2. Authorise the variation of the said contract dated 2nd July 2007 in so far as concerns the respondent's obligation established in Clause 3 ("Mantenimento") for payment of the monthly sum of SFR1,815 due in respect of each child;

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

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

With costs against applicant D O F whose oath is hereby made reference to.

Sworn reply to the Counter-claim filed by plaintiff:-

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

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

3. That through his counter-claim, and as can be attested in the list of witnesses provided therein, the respondent is seeking to re-discuss the merits of the divorce concluded between the parties. The principal action relates to the enforcement of the divorce judgement of the 21st September 2007 and the contract of the 2nd July 2007 approved in the same judgement, and hence the function of this Court is limited and circumscribed by the law in terms of the provisions of Articles 826 et seq. of Chapter 12 of the Laws of Malta, and hence this Court cannot investigate the merits of the procedures before the Swiss courts that led to its judgement dated 27th September 2007;

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

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

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

7. That subordinately and without prejudice to the above, should the Court accept the requests of the respondent for a variation of maintenance clause towards his two minor children, any such variation is, in any case, to apply from the date of the judgement that pronounces such a variation, and hence any amounts due by the respondent as maintenance till the date of judgement

delivered must be paid by the respondent in accordance with clause 3 of the contract dated 2nd July 2007 as it presently stands.

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

Having seen that by a Court decree of the 5th May 2011 these proceedings are to be conducted in the English language.

Having seen that during the court hearing of the 17th November 2011 the Court ordered that the legal referee should hear evidence and prepare the legal report solely in respect of plaintiff's claims and not in respect of the the counter-claims of defendant who had to regularise his position in view of the first preliminary plea of plaintiff to the counter-claim filed by defendant.

Having seen the respective notes of submissions filed by both parties.

Having seen the judicial report presented and sworn by judicial referee Dr Phyllis Aquilina.

Having examined the acts of the case,

Having seen that during the court hearing of the 14th January 2016 the case was adjourned for today for judgment, limitedly on plaintiff's claims,

The Court shall now proceed to summarise the events leading to the present court case.

Summary of events leading to the present court case

The parties were married on the 12th February 1993 in Switzerland, from which marriage two children were born, B Q and X, who have now both reached the age of 18.

Plaintiff had requested the Pretura di Lugano in Switzerland to dissolve her marriage with defendant by divorce and to regulate all matters ancillary thereto, including maintenance. A judgement was delivered by *Il Segretario Assessore della Pretura di Lugano*, on the 27th September 2007, which judgement became final and res judicata.

The Court in Lugano also approved as an integral part of the same judgment, a contract signed between the parties to regulate all matters ancillary to the divorce, which inter alia provides amongst other things, that defendant is to pay maintenance for his two minor children in the following manner : the sum of

CHF1,645 per child when they are between seven and twelve years, and the sum of CHF1815 per child, when they are between thirteen and eighteen years. Payment was to be effected every fifth of the month in advance.

Plaintiff claims that defendant has defaulted in the payment of maintenance dues as of January 2009, and thus seeks to enforce the aforementioned judgment in Malta and recover all dues in respect of maintenance from defendant.

Among other things defendant pleads that plaintiff has already appropriated payment of any amount due by way of maintenance, from the proceeds of the insurance policy Skandia Life Number MIP003585080 that were deposited in a bank account in Lugano for the minor children's needs, and that she misappropriated funds pertaining jointly to both spouses, which funds had to be shared equally between them in terms of the contract dated 25th March 2004. He thus pleads that no amount can be due since she is already in possession of sufficient funds belonging to him, to make good for any balance due.

Plaintiff's First Claim – To Enforce in Malta Judgment of Pretura di Lugano

Plaintiff is hereby requesting this Court to enforce the parties' divorce judgment pronounced by the Pretura di Lugano on the 27th September 2007, and which has since become a definitive judgment.

For a just determination of such claim, the Court must endeavour into ascertaining, first of all, that it has jurisdiction to enforce the said judgment in Malta, and secondly, that all the requisites laid down in Article 825A to Article 828 of the Code of Organisation and Civil Procedure are satisfied.

It results uncontested that defendant has in fact established his permanent residence in an apartment in Mellieha. This is confirmed by defendant himself in his affidavit (fol 227 et seq). The present procedure thus falls within the ambit of Article 721(1) (b) which states that the civil courts of Malta shall have jurisdiction in actions concerning:

(b) any person as long as he is either domiciled or resident or present in Malta.

On the basis of this provision, the Court is thus satisfied that it has jurisdiction to try and determine this action.

As regards the enforcement by this Court of the judgment of the Pretura di Lugano, reference is hereby made to Article 826 of the Code of Organisation and Civil Procedure, which states that:

826. Saving the provisions of the British Judgments (Reciprocal Enforcement) Act, any judgment delivered by a competent court outside Malta and constituting a res judicata may be enforced by the competent court in Malta, in the same manner as judgments delivered in Malta, upon an application containing a demand that the enforcement of such judgment be ordered.

With respect to whether the Pretura di Lugano was the competent court to pronounce the divorce between the parties and all ancillary matters, this Court embraces the Judicial Referee's findings on the matter, and declares that the judgment in issue satisfies both requirements since it was both given by a competent court and also constitutes a final and definitive judgment. The judgment is in fact declared to be a res judicata by La Cancelleria della Pretura di Lugano Sez. 4 as of the 5th October 2007 (fol 20).

Article 827 (1) of the Code of Organisation and Civil Procedure provides that the provisions of Article 826 shall not have effect:

- (a) if the judgment sought to be enforced may be set aside on any of the grounds mentioned in article 811;*
- (b) in the case of a judgment by default, if the parties were not contumacious according to foreign law;*
- (c) if the judgment contains any disposition contrary to public policy or to the internal public law of Malta.*

The judgment in hand also satisfies the tests hereabove provided for, as it does not fall within the ambit of any of the grounds therein listed. The Court thus finds that plaintiff's first claim merits to be upheld and declares that he judgement delivered by the Pretura di Lugano, Switzerland in the names D O F vs. Q N F dated 27th September 2007, including the contract that was signed by the parties on the 2nd July 2007 in order to regulate matters ancillary to the divorce and which is declared to form an integral part of the operative part of the judgement, as enforceable in Malta and thus orders its enforcement in terms of Articles 825A-828 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.

Plaintiff's second, third and fourth claims – sums due by defendant in respect of maintenance arrears

Plaintiff is requesting this Court to declare that defendant owes her the sum of €28,804.42 in maintenance arrears for their two minor children from January 2009 to date; to liquidate any further sums of money that the applicant is

entitled to till the day of the final judgement is delivered by way of maintenance for her two minor children B Q F and X F and thus to order defendant to pay such sums.

As per clause three (3) of the parties' contract signed on the 2nd July 2007, which forms an integral part of the aforementioned judgment, defendant was to pay plaintiff by way of maintenance CHF1,645 per child whilst they were between 7 and 12 years of age, and CHF 1,815 per child whilst they were between 13 and 18 years of age.

As per the parties' agreement abovementioned (fol 10 et seq), their elder son B Q F was born on the 5th May 1994, and thus turned 13 years on the 5th May 2007, and 18 years on the 5th May 2012, whilst their younger daughter X F was born on the 23rd December 1996, and thus turned 13 years on the 23rd December 2009 and 18 years on the 23rd December 2014.

From the evidence produced, in particular from the bank statements in plaintiff's name, this Court notes that payment of such sums due by way of maintenance occurred as to 50% from the escrow account, whilst the remaining 50% was to be paid directly from defendant to plaintiff. In cross-examination (fol 391 et seq), plaintiff herself confirms that payments were regularly received from the escrow account and that her claim was limited to that part of the payment which defendant was bound to pay him directly.

Plaintiff exhibits UBS bank statements a fol 77 et seq of the court file. Her contestation of defendant's payments start in January 2009. Based upon such statements and upon the parties' declarations and submissions, the Court is hereby reproducing the judicial referee's workings on the matter at hand:

“38. According to Clause Three, without taking into account the rise in maintenance that was due on the basis of the increase in the Retail Price Index, to which however plaintiff never referred, and on which she did not present any evidence, defendant was bound to pay plaintiff the following sums by way of total maintenance, from January 2009 onwards, on the 5th day of each month, and on a monthly basis:

B Q F CHF 1815 (until 5th May 2012)

X F CHF 1645 (until December 2009)

CHF 1815 (from January 2010 until December 2014)

Given that defendant received one half (1/2) of said sums due from the escrow account, therefore defendant was bound to pay directly in favour of plaintiff the following sums on a monthly basis:

B Q F CHF 907.50 (until 5th May 2012)
X F CHF 822.50 (until December 2009)
CHF 907.50 (from January 2010 until December 2014)

39. According to the statements which plaintiff exhibited¹, as from January 2009 onwards, she received only the following payments from defendant:

January 2009	-----
6th February 2009	CHF 1730 (CHF 822.50 + CHF 907.50)
5th March 2009	CHF 1730
3rd April 2009	CHF 1730
5th May 2009	CHF 1730
10th June 2009	CHF 1264.90
July 2009	CHF 232.55

40. Thus, in terms of Clause Three of the Contract, defendant failed to pay in favour of plaintiff the following sums:

B Q F

CHF 907.50 for January 2009*, June 2009*, July 2009*, August 2009, September 2009, October 2009, November 2009, December 2009, January 2010, February 2010, March 2010, April 2010, May 2010, June 2010, July 2010, August 2010, September 2010, October 2010, November 2010, December 2010, January 2011, February 2011, March 2011, April 2011, May 2011, June 2011, July 2011, August 2011, September 2011, October 2011, November 2011, December 2011, January 2012, February 2012, March 2012 and April 2012.

Total CHF 32,670

X F

CHF 822.50 for January 2009, June 2009*, July 2009*, August 2009, September 2009, October 2009, November 2009 and December 2009; CHF 907.50 monthly from January 2010² to December 2014 (60 months less CHF 387.86 for period between 24th December 2014 to 5th January 2015, both days included)

1 'Fol 80 et seq'

2 'Selena turned 13 years on 23rd December 2009, and not 23rd December 2008 as declared by plaintiff in her affidavit, fol 73'

Total CHF 6580 + CHF 54,450 - CHF 387.86 = CHF 60,642.14

41. This means that, until plaintiff filed this action, defendant had failed to pay the following total sums:

B Q F CHF 19,965

X F CHF 19,285

Total CHF 39,250

**Less Part Payments for June 2009 and July 2009, totalling to CHF 1,497.45, and less Extra Payment of CHF 59.30 mentioned in plaintiff's advocate's letter, and which plaintiff herself instructed defendant to deduct from January 2009 maintenance*

Total CHF 37,693.25

42. In terms of Clause Three of the Contract, the total outstanding maintenance due on the part of defendant, to plaintiff, for both children, after the filing of this action up until their respectively turning eighteen years. which is the date of termination of the obligation of maintenance in terms of the Contract, amounts to **CHF 54,062.14**.

43. The average rate of conversion of the Swiss Frank currency into Euro currency in February 2011 (date of filing of this action) was 0.771143, whilst the current average rate of conversion of the Swiss Frank Currency into the Euro Currency (June 2015) is 0.955949.³

Given that the legal tender in Malta is the Euro currency, and that the Judgment is being declared enforceable, to be enforced, in Malta, the amounts due are as follows:

Outstanding Amount at time of Filing of the Action €29.066.8942⁴
Additional Outstanding Amount After Filing of the Action €52.471.31 ”

The Court adopts as her own the judicial referee's workings on the amounts due by defendant to plaintiff with respect to maintenance arrears due for his minor children who have now turned of age. However with respect to the amounts

³ *The undersigned used the XE Currency Data API, <http://www.x-rates.com/>*

⁴ *'This outstanding amount exceeds the liquidated arrears for the term prior to the filing of the action which plaintiff demanded in this action. This Court is however bound by the terms of plaintiff's demands and therefore cannot award a sum exceeding that mentioned in the demand.'*

payable by respondent in the Euro currency, this Court is of the opinion that these amounts should be converted into Euro using the currency rate applicable at the time of judgment.

The present currency rate of conversion of the Swiss Frank into the Euro stands at 0.91262⁵ and thus the amount of CHF37,693.25 converted into Euro results in the sum of €34,399.61 representing maintenance arrears due by defendant to plaintiff at the time of filing of the present proceedings.

The Court agrees with the judicial referee who points out that this Court is bound by the remits of the plaintiff's sworn application, by virtue of which she claims liquidated maintenance arrears in the amount of €28,804.42⁶ from January 2009 till the day of filing of these proceedings. The Court shall thus limit its adjudication to the sum so requested by plaintiff.

As regards the amount owed by defendant to plaintiff with respect to maintenance payable for their children after the filing of these proceedings until they reached majority age, this Court concurs with the judicial referee that the amount payable is CHF 54,062.14. The Court however varies the conversion of the said amount into Euro as carried out by the judicial referee, and declares that according to the current exchange rate from Swiss Franks into Euro, defendant owes plaintiff the amount of €49,338.19 with respect to maintenance payable for their children after the filing of these proceedings until they reached majority age.

Defendant's plea based on set-off

Defendant claims that he does not owe any monies in terms of clause three of the contract, since any amounts he may have been obliged to pay were extinguished through set-off with plaintiff's alleged misappropriation of the Skandia Life Policy which were deposited in a UBS Account for the need of their son B Q F; and also with plaintiff's alleged receipt of a sum due to C. F Fashion Limited - a company which both parties had set up during their marriage, and from which defendant should have received one moiety.

Article 1199 of the Civil Code provides for the instances in which set-off may not take place. Sub-article (c) provides that one of these instances is *'in the case of a debt in respect of maintenance not subject to attachment.'*

5 As at 15/03/2016 [<http://themoneyconverter.com/CHF/EUR.aspx>]

6 The Court also notes a discrepancy between the amount claimed as per plaintiff's second claim and the amount mentioned in her fourth request. Given that the sum in question forms the merit of the second claim, the Court shall consider the amount therein mentioned as the correct amount being claimed.

Article 381 of the Code of Organisation and Civil Procedure on the other hand provides that among the property not subject to attachment is:

“(e) any sum due for maintenance whether awarded officio judicis, or by public deed if the debt itself is not due in respect of maintenance”

In the present case, given that the defendant's claim for set-off does not in any way arise in respect of maintenance, such plea may not be upheld. Even more so when the maintenance is not due for plaintiff herself but for their two minor children. Such monies are thus not subject to attachment and may not be set-off as per defendant's pleas. This without prejudice to any right of action which defendant may have against plaintiff for the recovery of any monies which he claims are due to him.

Decide

For the aforementioned reasons, this Court decides *in parte* this case as follows;

- (i) Rejects all defendant's pleas and upholds plaintiff's claims,
- (ii) Declares that the judgment delivered by the Pretura di Lugano, Switzerland in the names D O F vs Q N F dated 27th September 2007, including the contract signed by the parties on 2nd July 2007 forming an integral part thereof, is enforceable in Malta, and hence orders its enforcement in terms of Articles 825A-828 of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta;
- (iii) Declares defendant to be plaintiff's debtor for the sum of twenty eight thousand eight hundred and four Euro and forty two cents (€28,804.42) representing maintenance arrears owed to plaintiff for the two minor children B Q F and X F between January 2009 and February 2011;
- (iv) Liquidates the sum of forty-nine thousand three hundred and thirty-eight Euro and nineteen cents (€49,338.19) representing maintenance arrears due by defendant to plaintiff for their two minor children B Q F and X F between March 2011 and December 2014;
- (v) Orders defendant to pay plaintiff the sums so liquidated with immediate effect.

With costs and interests at the rate of 8% per annum on the sum of €28,804.42 with effect from 21st February 2011; and on the sum of €49,338.19 with effect from the date of this judgment, up till the date of effective payment, against defendant.

The Court orders that the case continues in respect of the counter claims filed by defendant.

Judge

Deputy Registrar