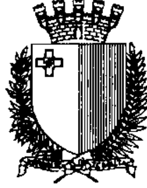

FIL-QORTI CIVILI
(SEZZJONI TAL-FAMILJA)

L-ONOR. IMHALLEF ANTHONY VELLA

Hearing held on Thursday 14th February, 2019

Rikors nru: 52/05 AGV

A in her own name and by decree of the 1st March, 2005 as curator ad litem of her minor daughter B

Vs

Av. Dr. Vincent Galea and PL Louisa Tufigno as curators to represent the absentee C (also known as D)

The Court,

Having seen the application filed on the 23rd February, whereby she pleaded and requested the following:-

1. That the plaintiff AE, who has been residing in Malta, together with her daughter, BE since 1996, on the 31st May, 1985, married defendant C (Dok. A) and from this marriage they had a daughter, the aforementioned BE who was born on the 13th September, 1990 (Dok. B), who today is still a minor; and
2. That on the 21st November 2001 the marriage between the parents of BE was terminated due to divorce (Dok. C) and the defendant abandoned his daughter together with her mother here in Malta; and
3. That since 2001 defendant has not paid any maintenance for his minor daughter;
4. That on the 10th June, 2003 the Court of the Judicial Division No.154 of the Khoroshevo-Mneviki, District in Moscow, Russia, ordered that one-fourth of his salary or any other form of income that defendant receives shall be given to defendant's daughter as maintenance, as this results from the annexed copy of the decree; and
5. That the defendant is not paying any maintenance that he is obliged to pay according to law, to contribute towards the upbringing and the education of his minor daughter as he should; and
6. That plaintiff has been informed that defendant has already sold his immovable property in Russia and nonetheless he still failed to pay plaintiff maintenance for his daughter; and
7. That the upbringing of the daughter is being paid for by plaintiff, although she does not work; and
8. That the plaintiff and her daughter are being prejudiced because of defendant's failure to pay maintenance; and
9. That on the 10th December, 2004, by decree number 1263/04 in the names AE vs C, as later extended (Decree185/05), the Civil Courts, Malta (Family Section), presided over by Mr. Justice Geoffrey

Valenzia, authorised the plaintiff to proceed with this application, save with the request for curators to be appointed for the absent defendant;

10. That plaintiff nominee AE is also *de facto* legal representative of her minor daughter BE.

Hereby defendant must state why for the abovementioned reasons, this Court must not:

1. Decide that defendant is responsible for payment of maintenance for his minor daughter BE;
2. Liquidate the maintenance to be paid by defendant and give the directives it deems necessary;
3. Condemns defendant to pay plaintiff as a representative of her minor daughter BE, that maintenance, so liquidated, together with an established day, time, place and way of payment;

With costs, including those related to the warrant of prohibitory injunction number 2244/04 against defendant.

Having seen the Note of Defence of Defendant, who pleaded and submitted as follows:-

1. That they are not aware of the facts of the case and hereby reserve their rights to present further defences at an ulterior stage;
2. That in any case, this case cannot proceed further because the marriage between the parties – from the documents exhibited with the application – was not celebrated in Malta. That it also results not being registered in Malta;

3. That even if the plaintiff pleas fall within the jurisdiction of these Courts, this Court has to declare that the procedure followed is not suitable and instead they had to follow a procedure ad hoc;
4. Save for further defences.

Having seen that defendant withdrew his second and third defence[1]

Having seen the nota with attached documents.[2]

Having seen the itemised list of expenses of plaintiff for her daughter.[3]

Having seen the judgement delivered by the Civil Court (Family Section) dated 27th June, 2006 NC.[4]

Having seen the retrial judgment delivered by the Civil Court (Family Section) dated 9th November, 2016 (Rik.163/13) RGM.[5]

Having seen the Recission of Transfer of Property subsequent to judgment as instructed by the Civil Court.[6]

Having seen defendant's statement of defence whereby he submitted and pleaded as follows:-

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[1] Vide note of proceedings at fol. 48.
[2] Vide fol.50.
[3] Vide fol. 63.
[4] Vide fol. 73.

[5] Vide fol. 271 of attached file 163/13
[6] Vide fol.122 of file.

1. The lawsuit being proposed by A et. is irritual and null because the effects of Decree number 1263/2004 which had authorised her to proceed according to law within a two month period had lapsed and although she had obtained another decree extending the two month period by a further two months (Decree 185/2005), yet she did so when the two month period had already expired [vide "Francis Schembri vs Angiolina sive Lina Schembri et.", Appeal 10th November, 2008].

2. Without prejudice to the above, this Honourable Court needs to abstain from taking cognisance of E's claim because BE for whom maintenance is being claimed is no longer a minor and having been born on the 13th September, 1990 she has also reached the age of 23 years.

3. Moreover, the merits of the case already constitutes "res judicata" having been decided by a prior judgement delivered by the Court of Magistrates of Juridical Division N 154 Khoroschevo – Mhevnbiki District of North-West Administrative Okrup of Moscow on the 10th June, 2003 which had ordered the father D to pay the mother A as maintenance for the then minor daughter B a particular amount which he eventually paid in full.

4. Finally, E's claims are unfounded both in fact and in law because applicant has over the years adequately provided for his daughter.

5. Subject to the submission of further pleas according to law.

Having seen the Note of Ulterior Pleas of defendant who submitted and further pleaded as follows:-

1. Without prejudice to the pleas already submitted, defendant nominee further pleads the five year prescription in accordance with Article 2156 (b) and (f) of Chapter 16 of the Laws of Malta.

2. Subject to the submission of further pleas in accordance to law.

Having seen the parties' notes of submission.[7]

FACTS

1. Plaintiff married defendant on the 31st May, 1985[8] and the Civil Acts Registry and the certificate of marriage number VI-M10 N 338250 was issued by Civil Acts Registry on the 31st May, 1985. They had a daughter BE who was born on the 13th September, 1990 in Moscow.[9]

2. On the 14th December, 1995, they purchased an apartment 4, Veronica Flats, Perellos Str, St.Paul's Bay as per deed published by Notary Dr. John Gambin. Plaintiff did not appear on the deed of sale because at the time she states that she could not travel to Malta, but she denies ever giving a power of attorney to defendant and infact she admits she is surprised that the notary never questioned whether defendant was married at the time of the purchase. In terms of Article 34 of the Family Code of the Russian Federation, the plaintiff states that anything bought during their marriage belongs to the couple. This place was generally used as a summer residence and according to the plaintiff it was purchased with family money. Plaintiff

[7] Vide fol.200 et seq. of the file
[8] Vide fol.6/7 of the file.

[9] Vide fol.10 of the file.

is convinced that the money was transferred to Bank of Valletta through money from an international bank and she denies that it could have been transferred by defendant's mother through Bank One Colombus. Defendant has a different version in this respect and states he had come to Malta in 1993 and fell in love with the place. He became interested in this apartment at St. Paul's Bay, that was still under construction. He states that the price was approximately €45,000, but he did not have the finances to purchase it, so he tried to convince his mother FG to purchase the place, but although she intended to come to Malta, she fell ill and instead donated the money to him to purchase the place in Malta. Defendant states that plaintiff was aware of the fact that he was purchasing the property in his own name, so much so that when he came to Malta to sign the contract, she never gave him a power of attorney.

3. On the 7th January, 2000, plaintiff and her daughter moved permanently to Malta and lived in the apartment at St. Paul' s Bay, for which defendant never asked for rent and on the 21st November, 2001, the parties divorced as plaintiff states that defendant had a gambling problem and she was receiving threats from the creditors. Defendant actually confirms that in 2015 he had a serious gambling problem, though since 1995 he used to gamble frequently. From the time of the divorce onwards, plaintiff states that defendant was not in contact with them and he had disappeared and therefore they never divided their property according to the divorce decision. This is also confirmed by BE, the parties' daughter. At the time, their daughter was 11 years of age and at no point in time did he participate in her upbringing. Her husband she states was always registered at the following address – Moscow 9, Michurinsky Avenue, Apartment 100.[10]

[10] Vide Dok.E a fol. 100 of the file.

Defendant admits that during their marital problems, although he had a degree in economics and finance, he was in partnership in a company called Nartos that was involved in the tourism industry and he was president of the said company. He also adds that he had a 50% shareholding and although the company started off with €500, then it had much more than that. He also confirms that today the company no longer exists and had practically stopped functioning since 2000. He then states that he worked with Atlas and a Russian company called Skyfort. He admits to have also worked in Belarus and Russia too.

4. Plaintiff explains that when in 2002, she and her daughter returned to Moscow to visit relatives, she had gone to the apartment that was their matrimonial home, Flat 145, 30 – building 2, General Glagolev Str, Moscow, she discovered a certain amount of documents related to property her husband owned: -

(i) Contract of commercial lease of his apartment Moscow 9, Michurinsky Avenue, Apartment 100;

(ii) Power of attorney issued on the 7th December, 2000 to HI authorising him to sell his apartment abovementioned at a price of his own discretion[11] and another power of attorney issued to JK issued on the 6th November, 2001 also authorising him to sell the abovementioned apartment at a price of his own discretion.[12] Plaintiff states that she is unaware of who these third parties might be.

[11] Vide Dok.F a fol. 101 of the file.

[12] Vide Dok.G a fol. 102 of the file.

(iii) Purchase and sale contract of apartment Moscow, 2 Petrovsko-Razumovskiy proezd, apartment 18, which defendant had inherited from his aunt.[13]

5. Plaintiff states that despite defendant having leased his apartment and having sold the apartment that he had all inherited from his aunt, he never passed on any maintenance to their daughter. She says that he had inherited the property together with his brother L. Defendant confirms that he had inherited these properties one from his mother, that was a house and for which he sold for 75,000 dollars and the others were apartments he inherited from his aunt and he had sold them for 18,000 and 14,000 dollars respectively.

6. On 26th July, 2002, plaintiff explains that she and her daughter were returning to Malta and they were impeded from doing so, since they found out at passport control, that defendant had issued an application to prevent their daughter from departing from Russia. The parties' daughter states that she and plaintiff used to visit Russia every summer to visit her grandparents. It was because of this, plaintiff explains, that she had to initiate proceedings to ask authorisation to return to Malta and in fact the court granted her request on the 1st November, 2002.[14] Both plaintiff and her daughter confirm that during such period, defendant did not even contact them. Their daughter states that she was very upset about all these circumstances and she wanted to return to Malta to her friends and school. During this time spent in Moscow, B states that she celebrated her 12th birthday, but defendant never called or sent her birthday wishes in any way. She adds that this happens till this very day, when she is 27 years of age

[13]Vide Dok.H a fol.103 of the file.
[14] Vide Dok.H1 a fol. 104 of the file.

(at the time of evidence in 2017) and married on the 13th November, 2011. Under cross-examination she denies that defendant tried calling her, but her mother had objected to him talking to her directly.

Defendant however, gives a conflicting view, in that he states that plaintiff initiated proceedings because she believed that her daughter had chances of a better education in Malta. Despite the fact that he opposed this idea, the Court upheld the plaintiff's request. He denied under cross-examination, that the reason why plaintiff wanted to leave was because she was being threatened by creditors.

7. Plaintiff explained that in 2003, considering that she was maintaining her daughter alone, she had sold her apartment in Moscow, namely, Flat 145, 30-building 2, General Glagolev Street for the price of 32,999 US dollars. She decided to inform the defendant and when she went to look for him at his usual registered address, namely Apartment 9, Michurinsky Avenue, apartment 100, she discovered that he was no longer registered there, but he had moved to Roshal 8, Mira Street, apartment 12, Moscow. However, she explains, that when she went to look for him there, she was informed by the residents there, that defendant had never resided there. However, under cross-examination she explains that defendant had refused his share so as to obtain a right to register the Avenue apartment. Plaintiff insists that defendant spent three years ten months without registration.

   Defendant believes that plaintiff transferred the matrimonial home without his consent and without his knowledge, heavily undercutting its value.

Plaintiff denies having misled Notary Dr. John Gambin for the sale of the matrimonial home by not stating that she was married, because he didn't have his status written on his passport.

8. On the 10th June, 2003, the Horoshovo-Mneviki court ordered the defendant to pay maintenance to their, at the time minor daughter as from the 12th May, 2003 until she reaches 18 years of age. Until then plaintiff states that she had been paying for all their daughter's needs such as schooling, clothes, food, books and private lessons, entertainment as well as all her personal needs. According to the judgement, the defendant was ordered to pay one-fourth of his income as maintenance, although plaintiff confirms that to date she had not received any payment from him. Plaintiff continues to explain that court curators were appointed to try to establish defendant's place of residence and on the 19th July, 2005, the Ministry of Internal Affairs of Russia informed the court curators that defendant's last address was Samora Machel Street 4-1-8.[15] However, she stated that whenever her lawyer tried to send correspondence to defendant to this address, it was always returned back and therefore they had informed the Ministry of Internal Affairs.[16]

   Defendant has contrasting evidence and he explains that he only became aware of the judgement delivered on the 10th June, 2003 by the Court of Magistrates of Juridical Division N 154 Khoroschevo – Mhevnbiki District of North West Administrative Okrup of Moscow, in 2009 when he had to leave Russia. [17] He was made aware that he was condemned to pay his

[15] Vide Dok.I a fol. 107 of the file.
[16] Vide Dok.J a fol.109 of the file.
[17] Vide DOK.H attached to retrial application.

daughter one-fourth of his salary from 2001 till 2008, that is when his daughter reached 18 years of age.

9. Plaintiff explains that on the 2nd July, 2013, she had received a letter from defendant's lawyer, requesting her to refund the sum of Rub 499,968 together with 8% interest, he stated that this was according to a judgement delivered by the Moscow court on the 6th September, 2006.[18] She felt that defendant had deceived his lawyer. She explained that the time for the request for payment had expired, because three years had elapsed from the 6th September, 2006.[19] She also denies the defendant's pretension that he only got to know that he had to pay maintenance in 2009, since she was sure he got to know beforehand and that was when he opened the civil law case regarding the property Flat 145, 30-building 2, General Glagolev street in 2006.

10. Through Dr. Henry Antoncich, plaintiff found out that in accordance with the judgement dated 10th June, 2003, defendant had paid the sum of RUB. 102,824.63 on the 15th July, 2010 as maintenance money, when their daughter was 20 years old and she states that she had never taken this money and up to this day they should still be in court and which should amount to about €1,600. She also confirmed that between the 19th January, 2007 and the 27th August, 2010 defendant had no domicile in Moscow.[20] Defendant infact confirms that on the 15th July, 2010 he had paid his debt in full to the Russian Court Bailiffs by depositing in a bank account provided by plaintiff the amount abovementioned, together with the enforcement expenses that amounted to RUB 7,197.72[21]

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[18] Vide Dok.K a fol.111 of the file.
[19] Vide Dok. L a fol.113 of the file.
[20] Vide Dok. N a fol 116 of the file.
[21] Vide Dok.G of the retrial application

11. Plaintiff admits that since 1999 she has been the sole parent to maintain her daughter and she paid for all her education expenses. At the time she was studying to become a doctor and prior to this, she had also obtained a degree in psychology and in nursing studies. Plaintiff explains that for her daughter to follow these courses she had to pay €21,500 by way of tuition fees. She confirms that she maintained her daughter till she reached the age of 21 as she then got married. She had also paid for her wedding and gave her €10,000 to help her buy an apartment.

12. Plaintiff explains that she is expecting defendant to make up for his payment of alimony, for which she calculated that his share would be €58,455.65, on the basis that she was paying €10,628 per year for 11 years, amounting to €116,911.30. Plaintiff explained that she made such payments because after the sale of the matrimonial house, she invested the funds in the family business (run by father, who later passed away and brother) called Uniterms Limited in Russia and every month she states that money is sent to her, approximately €2300. Usually she would get the money in cash when she visited Moscow.

On the other hand, defendant states that he had already paid up further maintenance for his daughter because plaintiff had sold their matrimonial home, precisely 30-2-145 General Glagolev Street, Moscow to M, without his consent and without his knowledge. On the 6th September, 2006, the Higher Court in Moscow, he explains, overturned the judgement of the Lower Court which had declared plaintiff's transfer as null and void. However, the Higher Court considered the purchaser to be *bona fide,* it only ordered plaintiff to pay him his share in the amount of RUB 488,

968,[22] though he didn't proceed because he was aware of the fact that his wife was taking care and bringing up their daughter.

Defendant also claims that plaintiff undercut the price firstly for tax purposes so that she would only pay one-half of the taxes due by her on the actual sale and secondly to avoid refunding to plaintiff should she had claimed her share. He states that the average price for the apartment in 2003 was of €60,000 and on the sale contract, plaintiff undercut the price by one-half its value.

Defendant also claims that he had allowed plaintiff to live here in Malta together with their daughter and this only served to explain that plaintiff had been spared from having to pay large sums of money to be paid as rent.

13. On the 27th June, 2006 the Civil Court (Family Section) in the said names of the parties in the above case decided in favour of plaintiff and declared the "***defendant to be responsible for the payment of maintenance of his daughter B; declares maintenance due to be paid in terms of sub-section (6) of the above section and orders that one third (1/3) of the aforementioned property be assigned to plaintiff in full and final satisfaction and payment of maintenance due, past, present and future for the minor child.***"[23]

14. Defendant filed a retrial application on the 13th August, 2013 (Rik.163/13 RGM) that was decided on the 9th November, 2016 wherein the Civil Court (Family Section) decided as follows: -

[22] Vide Dok.E in the retrial application.
[23] Vide fol.73 of the file.

"Rejects defendant's pleas and accedes to plaintiff's claim,

1. ***By virtue of Article 811 (a) and (b) of Chapter 12 of the Laws of Malta, revokes and annuls the judgment delivered by this Court as differently presided on the 27th June, 2006 in the names "AE pro. et. noe. vs Doctor Vincent Galea et. nomine" (Citaz.Nru. 52/02 NC);***

2. ***Orders the recission of the contract published by virtue of that judgment on the 30th March, 2007 by Notary Dr. Sylvana Borg Caruana and for this purpose appoints Notary Dr. Sylvana Borg Caruana to publish the relative contract of rescission within one month from today and appoints Dr. Anna Mallia as curator to represent any contumacious party on the deed;***

3. ***Orders the retrial of the lawsuit.***

4. ***With costs against respondent A."*** [24]

15.L, defendant's brother confirmed that their mother FG donated in1995 all her savings to defendant for the purchase in his name of an apartment away from Malta. He explained that he was aware of this because his mother had asked for his permission before doing so. He said that he had sold an apartment for the sum of USD 78,000 and his mother had asked him to give part of the sum of money to defendant because the latter needed to buy an apartment. Infact, he says that the apartment was purchased in his name and in his mother's. He had helped his mother transfer the money due to defendant from Ohio and then to Malta.

[24] Vide fol.271 of retrial file attached.

The witness explains that his mother only got refugee status in 1993 and at that time they did not have the money because the property was not sold as yet. But it all depended on the political situation to obtain the said status. On the 5th October, 1993 they were given the status, but only him and his mother moved. He waited for two years before moving, because initially he had plans to marry and then he didn't. He explained then that the apartment was sold in 1994, and the proceeds were deposited in a deposit box at the Bank and then the money was transferred from a company of a person he knew to the United States and deposited in his name. He did so because his mother couldn't have money in her name so as to be eligible for medical aid.

16. N on behalf of the Commissioner for Inland Revenue confirmed that defendant had filed a request to purchase the Flat number 4, forming part of a block of 4 flat with underlying garage named Veronica, Perellos Street, St. Paul's Bay. He reiterated that the AIP permit was issued on the condition that defendant establishes his ordinary residence here in Malta. He also produced two documents to confirm the proof of funds, which show a transfer from One Colombus to Bank of Valletta Limited in the sum of USD 9000, equivalent to Lm3319, where defendant had an external account with the St. Julians branch and he had deposited an amount of Lm17.000.91, all originating from foreign banks.[25]

    The said witness also confirmed that the application for the issuing of the AIP did not reflect defendant's marital status and this was something they never entered into, but whenever spouses are applying jointly, they would appear together on the application.

[25] Vide Dok. AF1 and AF2 a fol, 188/189 of the file.

Having considered: -

CONSIDERATIONS

The Irrituality and Nullity of the Lawsuit

Having examined the pleas and defence brought forward by the parties, the Court can establish the following sequence of facts with respective to this defence: -

(i) Plaintiff filed mediation proceedings on the 9th December, 2004 before the Civil Court (Family Section)[26] and these were thrown out by a decree of the Court on the 10th December, 2004 stating that a request for maintenance does not entail mediation proceedings and they had to proceed forthwith with a lawsuit.[27]

(ii) On the 17th February, 2005, plaintiff filed another application asking the court to grant her an extension of time for the opening of the lawsuit due to the fact that the two-month time period within which the suit had to be opened, elapsed[28] and this request was granted on the 18th February, 2005 by court decree 185/2005.[29]

(iii) Plaintiff filed her lawsuit on the 23rd February, 2005.

[26] Vide Dok.J a fol.93 of the retrial file.
[27] Vide fol.94 of the retrial file.
[28] Vide fol.101 of the retrial file.
[29] Vide Dok. J a fol. 102 of the retrial file.

Defendant insists that the civil action is null and void, once the plaintiff failed to file the court case within two months from the initial decree, even more so, because when she filed her request for an extension, the two-month period had already elapsed.

Plaintiff argues that this is not the case and it was abiding by the law when it instituted the case upon being granted a further extension by the court decree dated 18th February, 2005, so much so that the case was filed on the 23rd February, 2005.

Plaintiff quotes from Article 37 (5) of the Civil Code:-

"(5) The decree referred to in subarticle (3) shall cease to be enforceable if the action for separation is not instituted within two months of the date of the decree or within such longer period as the court may in the same or in a subsequent decree allow."

Defendant refers to the case **Francis Schembri vs Angelina sive Lina Schembri et**.[30] and states that the court there had confirmed that if a lawsuit fails to be filed within the two-month period according to Art.37 (3) of the Civil Code, then it ceases to be enforceable. This Court begs to differ with this interpretation because this judgement a aforementioned further states that: -

"This provision is only dealing with a matter of enforcing a decree and no more no less. This by no means can interpreted as meaning that on the lapse of two months as stipulated in Article 37 (5) the court order is cancelled ipso iure,

[30] Decided 10.11.2008 App. 47/2007

…This does not mean that on the lapse of the two months the decree loses all its validity or it becomes null, but it doesn't constitute any longer an executive title. The Court believes that for there to be a change there must be another court order. " (translated by this Court).

Having considered this plea in the light of the law and jurisprudence, it is evident that once the Court authorised an extension of the time by its decree on the 18th February, 2005, defendant's defence is no longer sustainable.

<u>Court's Abstention on the Maintenance Claim as B Is Now Of Age</u>

Defendant argues that since the case is subject to a retrial today and the parties daughter was 26 years of age at the time when defendant was notified with the case on the 28th November, 2016 , in consequence of the retrial, it was superfluous to continue with the merits of the case.

Plaintiff disagrees on this point, considering that since the case is ongoing further to retrial proceedings, one is thrown back to when the case originally started.

In truth, the case has taken over ten years from the date it was filed and meanwhile the parties' daughter not only grew and attended University according to the evidenced produced by her mother, but she also got married on the 13th November, 2011. The Court disagrees with the defence put forward by defendant in that the case quoted **Theresa Caruana Gatto et. vs Theresa Bonanno et. (App.277/1987, decided on the 2nd December, 2005)** made it very clear that in case of a retrial, the facts of the case should revert to the time when the original application was filed. Moreover, defendant's citing of another case **Cristino Muscat vs Cristina Muscat (Prim' Awla decided 12th July, 2002)** is totally

irrelevant because it simply did not decide the third plea which was a request for care and custody of the minor child, who by the time the case was decided, had reached majority, so it was pointless to determine such an issue.

In this case, there was an original judgement that was decided in 2006 and then there was a retrial that was decided in 2016, annulled the first judgement and ordered for a fresh start. The lengthy proceedings cannot prejudice at any point in time any of the parties and therefore they should return to the original *status quo* they were in when the case was initiated in 2005.

Thus, defendant's plea in this respect is unfounded.

RES JUDICATA

Defendant has also raised the preliminary plea that the case has already been decided by a Russian Court, precisely the Court of Magistrates of Juridical Division N 154 Khoroschevo – Mhevniki District of North-West Administration Okup of Moscow on the 10th June, 2003 and hence once the maintenance issue has already become final and conclusive, therefore it is *res judicata.*

In the judgment **Dottor Jose' Herrera noe. vs Anthony Cassar et.noe**.[31] the Court reiterated:-

"L-eccezzjoni ta' "res judicata" f'certi kazijiet, tiggenera certa diffikolta'. Dak li tista' taddotta favur taghha l-kumpanija konvenuta, hija duttrina kkwotata

[31] App.Kumm. deciza 5 ta' Ottubru, 1992

minn din il-Qorti – Sede Inferjuri – f'sentenza fl-ismijiet Nicola Camilleri vs Carmela Pace tal-31 ta' Mejju, 1911 (Vol. XX I. . 324):

"tra gli estremi della cosa giudicata si annoveri l'identita' dell'oggetto, pure tale identita' non e' uopo che sia assoluta (Aubry et Rau paragrafo 769 e Laurent XX, 56 eseg) e potrebbe farsi luogo all'eccezione del giudicato anche quando l'oggetto dedotto in lite quantunque distinto da quello della lite precedente, pure l'uno e l'altro formano parte di un sol tutto, purche' pero' il punto controverso sia identico";

In this same judgment, the Court also cited from another judgment in the names **Catarina Gerada vs Avukat Dr. Antonio Caruana**[32] wherein it was stated as follows:-

"Intqal tajjeb illi "l'eccezione di regiudicata si deve ammettere con molto circospezione, tant piu'quando trattasi di escludere un diritto (Coen. Cosa Giudicata, (materia civile) no.145) ….jehtieg ghall-eccezzjoni tal-gudikat illi l-kwistjoni tkun giet "effettivament" deciza bis-sentenza ta' qabel, u mhux biss li "setghet tigi deciza….Ighid il-Mattirolo:- "Sta soltanto nel dispositivo; onde e' principio che la cosa giudicata risiede esclussivamente nella parte dispositiva della sentenza, non nei motivi (Diritto Giudiziario Civile, Vol.V 28)

It continued stating as follows: -

"……xi drabi jigri illi d-decizjoni mhix interament fil-parti dispositiva tas-sentenza, izda anki fil-parti razzjonali taghha, meta fil-motivazzjoni tigi definita u rizoluta xi vera kwistjoni, b'mod li dik il-parti tkun il-premessa logika

[32] Vol.XLII.I.113

u necessarja tad-dispositttiv, u allura dik il-parti tifforma haga wahda mid-dispositttiv, li kollha flimkien jiffurmaw il-gudikat,”

Rightly so, in the judgment **Sharon Zahra vs Stefan Zahra** [33]**,** the Court had the following to say**:-**

“..il-legislatur hass li ma jistax ikun hemm stat ta’ incertezza indefinita fejn jidhlu kwistjonijiet ta’ drittijiet akkwiziti wara process gudizzjarju. Hu maghruf li r-rekwiziti biex l-eccezzjoni tirnexxi huma tlieta u cioe’ l-identita’ tal-persuni, tat-talba u tal-oggett – eadem personae, eadem res, eadem cause petendi. Ghalhekk kull ezami dwar din l-eccezzjoni ghandha bzonn ta’ indagini ta’ dawn it-tlett fatturi.”

There is no doubt that the parties are the same in both the Russian and the Maltese case. The arguments in contradiction are that plaintiff argues that the case that she had filed before the Maltese Courts was not identical to the case filed before the Russian Court, because in reality the case claiming maintenance from the defendant, filed before the Maltese Courts, is simply a continuation of the Russian Case, since it is a claim for the liquidation of the maintenance.

The court acknowledges that the Russian court had decided in 2003 that defendant had to pay maintenance for his daughter and this had to be done by deducting one-fourth of his salary. As defendant pointed out, the parties are both Russian and the domiciled in Russia and therefore Russian law should prevail.

Either of the parties failed to prove whether effectively the Russian judgment delivered on the 10th June, 2003 was one that could be enforced in Malta and that

[33] App. Civili deciz 29 ta’ Jannar, 2016

should have been the starting point before the Court could proceed to determine whether the case is res judicata or not. At no point in time was this matter raised and debated, making the task more arduous for the Court.

Nevertheless, the matter in dispute is that plaintiff proceeded with a case in 2005 before the Maltese Courts because, despite the decree delivered by the Russian Court on the 10th June, 2003, defendant had not contributed any maintenance towards their minor daughter and therefore once they were living in Malta, they initiated proceedings requesting defendant to assume his responsibilities and asking for the liquidation of the said amount of maintenance, because meanwhile he had sold his property and therefore had derived more income, but failed to contribute towards the daughter's needs. Although, throughout the proceedings, it resulted that payment according to decree was effected seven years later and the money was still deposited in court.

In this respect, therefore, it transpires that the object of the case, though very similar in nature to the case instituted before the Russian courts, touches on slightly different merits, as it goes a step further and requests the liquidation of the maintenance amount, something which essentially the Russian courts failed to do and hence on this ground alone, the case cannot be considered to be a res judicata.

All costs for this plea are to be borne by defendant.

PRESCRIPTION

Defendant pleads that the case is time-barred in terms of Articles 2156 (b) and 2156 (f).

Article 2156 (b) and (f) contemplate that:-

"The following actions are barred by the lapse of five years;

(b) actions for payment of maintenance allowances;

(f) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed."

The Court is in agreement with plaintiff that defendant did not bring forward the relevance of the claim of prescription on the grounds of Article 2156 (f).

As to the relevance of Article 2156 (b) it was explicitly made clear in the case **Victoria Camilleri et.noe. vs Mahmoud Faraj Abdul**[34] that:-

"Naturalment bhal fil-kazijiet kollha fejn tigi eccepita l-preskrizzjoni din tista' tigi kumbattuta b'success bil-prova tal-interruzzjoni taghha. "Provocata la prescrizione incombe all'attore di provare la sua interruzione; ed in difetto di

[34] Prim'Awla tal-Qorti Civili, deciza 9 ta' Dicembru, 2002, Citaz.Nru.533/2000

tale prova, l'eccezione di prescrizione non puo' essere rigettata (Vol.XIX P.I p.5). Dan proprju ghaliex il-preskrizzjoni tohloq l-estinzjoni tal-obbligazzjoni."

Plaintiff filed her case on the 23rd February, 2005 and as she pointed out, the prescriptive period would have to commence on the 23rd February, 2000. Nevertheless, as plaintiff remarks, citing the disposition of the law in question, precisely Article 2131 of Chapter 16 of the Laws of Malta, it is crystal clear that what the legislator intended: -

"Prescription is interrupted by a judicial demand, even though such demand has not been notified to the defendant on account of his absence or for any other lawful cause, provided the plaintiff has continued the proceedings against a curator appointed by the court according to the provisions of the Code of Organisation and Civil Procedure, and has obtained a judgment on such demand."

As has already been established the case is a request for maintenance and a liquidation of the said maintenance further to a judgement delivered by a Russian court on the 10th June, 2003. In pursuance of this judgement was the present case filed on the 23rd February, 2005. Moreover, the judgement delivered by the said Court on the 27th June, 2006 was nullified due to a retrial and as was stated in the case **Carmela Falzon vs Maltacom plc**. [35] as pointed out by plaintiff, if there is a retrial, even though the original judgment is rescinded, for the case to be retried, still the determining point in time is when the rescinded judgement was filed. It is from this point in time that prescription is interrupted and parties are thrown back to the position they were in as at that point in time.

[35] Citaz.Nru.1294/99 decided 9/1/04

"It-thassir ta' sentenza permezz ta' ritrattazzjoni ma jeliminax l-effetti ta' interruzzjoni tal-preskrizzjoni li tkun sehhet bil-prezentata tac-citazzjoni relattiva ghas-sentenza mhassra."

So, even this preliminary plea is being rejected with costs to be borne by defendant.

MAINTENANCE DUE

This case was initiated in 2005 by plaintiff claiming maintenance to be paid to her daughter by defendant, after the said amount is liquidated by the court, following a judgement of the Russian Court delivered on the 10th June, 2003, that ordered that maintenance be paid for their minor daughter until she attains the age of 18 years.

Unfortunately, due to several complex legal issues, the case took much longer than expected and who was a minor, now grew into a woman, who completed her tertiary education and got married. As a result, the amount being claimed is from 2001 up to 2011, when their daughter was 21 years of age.

At the time of the instituting of the case before the Maltese Courts, plaintiff was under the impression that defendant had failed to observe the judgement delivered by the Moscow Court, whereby he was ordered to pay one-fourth of this salary to the child. Nevertheless, throughout the proceedings it transpired that around 2009 defendant found out about this court case and through the court bailiffs, defendant had deposited the money for the maintenance in arrears in the amount of Rub.102,

824,.64 (approximately €1,600) as well as the enforcement expenses in the amount of Rub.7,197.72 , as he calculated for the period between 2003 until 2008 when their daughter reached 18 years of age.

Plaintiff is claiming that she used to spend about €10,628 annually to cover all her daughter's expenses and as proof of this she exhibited a note with an itemised list of the said expenses.[36] In total for the period of 11 years this would amount to €116,911.30, of which she claims, defendant's share would be that of €58, 455.65.

In reality, however, this breakdown of expenses is not supported by any real documentation. Plaintiff claims that these are the expenses she encountered annually to bring up her daughter and, in particular this goes to show that it was during the period between 2006 and 2008 when their daughter was attending Junior College. She then added that she spent €21,000 as university tuition fees for a course that her daughter had followed and €10,000 which she gave her to help her buy an apartment before her wedding.

Nevertheless, expenses such as food, clothing and everyday necessities are more than reasonable. Defendant never contests these expenses throughout the court case and although plaintiff's production of evidence, when it came to quantifying her claim for maintenance is not so satisfactory and desirable as one would have required for the purposes of liquidation, but considering that there is no contestation and that the said expenses are no more than the ordinary mundane expenses that a parent generally incurs in bringing up children, the plaintiff's claim for Lm4621 (equivalent to €10,628) per annum is credible.

[36] Vide fol 63 of the file.

It has however, been established by both parties, that further to the court judgement by the Moscow Court, defendant deposited the sum of €1,600 by way of maintenance arrears as well as the enforcement fees of the said judgement. Nevertheless, again defendant states what his various income was over the years, but failed to produce any financial statements in this respect. He stated that his monthly income was as follows and he had confirmed this income with the Court bailiffs: -

i) €125 in 2001= €1,500
ii) €138 in 2002 = €1,656
iii) €157 in 2003 = €1,884
iv) €184 in 2004 = €2,208
v) €244 in 2005 = €2,928
vi) €312 in 2006 = €3,744
vii) €388 in 2007 = €4,656
viii) €480 in 2008 = €5,760

This leads to a total of €24,336 over a span of 8 years. There would still be the need to calculate the period between 2009 and 2011, though a clear picture of what defendant's earnings is not quite clear. He admits to paying about €1,600, in representation of the one-fourth of his salary that was due by way of maintenance by court order delivered on the 10th June, 2003 by the Russian Court. The defendant cannot be credible on this point because over the span of eight years one-fourth of his income would not amount to €1,600 but to €6,084. Again the quantification of his income becomes an arduous task, when no documentation has been produced to substantiate his case, however defendant continues to insist that he had a good income, when compared to a lot of people in Russia. He adds that if in 2007, he was earning €388, it was a good salary

because it was difficult to earn more than 500 dollars and this is not questioned by plaintiff. Thus, the defendant's version seems to be tenable.

As to the remaining period between 2009 and 2011, though no evidence was produced in this respect, the Court calculates that for every year, the monthly salary increased by around €60 by what defendant produced as his income throughout the years, so presumably he would have been earning around €540 in 2009, with a total of €6,480, €600 in 2010, with a total of €7,200 and €660 in 2011 with a total of €7,920. These added together with the €24,336 add to a total income of approximately €45,936.

Defendant also gave up all his claims on the proceeds from the sale of the apartment in Moscow, namely Flat 145, 30-building 2, General Glagolev Street, Moscow because he felt that his share would make up for the expenses incurred by his wife in bringing up their daughter and therefore he chose to renounce to it, despite the fact that there was a judgement in this regard entitling him to his share of RUB 499, 968 (approximately €15,000). Plaintiff doesn't deny selling the said property, because she was in financial need and states that she did not owe anything to defendant because the claim was time-barred in any case.

Defendant also adds that he contributed towards his child because he let them live in the apartment at St. Paul's Bay without ever paying anything even though he claims the property was paraphernal to him. It has not been denied by any of the parties that defendant alone appeared on the deed of sale, but the contrasting views are that the apartment appertains to the community of acquests and thus, at no point in time can the defendant claim the rent by way of setting off any of his maintenance dues.

Plaintiff brought proof through Russian legal experts that under Russian Law, precisely Article 34 of the Family Code of the Russian Federation, the property acquired by the spouses during the marriage is their joint property. This article further states that joint property includes also property purchased from the general revenues of the spouses, movable and immovable property, securities, shares, investments, shares in the capital made to the credit institution or other commercial organisations and any other things acquired by the spouses during the marriage, irrespective of the name this property is registered or acquired and no matter which of the spouses made payments.[37] This document was not contested and neither was any representative of the legal firm called in for cross-examination.

This can only be interpreted in one way, in the sense that irrespective of the fact that the property at St. Paul's Bay was purchased in the name of defendant with money that was given to him by his mother, the property fell under Russian law, within the community of acquests and hence one-half undivided share remains belongs to plaintiff.

Therefore, defendant's arguments that he also satisfied payment of maintenance by allowing his wife and daughter to live in his apartment for free is totally unjustifiable.

It has also been proven, through defendant himself that he was once a business man and ran a company, until he started gambling, which habit he alleges started when he came to Malta and used to visit the Casino regularly. It transpires that he prejudiced his financial position, but this in no way should mean that it must be to the detriment of his wife and daughter. Moreover, throughout the years he

[37] Vide fol.114 of file.

sold his paraphernal property and did not feel the need to send any maintenance from the proceeds towards his daughter. The sale has been confirmed by both parties and defendant seems to have believed that by renouncing to his claim over his share of the sale of the matrimonial home in Moscow, that took place without him knowing and with the amount he deposited with the court bailiffs he had satisfied all his responsibilities of maintenance towards his daughter.

Hence, the Court comes to the following conclusions: -

(i) Defendant has satisfied the judgement delivered by the Russian Court on the 10th June, 2003 *in parte* and deposited the sum of (RUB. 102,824.63) €1,600 with the court bailiffs that result to still be deposited in court;

(ii) Plaintiff sold the matrimonial home without defendant's knowledge and was ordered by Court to pay him back RUB. 499,968(approximately €15,000) which she never did, though defendant did not insist on it considering that his wife was maintaining his daughter;

(iii) Maintenance is being claimed from 2001 when the parties' daughter was 11 years up to when she got married at the age of 21.

(iv) Considering that the plaintiff and her daughter have been living in Malta since 2000, it is evident that they are domiciled here and therefore Maltese law would have to apply in this respect, in the sense that if the child is studying full-time, then maintenance will be due until the age of 23. In this case, though mention has been made that parties' daughter got married in 2011 and thus all contributions of maintenance had to stop.

In conclusion, therefore, on the basis of plaintiff's claim that defendant should contribute maintenance for their daughter in the sum of €58, 455, on the basis that defendant has already paid the sum of €1,600 as per court order in Russia and on the basis that plaintiff owes defendant the sum of €15,000 for the sale of the matrimonial home, and that between 2001 and 2011, defendant earned €45,936, maintenance would have to be calculated as follows:-

i) €58,455 - €16,600 (€15,000+€1,600) = €41,855;

ii) One fourth of €45,936 = €11,494; this amount is incorporated in the sum just mentioned above.

DECIDE

The Court therefore decides this case as follows:-

Rejects defendant's pleas for the abovementioned reasons and grants plaintiff's claims,

1. Declares defendant to be responsible for the payment of maintenance for his daughter BE, for the period between 2001 – 2011;

2. Orders that the amount of maintenance be liquidated in the sum of forty-one thousand, eight hundred fifty-five Euro (€41,855);

3. Condemns Defendant to pay the said sum of money so liquidated within the period of three (3) months from the date of judgment.

In addition to what has already been decided, all other costs are to be borne by defendant, including that of the warrant of prohibitory injunction 2244/04.

Imhallef
Mr. Justice Anthony Vella

Cettina Gauci
Deputat Registratur