

Court Of Appeal

Judges

**THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
PRESIDENT
THE HON. MR JUSTICE TONIO MALLIA
THE HON. MR JUSTICE NOEL CUSCHIERI**

Sitting of Thursday 14th March, 2019.

Number: 21

Application Number: 275/13RGM

Susanne Hackenbruch f'isimha proprju u bhala kuratrici *ad litem* ta' uliedha minuri Sophie u Felix ahwa Hackenbruch mahtura b'digriet moghti fl-14 ta' Jannar 2014

v.

L-Avukat Dr.Mark Mifsud Cutajar u l-Prokuratur Legali Quentin Tanti illi b'digriet ta' din l-Onorabbli Qorti tal-5 ta' Marzu 2013 gew mahtura bhala kuraturi sabiex jirraprezentaw lill-assenti Dr Urlich Hackenbruch

Preliminary

1. This appeal was filed by Dr. Mark Anthony Mifsud Cutajar and Legal Procurator Quentin Tanti as deputy curators duly appointed by court decree of the 5 March 2013 to appear for and on behalf of absentee Dr. Urlich

Hackenbruch [Defendant] from the judgment [the appealed judgment] delivered by the Civil Court (Family Section) [First Court] on the 11 July 2017, whereby that court established the amount of child support to be paid each month by Defendant to plaintiff for their two children Sophie and Felix in the amount of €2,111 as from the 1 September 2010 and on the first anniversary of the appealed judgment and each year thereafter that amount was to increase proportionately with the increase in the Index of Inflation published officially each year in Malta, such child support being payable until the children reach twenty three years of age if they follow tertiary education on a full time basis, and this whilst (a) liquidating the arrears of child support ordered to be paid by Defendant to Plaintiff in the amount of €72,937.55; and (b) ordering plaintiff to pay $\frac{3}{4}$ of the educational and health expenses of the two children up to the date they reach twenty three years of age if they follow tertiary education on a full time basis; costs were to be borne by defendant.

The Merits

2. Plaintiff instituted proceedings by means of a sworn application before the First Court requesting that court to: establish an amount payable monthly by Defendant as maintenance for their minor children and to order the payment of the said monthly installments to her; also, to establish the amount due to Plaintiff representing arrears of maintenance, as from the 1st September 2010 till the date of the appealed judgment, which are still due by

Defendant, and to order the latter to pay such amount so established and to reimburse Plaintiff for expenses made by her due to the Defendants' non-payment of maintenance, and that court fees and expenses are to be paid by the latter.

3. Dr. Mark Anthony Mifsud Cutajar and Legal Procurator Quentin Tanti as deputy curators filed their reply on the 31 January 2014 whereby they pleaded that they were not aware of the facts and they therefore reserved the right to file a reasoned reply if and when they become aware of the said facts.

The Appealed Judgment

4. In its judgment of the 11 July 2017, the First Court made the following deliberations prior to reaching its decision:

"THE EVIDENCE.

"In her affidavit filed on the 13th March 2014, Fol 48 **Plaintiff** confirmed that she married defendant in Germany on the 24th November 1995. They had two children, Sophie born on the 1st September 1996 and Felix born on the 23rd January 2000. Her husband was employed by the German Ministry of Foreign Affairs and was posted to the German Embassy in Malta in July 2007, so all the family took up residence in Malta. They decided to send their children to Verdala International School, where she works as a teacher. Plaintiff claims that their marriage broke down in June 2010 as their married life became unbearable, due to constant tension and emotional neglect on defendant's part towards her and the children. During their marriage she caught him on five occasions having affairs with other women. In August 2010 they decided that she should leave their residence in Malta and she moved with the children to a flat in Xemxija. After she moved out defendant never tried to communicate with the children except by an occasional and formal e-mail. He met the children in November 2010 and February 2011, he was not willing to pay the school fees. By a decree of the 8th May 2011 she was granted

exclusive custody of the children, while he was granted access to the children three times a week. He insisted on not paying the school fees, as confirmed by his e-mail which she exhibited, and the children were particularly hurt by his stand of refusing to pay their school fees.

“In July 2011 he was posted to the German Embassy in Kiev and the children met him last in June 2011, it was an unpleasant meeting. They met again in May 2013, in July 2013 and in November 2013. He would come over to Malta for 7 days but would only meet the children for an hour. He does not take any initiative to communicate with the children, Sophie tries to communicate with him via e-mail but Felix feels totally neglected by his father.

“Plaintiff declared that she does not receive any maintenance from her husband, but the children receive the sum of Euro 1,081 as established by German Law. However, defendant has consistently failed to pay for their educational expenses and she was faced with an accumulated bill for Euro 25,540 in school fees. The sum of Euro 9,000 was reimbursed by the German Foreign Ministry. Defendant claimed that he could not afford these expenses, but plaintiff insists this is not the case, as he owns two houses in Germany, their former matrimonial home in Berlin, of which he bought her share, and another in Kassel. She claims that his monthly wage is between Euro 6,000 and Euro 6,800.

“As he is a civil servant he enjoys yearly increments in his salary. He complains that he is in debt, however plaintiff insists that he always rented and had no problems with paying the mortgage with the rent.

“Plaintiff listed her monthly expenses for the children, Fol 50, which amount to Euro 2,175. This does not include school fees amounting to Euro 1,336 which at present she is exempted from paying as she is a teacher at the school.

“She insists that defendant is in a position to pay his children’s educational expenses, but he refuses. Her German lawyer also informed her that the maintenance he was paying was ‘ex gratia’, provisional and subject to adjustment if the divorce proceedings were concluded in a short time. She felt this to be shameful as it meant putting pressure on her not to oppose his claims in the divorce proceedings.

“At the sitting of the 22nd July 2014, held by the Judicial Assistant, Fol 71, plaintiff confirmed that she works as a teacher at Verdala International School and filed her FS3’s for 2011, 2012 and 2013 as well as her pay slips from May 2014 to June 2014. Her present net pay is Euro 1680 per month. Her husband works at the German Embassy in Kiev. She confirmed that her husband earned Euro 6,584 in August 2012 and September 2012, Dok SH6A to Dok SH6G FOL 189 to Fol 195.

“She confirmed that no provision was made for maintenance of the children in the divorce proceedings as the German Courts declined jurisdiction on the matter as plaintiff and the children reside in Malta.

“She confirmed that her husband pays her Euro 1,080 per month since September 2010 which she considers insufficient as it barely covers the educational expenses of the children.

“At the sitting of the 25th August 2014, Fol 72, plaintiff exhibited various documents marked Dok SH(7) to Dok SH(19) in connection with expenses relative to the children’s educational requirements.

“**Ivan Camilleri, Financial Controller at Verdala International School**, gave evidence at the same sitting, Fol 73. He filed a breakdown of the fees paid from 1st July 2010 to date in respect of the attendance of the children at the school. The account is in plaintiff’s name for a total of Euro33,577,25, last payment being made on 4th September 2014, Dok IC(1). He also filed, marked as Dok IC(2), Dok IC(3) and Dok IC(4) plaintiff’s FS3’s for the years 2011, 2012 and 2013.

“Dr. Mark Mifsud Cutajar, for defendant at the sitting of the 20th October 2014 Fol 198, filed the documents relative to the divorce proceedings and judgement of the parties in the German language.

“Plaintiff filed her second affidavit attached to a Note of the 11th March 2015, Fol 229. She confirmed that she is making two claims against defendant, i.e. the first claim is for maintenance for the needs of the children, the second relates to accumulated arrears of maintenance since September 2010 less any payments effected by defendant during that period. In January 2011 he told her he would be taking Court action as he wanted full custody rights over the children. However the Court by a Decree of the 8th May 2011 granted exclusive custody to plaintiff and defendant was only granted access to the children three times a week.

“She exhibited Dok SH2 Fol 235 defendant’s e-mail to the school informing them that he was not responsible for the payment of the children’s school fees.

“She confirmed that she did not receive any maintenance from defendant, that the children receive Euro 1,081 as established by German law, that she was faced with a bill of Euro 25,540 for accumulated school fees of which the amount of Euro 9,000 was reimbursed by the German Foreign Ministry.

“She contests his allegation that he cannot afford to pay these expenses, as his monthly wage is between Euro 6,000 and Euro 6,800 and their former matrimonial home has always been rented, the tenant, Holger Tyson still resides in the property.

“Her average monthly income is Euro 1,700. She claims that defendant should be ordered to pay Euro 2,200 per month, Euro 1,100 for each child. She confirmed that being herself a teacher at the school she enjoys the benefit of not being charged for her children’s education costs. However if for

any reason, she will no longer enjoy this benefit she claims that education costs should be borne by defendant. Her net claim for maintenance is Euro 2,200 less Euro 1081 namely Euro 1,119 per month.

“She attached to her affidavit a document marked Dok SH7, Fol 241 wherein she listed her expenses and apportioned such expenses in the sense that she excluded from her claim expenses incurred to her own benefit, and is only claiming in respect of expenses benefiting the children.

“The monthly expenses indicated are the following:

“Rent Euro 250 (The monthly rent paid is Euro 380)
Water and Electricity Euro 50 (The average monthly consumption is Euro 70)
Food and Toiletries Euro 550 (The average monthly expense is Euro 800)
Pocket money Euro 100
Petrol and car costs Euro 100 (The average monthly expense is Euro 200)
Clothes, shoes and accessories Euro 150.
Entertainment birthday gifts etc Euro 100.
Sports and extra curricular activities Euro 300.
Stationery and books Euro 50.
School outings Euro 5.
Telephone and internet Euro 30.
Home entertainment Euro 20.
Hairdressing Euro 20;
Non-prescription medicine Euro 25.
Birthday party expenses Euro 20.
Travel expenses Euro 316
School fees Euro 83. (Plaintiff declared that school fees were not being paid as she was a teacher at the school, however exam fees and Capital Levy have to be paid).
Exam fees Euro 60.
Doctor’s fees N/A as children are insured in Germany and medical expenses are refunded.
Total Euro 2269.”

“Plaintiff is therefore claiming as arrears of maintenance, Fol 231, Euro 2,200 per month less Euro 1,081, i.e. Euro 1,119 per month, with effect from September 2010.

“She contests defendant’s allegation that she has a teacher’s job in Germany with a salary of Euro 3,500 per month. She attached a document Dok SH9 Fol 243 confirming that her monthly income in Berlin would be Euro 1,539 per month.

“She admits receiving Euro 80,000 from defendant for her share of the house which is worth Euro 400,000. It is rented for Euro 13,000 per annum . She did withdraw Euro 30,000 from their common bank account, but this was less than half of what was in their common account. She has utilized the money

to pay the shortfall between the maintenance she received and the actual costs of maintaining the children.

“In his affidavit annexed to the Curator’s Note filed on the 22nd June 2016 Fol 282 **Defendant** confirmed that he is paying Euro 1,081 as monthly maintenance for the two children as established in the Divorce proceedings in Berlin on the 26th June 2014, he also pays private health insurance for both children. A monthly post-marital maintenance of Euro 1000 was agreed to payable to plaintiff for one year only from July 2014. Plaintiff still held the position of teacher/civil servant in Berlin where she could earn a salary of about Euro 3,000.

“He declared that his ex-wife since 2011 has been living with Albert Mamo her former tennis instructor, and that the German Foreign Ministry has revised its policy and has now agreed to continue with the payments of the children’s school fees. Plaintiff should also be receiving child benefits from Germany (Kindergeld) of around Euro 190 per child every month, as from January 2012.

“He confirmed that their daughter Sophie is studying at the University in Malta at the faculty of Medicine and Surgery and together with his mother they paid Euro 6000 as an apprenticeship assurance.

“He declared that it was very difficult for him to travel to Malta at the time he was was living in Kiev, had a child and a 6 month old daughter and was going to be posted in Reykjavik, Iceland in the Summer of 2016.

“He offered to pay a monthly maintenance of Euro 400 to his son Felix and a monthly maintenance of Euro 600 to his daughter Sophie, and to continue to pay their health insurance.

“**Defendant was cross-examined** at the sitting of the 10th November 2016, Fol 353. He confirmed that the German Embassy was paying for the school fees of the children, on condition that they were living with the parents as one household, Fol 362, however when he was assigned to the post in Kiev, Ukraine the Embassy had stopped paying for the school fees. Briefly afterwards there was a change in policy and the Embassy resumed paying the school fees. He confirmed that living in Iceland is expensive and he receives Euro 6,000 as his salary as well as Euro 3,000 for rent, even though he declared that he was paying Euro 4,000 a month in rent. He came to Malta once in 4 years and had on one occasion sent his daughter Euro 200 so tht she could repair a damaged tyre. He also confirmed that on a regular basis he still pays for the children’s medical insurance.

“Plaintiff was also cross-examined at the same sitting. She confirmed that she was receiving from Germany, the State’s children’s allowance i.e. Euro 187.35 per month for both children and that she has received arrears back dated from 2012. In 4 years she confirmed to have received Euro 8,700 which she

admitted is to be reduced from her claim, as well as the monthly payment of Euro 187.35.

“Dr Anna Mallia, the Court appointed Legal Referee, in her report confirmed on the 10th November 2016, Fol 400 et seq concluded that defendant should pay as maintenance for the two children the amount of Euro 2,111 per month; Euro 2269 indicated by plaintiff in Dok SH7 Fol 241, less Euro 158 one half of the travelling expenses which according to the Legal Referee are to be paid equally between the parties, that is Euro 2,111; that in the event that the children stop attending Verdala International School, educational expenses until they reach the age of 23 are to be paid $\frac{1}{4}$ by plaintiff and $\frac{3}{4}$ by defendant, in line with their respective incomes.

“As regards arrears of maintenance she concluded as follows:

“Maintenance due from September 2011 to March 2016, 54 months @ Euro 2111 per month----- Euro 113,994.

“For the same period defendant paid Euro 1081 for 54 months i. e. Euro 58,374.

“Arrears due are Euro 113,994 less Euro 58,374 i. e. Euro 55,620.

“Plaintiff’s legal adviser submitted at the sitting of the 30th May 2017 that the Legal Referee had omitted the document relative to the school fees for the year 2011/2012, fees for that year amounted to Euro 9,052.75; that plaintiff had started her employment in 2008 and not 2003; and that the computations are to be calculated from 2010 and not 2011.

“Defendant’s legal adviser submitted that it was plaintiff’s decision to remain living in Malta with her children, and this entailed a considerable expense which defendant was not obliged to pay. Defendant would still pay school fees so long as these are subsidized by his employer.

“THE COURT’S DELIBERATIONS.

“The parties married in Germany on the 24th February 1995; they had two children, Sophie born on the 1st September 1996 and Felix born on the 23rd January 2000.

“Their marriage came to an end in June 2010 and they are divorced, a judgement of the German Court dated 26th June 2014. Sophie turned 18 on the 1st September 2014, however as confirmed by defendant, Fol 282 a tergo, she is following a course of Medicine and Surgery at the University of Malta. Felix will be 18 years old on the 23rd January 2018.

“Parties agree that defendant has been paying Euro 1081 a month as maintenance for the children; plaintiff also receives a State Child’s Allowance of Euro 187.35 a month for both children, since 2012, Fol 376.

“Plaintiff has declared that such amount is insufficient and is asking the Court to establish and determine the amount which defendant should be ordered to pay as maintenance for their two children, taking into account defendant’s means; as well as arrears of maintenance as from 1st September 2010.

“The provisions of the Law, Chapter 16 of the Laws of Malta, relating to maintenance of the children are the following Articles:

“Article 3.

“Both spouses are bound, each in proportion to his or her means and of his and her ability to work whether in the home or outside the home as the interest of the family requires, to maintain each other and to contribute towards the needs of the family.

“Article 3B

“(1) Marriage imposes on both spouses the obligation to look after, maintain, instruct and educate the children of the marriage taking into account the abilities, natural inclinations and aspirations of the children.

“(2) The obligation of the parents to provide maintenance according to sub-article (1) also includes the obligation to continue to provide adequate maintenance to children, according to their means, and where it is not reasonably possible for the children, or any of them, to maintain themselves adequately, who:

“(a) are students who are preparing in full time education, training or learning and are under the age of twenty-three.

“Article 6 (1) Parents are bound to look after, maintain, instruct and educate their children in the manner laid down in article 3B of this Code.

“Article 19 (1) Maintenance shall include food, clothing, health and habitation.

“(2) In regard to children and other descendants, it shall also include the expenses necessary for health and education.

“Article 20. (1) Maintenance shall be due in proportion to the want of the person claiming it and the means of the person liable thereto.

-omissis-

“(3) In estimating the means of the person bound to supply maintenance, regard shall only be had to his earnings from the exercise of any profession, art, or trade, to his salary or pension payable by the Government or any other person, and to the fruits of any movable or immovable property and any income accruing under a trust.

“Article 54. (2) The amount of maintenance referred to in sub-article 1, and the maintenance due to the children in the event of separation, shall be determined

having regard to the means of the spouses, their ability to work and their needs, and regard shall also be had to all the other circumstances of the spouses and of the children, including the following:

“(a) the needs of the children, after considering all their circumstances;

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“(e) every income or benefit which the spouses, or any of them, receive according to law, other than social assistance that is not contributory which is paid to them under the Social Security Act:

“(f) the accommodation requirements of the spouses and of the children;

“In the case “ **Angela Conti vs Lawrence Bonnici**” decided by the Court on Appeal on the 6th February 2015 the Court declared the following:

“Wiehed l-ewwel net ghandu jifhem li f'ezercizzju bhal dak li taghmel Qorti meta tiffissa hlas ta' manteniment l-istess Qorti tkun qed taghmel apprezzament tal-fatti li jkollha quddiemha u mbaghad skont l-artikoli fuq imsemmija tal-Kodici Civili tasal ghall-konkluzjoni taghha dwar x'ghandu jkun l-ammont gust li jithallas.

“It results that plaintiff's average net income, as a teacher at Verdala International School is Euro 1,700 a month, whereas defendant has a monthly salary of Euro 6,000 together with a monthly allowance of Euro 3000 for the payment of rent.

“As regards the monthly payments received from defendant, plaintiff declared, Fol 231, the following:

“As stated I have received Euro 1081 every month from defendant for the children, since September 2010. The arrears of maintenance due to me since September 2010 should be reduced by that amount”.

“Plaintiff further declared, Fol 376 that she received a State Child Allowance of Euro 187.35 a month for both children, as from 2012.

“The Legal Referee concluded that the amount of maintenance which defendant is bound to pay as maintenance for both children is Euro 2,111 a month.

“Taking into account the expenses made in the children's interest, as submitted by plaintiff, the amount determined by the Legal Referee, is correct and is being confirmed.

“In computing the arrears of maintenance due, the Legal Referee has rightly deducted the amount of Euro 1081 a month paid by defendant, however the State's Child Allowance of Euro 187.35 a month since 2012 has not been taken into account.

“The Legal Referee calculated the arrears of maintenance for the period September 2011 to March 2016. This is presently being revised and updated in the sense that the arrears of maintenance are being calculated for the period September 2010 to July 2017, both months included, a total of 83 months.

“Arrears are therefore being calculated as follows:

“83 months @ Euro 2,111 amount to Euro 175,213.

Payments made by defendant Euro 1,081 for 83 months amount to Euro 89,723.

State Child Allowance payments Euro 187.35 from January 2012 to July 2017, 67 months amount to Euro 12,552.45.

Total amount.....Euro 175,213.

Less Euro 89,723 + Euro 12,552.45= Euro 102,275.45.

Balance due Euro 175,213 less Euro 102,275,45= **Euro 72,937.55.”**

The Appeal

5. Defendant felt aggrieved by the judgment delivered by the Court of First Instance on the grounds that (a) the amount of maintenance established by that court is beyond his means, and also is beyond the actual needs of the children considered separately from the needs of Plaintiff and (b), in its examination of the facts and the application of the law, the First Court failed to consider the earning capability of the plaintiff when establishing the amount of maintenance due by Defendant. On the basis of the above, the latter is requesting that the appealed judgment be revoked and that Plaintiff's demands be rejected.

The Reply

6. Plaintiff contends that the appeal filed by Defendant should be rejected and that the appealed judgment be confirmed by this Court with costs of the procedures both before the First Court and this Court being borne by Defendant.

The Court's Considerations

Procedural issues

7. Prior to stating her arguments against the appeal, Plaintiff raised an issue of a procedural nature. Plaintiff is contending that the appeal filed by Defendant ought to be declared deserted due to the lapse of the peremptory periods established by law. The Court observes that subsection 963(3) of the Code of Organization and Civil Procedure provides that:

“If, even where the peremptory times referred to in sub-article (1) shall have lapsed, it is found that the written pleadings in any cause are not closed, the court shall once only give such orders which it may deem fit so that such pleadings maybe closed as soon as possible in order to avoid that such cause be deserted by reason of some failure to notify or by reason of the failure of performance of a procedure or formality.”.

8. Thus, according to the above disposition of law, even in those cases where the written pleadings have not been concluded before the lapse of the peremptory periods stipulated by law, the case will be considered as deserted only after the court had given those orders which it deems fit with a view to

avoiding the desertion of the case. Now, from the records of the case it appears that no such order had been given, and therefore the plea of desertion cannot be legally upheld.

9. Defendant too raised procedural issues. He argues that, whilst acknowledging that he is morally and legally bound to pay maintenance for his children, the Court of First Instance should have refused Plaintiff's request for maintenance because this is marred with procedural deficiencies. Defendant explains that Plaintiff had not made a request for the care and custody of the children and neither had she requested the First Court to declare her residence as the ordinary residence of the children. Therefore, according to Plaintiff, since there is no decision on either of these issues by the Court of First Instance, the appealed judgment should be quashed by this Court.

10. Defendant also submits that since Sophie has turned 18 in 2014, that is prior to the appealed judgment, Plaintiff could not continue representing her in these proceedings. Consequently, this Court should necessarily quash the appealed judgment because of the lack of involvement of one party essential to the validity of that judgment.

11. On her part Plaintiff submits that appeal proceedings are proceedings for the review and revision of a judgment of the Court of First Instance, and Defendant had not raised this issue before the First Court.

The Court's Considerations

12. This Court observes that defendant's pleas on the matter of care and custody and on the issue of nullity of the appealed judgment in its entirety due to the parties' first child becoming of age¹ during the proceedings, are factually and legally unsustainable on the following grounds.

13. [a] Firstly, notwithstanding that Defendant had ample opportunity before the First Court to raise the issues regarding the care and custody of the children, as well as well as their residence, he had failed to do so, and instead he is raising these pleas for the first time before this Court at the appeal stage. This Court observes that, apart from the consideration that this plea is a *noviter deductus* and should have been raised before the First Court, from the evidence it appears quite clearly that the children are in the effective care and custody of Plaintiff who is bearing alone the onus of their upbringing. Also, it appears quite clearly that this fact was not in dispute between the parties, and therefore it is quite logical to assume that Defendant was happy leaving the upbringing of their children to his wife, his only issue being related solely to maintenance.

¹ 1st September 2014

14. [b] Secondly, these same considerations apply regarding the children's place of residence. Since Defendant has never throughout the proceedings objected to the fact that the care and custody of the children lies with Plaintiff and that they hold the same ordinary residence as Plaintiff, it must be assumed that he has acquiesced to the fact that Plaintiff has the effective care and custody of their two children and that their ordinary residence is the same as the Plaintiff's.

15. [c]. Regarding Defendant's submission that the judgment is null on the basis that not all the persons involved were parties to the suit when judgment was given, this Court observes that this plea [tal-integrita` tal-gudizzju] may be raised at any stage of the proceedings even at the appeal stage, so the submission that, since the Defendant had not raised this plea before the First Court, he cannot raise it at the appeal stage is legally incorrect. In this case, it results that when the proceedings were instituted the child Sophie was still a minor, so legally she was correctly represented by Plaintiff, her mother.

16. During the proceedings she became of age on the 1st September 2014 but was still entitled to maintenance till the age of 23 from Defendant since she satisfied all the conditions stipulated in Article 3B[2][a] of the Civil Code. However, it appears that due to a *lapsus calami* the *okkju* of the case was not changed to reflect this new circumstance and proceedings continued by the mother on behalf of the child instead of by Sophie herself in her own name.

Consequently, the appealed judgment is null and void limitedly in so far as it refers to the period after the aforementioned date and only in respect of the child Sophie who from that date onwards should have assumed the acts of the proceedings in her own name as an adult.

Merits

First Ground: [The amount of maintenance to be paid is beyond Defendant's means and the actual needs of the children]

17. Defendant contends that the amount of maintenance ordered by the First Court to be paid to Plaintiff is excessive, even in comparison with other cases decided by the same court. He explains that the Court had failed to consider the following factors: (a) that Defendant's gross salary varied according to his posting; (b) that during his posting in Ukraine his salary had been reduced; (c) the income capabilities of Plaintiff which would allow $\frac{1}{4}$ of the children's needs to be covered by her salary.

18. On her part, Plaintiff insists that the maintenance awarded by the First Court is fair and just, considering Defendant's generous income. As to Defendant's submissions regarding income received in Malta, Kiev and Iceland, this Court observes that he had failed to produce the necessary evidence regarding his income received in Iceland, even though he was

ordered to do so by the Court of First Instance. The facts alleged by Defendant are not substantiated by evidence in the records of the proceedings. As to Defendant's submission that the First Court had failed to take into consideration Plaintiff's earning capabilities, that Court rightly considered the actual income received by her. The other two issues brought up by Defendant, that is, the abatement in his income due to the payment of a mortgage on the former matrimonial home in Germany and the obligations towards the two children from his second relationship, are not valid: (a) the former matrimonial home can only be regarded as an asset of Defendant and cannot be invoked as a plea against the payment of maintenance; (b) also, the birth of children from a second union is not a valid reason to reduce the maintenance due to offspring from the first union, particularly where no evidence had been produced as to the existence of that offspring, their needs and the means of their other parent.

19. Before referring to particular facts resulting from the evidence, this Court notes that, though Defendant contends that the amount of maintenance ordered by the Court of First Instance to be paid is in excess of that which is ordered by that court in other cases, Defendant fails to substantiate this claim and therefore this claim cannot be considered favourably.

20. Defendant contends that the salary receivable varies according to his posting and that the salary received in the Ukraine had been less than that he

had received previously. However Defendant brought no evidence of the salaries received throughout his postings in Malta and Iceland and the evidence of the salary received in the Ukraine is in the German language and therefore cannot be considered as evidence without an official translation as required by our law. Defendant's claims in this regard are legally unsustainable.

21. Another argument brought forward by Defendant is that the Court of First Instance, in line with the legal referee's position, did not consider the earning capabilities of Plaintiff when calculating the maintenance due. Consequently Defendant is being made to foot the entire bill when Plaintiff's and Defendant's earnings are in proportions of 1/4 and 3/4 respectively. This Court, after having reviewed the legal referee's findings, notes that in respect of educational expenses, the legal referee concluded that "*... these educational expenses are to be borne as to one fourth by the plaintiff and three fourths by the defendant. This in line with the parties income.*". The Court of First Instance endorsed this in its judgment and ordered Defendant "*... to pay plaintiff three fourths (3/4) of the educational and health expenses of the children Sophie and Felix ...*". Taking into consideration Article 54(2) of the Civil Code, whilst discarding Defendant's arguments against Plaintiff's allegedly capricious decision to live in Malta and concerning Defendant's disposable income due to lack of evidence, the Court accepts that maintenance due to the parties' children should be established in the same

proportion, that is $\frac{1}{4}$ equivalent to €527.75 to be borne by Plaintiff each month and the remaining $\frac{3}{4}$ equivalent to €1,583.25 are to be paid by the Defendant each month to Plaintiff.

This Court observes further that the fact that Sophie turned 18 on the 1 September 2014 is only relevant in the calculation of arrears of maintenance due to Plaintiff, as, from that date, no maintenance is payable to Plaintiff on behalf of the parties' daughter Sophie; on the other hand maintenance is due to Plaintiff only in respect of their other child Felix. The amount calculated by the Court of First Instance must therefore be halved and the amount due from Plaintiff is €263.88 whilst the amount due from Defendant is €791.62.

22. The Court of First Instance calculated arrears in the sum of €72,937.55 as explained in the final paragraph of its considerations. However in view of the fact that this Court is accepting Defendant's argument that the Court of First Instance failed to take into consideration that Plaintiff was to contribute a share of $\frac{1}{4}$ towards maintenance of the children and that Sophie turned 18 on the 1 September 2014 and no maintenance was therefore due to Plaintiff on her daughter's behalf, arrears due by Defendant to Plaintiff are being calculated in the sum of €8,429.50 according to the following calculation:

Sept 2010 to August 2014 for 2 children (€2,111x48months) €101,328.00 +
Sept 2014 to July 2017 for 1 child (€1,055.50x35months) €36,942.50

Less state child allowance received from Germany (fol 376)

January 2012 to August 2014 for 2 children (€187.35x22months)

€4,121.70 -

September 2014 to July 2017 for 1 child (€93.68x35months) €3,278.80 -

€130,870.00

Defendant's share $\frac{3}{4}$ €98,152.50

Less payments made

(€1,081x83months) €89,723.00

Total due €8,429.50

Decide

For these reasons, the Court decides by upholding the appeal limitedly declaring the appealed judgment null and void limitedly from the period following the 1st September 2014 onwards and only in so far as maintenance for the child Sophie is concerned, and varies the said judgment by reducing the amount of maintenance to be paid each month by Defendant to Plaintiff for their son Felix to seven hundred ninety one Euro and sixty two cents (€791.62) and the sum of arrears of maintenance to eight thousand four

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hundred twenty nine Euro and fifty cents [€8,429.50]; whilst confirming the remaining part of the said judgment.

Costs shall be borne equally by the parties but judicial fees and expenses of the deputy curators for Dr. Ulrich Hackenbruch are to be provisionally paid to them by Plaintiff with the right to recover same from the former.

Giannino Caruana Demajo
President

Tonio Mallia
Judge

Noel Cuschieri
Judge

Deputy Registrar
gr