Court Of Appeal

Judges

THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO (President)
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR. JUSTICE ANTHONY ELLUL

Sitting of Thursday, 25th March, 2021

Number: 1

Application Number: 44/18/2 AGV

Mark Fenech Laudi

v.

Irina Fenech Laudi in her own name and as curator ad litem to represent the minor Isabelle Fenech Laudi,
and the Director of Public Registry

The Court:

1. Havin seen the appeal filed by the plaintiff Mark Fenech Laudi from the judgement delivered by the Civil Court (Family Section) on the

30th May 2019, by means of which his claims for disavowal of paternity of the minor Isabella Sophia Fenech Laudi were rejected.

2. Having also seen the acts of the case before the Court of First Instance:

2.1. That on the 22nd February 2018, plaintiff filed a sworn application before the Civil Court (Family Section) wherein he declared:

> *'1. Whereas parties were involved in an intimate relationship.*
>
> *"2. Whereas in the course in the course of this relationship, the minor Isabelle Sophia Fenech Laudi was born, as results from the relative certificate of birth, herewith attached, exhibited and marked as **Dok. A**;*
>
> *"3. Whereas defendant Irina Fenech Laudi always led plaintiff to understand that the minor child was plaintiff's daughter and even though plaintiff was aware that at the same time defendant had a relationship with an Englishman, but she always made him believe that he was the minor's father and he chose to believe her and therefore always recognised the minor Isabella Sophia Fenech Laudi as his daughter, so much so that he is indicated as the aforementioned minor's father in her Act of Birth;*
>
> *"4. Whereas this premise led parties to marry on the 5th November, 2010, with the civil rite, as per copy of the marriage certificate herewith attached, exhibited and marked as **Dok. B**;*
>
> *"5. Whereas it was only after parties were legally separated, recently, that plaintiff discovered that in fact the minor Isabelle Sophia Fenech Laudi was not his progeny, as resulted from a DNA test, a copy of which is herewith attached, exhibited and marked as **Dok. C**;*
>
> *"6. Whereas now that he discovered that she is not his progeny after the DNA test was carried out on the 30th November, 2017, plaintiff does not want to be indicated as father to the minor Isabelle Sophia Fenech Laudi, as this does not reflect the truth;*

"7. Whereas this is why this lawsuit had to be lodged – in order for plaintiff to obtain a declaration that the minor Isabella Sophia Fenech Laudi is not plaintiff's daughter and to order that the relative Act of Birth be duly corrected, because clearly there is no parental relationship between plaintiff and said minor;

"8. Whereas these facts are known personally to plaintiff.

"9. Whereas the inclusion of defendant Director of the Public Registry is required procedurally, even for the validity of the second demand;

"Defendants are to state why this Honourable Court should not:-

"1. Besides any further necessary medical tests, if need be through the services of nominated referees, declare and decide that the minor Isabelle Sophia Fenech Laudi is not the plaintiff's natural daughter;

"2. Order that the Act of Birth 3757/2008 be corrected by defendant Director of Public Registry in the sense that plaintiff's name and surname be erased from the column "Name and Surname and Place of Birth of the father," and in the column "Name and Surname and Place of Birth of the mother," there be erased the words "wife of the said Mark Fenech Laudi," and/or take all necessary action so that plaintiff no longer appears formally on the Act of Birth as father to the minor Isabella Sophia Fenech Laudi;

"With costs against defendants, who are being summoned from now with reference to their oath.'

2.2. That by means of a sworn reply in the Maltese language dated 27th March 2018, the Director of Public Registry declared: (1) that he is not aware of the facts of the case; (2) that notwithstanding that the plaintiff failed to declare the legal basis of the lawsuit, it is presumed that the case was filed in terms of Article 73 of the Civil Code; (3) that therefore, the plaintiff must prove and satisfy at least one of the requisites listed in Article 70 (1) of the Civil Code. In this regard, the genetic tests report filed by the plaintiff indicating that he's not the natural father of the minor Isabelle Fenech Laudi, need to be confirmed

on oath by Dr. Marisa Cassar; (4) that without prejudice, considering that the minor is nearly ten years old, the plaintiff must overcome the legal presumption in terms of Article 81 of The Civil Code, by adequately and convincingly proving that the status of the minor Isabelle Fenech Laudi is not in conformity with her birth certificate; (5) that without prejudice to the above, the parties must definitively agree which surname the minor is to assume in accordance with Article 92 (6) of The Civil Code; (6) that furthermore and without prejudice, should this Honourable Court accept plaintiff's claims, it is important that the words *"the said"* before the plaintiff's name, precisely under the column and row where the details relative to the mother are indicated, should be deleted from the Act of Birth of Isabelle Fenech Laudi; (7) that finally, since the present proceedings are not attributable to any doing or failure to act by the Public Registry, the latter shouldn't be subjected to the costs of the present proceedings; and (8) reserving the right to further pleas; with all costs to be borne by plaintiff;

2.3. That by means of a reply confirmed on oath defendant Irina Fenech Laudi in her own name and as curator *ad litem* of her minor daughter Isabelle Fenech Laudi replied as follows:

> *'1. That as a preliminary requirement, plaintiff must indicate the article of the law on which he is basing his claim in order that the respondent be in a position to make her defence and the respondent hereby reserves her right to file an additional sworn reply after the plaintiff complies accordingly.*

"2. That without prejudice to the foregoing, plaintiff's claims are unfounded in fact and at law and should be denied with costs against the plaintiff.

"3. That without prejudice to the foregoing, the plaintiff's claim is time-barred in terms of Article 73 of the Civil Code and this is because it is not true that the defendant concealed from him the fact that the minor child Isabelle was not his daughter as will be proved during the hearing of the case. That therefore, the applicant cannot agree with what the plaintiff has stated in paragraphs 3 to 6 of his sworn application.

"4. So unfounded are the plaintiff's claims that in actual fact it was the plaintiff himself who insisted that the child be registered in his name. It was plaintiff who effected the necessary act of birth notifications and insisted that his name be put down and that he be registered as the father of the child.

"5. That furthermore, the action is not legally admissible given the fact that no person may disturb the status conferred by the act of birth and the presumption it creates and this action is therefore an attempt to disrupt the good order of the family.

"6. That without prejudice to the foregoing circumstances and in the best interests of the child, the applicant requests that the child be allowed to retain the plaintiff's surname.

"Save further replies in fact and at law as permissible.'

2.4. That during the sitting of the 18th April 2018,[1] the Civil Court (Family Section) upheld defendant's request to conduct proceedings in English. During the same sitting, in view of the first plea of defendant Fenech Laudi and of the second plea of the Director of Public Registry, the Court ordered the plaintiff to file a note and declare the article of the law on which he based his claim and requests;

[1] Fol. 37.

2.5. That by means of a note filed on the 26th April, 2018[2] plaintiff stated that the present proceedings are based on Articles 101, 70(1)(d), 75, 77(b) and 99 of The Civil Code, without prejudice to any other applicable provision of the Law;

2.6. That on the 21st May 2018, with reference to the above declaration, defendant Irina Fenech Laudi filed an application alleging that: (i) the words '*without prejudice to any other applicable provision of the Law*' are in breach of the Court's decree and should therefore be ignored; and (ii) the articles quoted by the plaintiff are conflicting since Articles 70(1)(d), 75 and 77 refer to '*filiation of children conceived or born in wedlock'* whereas Articles 99 and 101 refer to '*filiation of children conceived and born out of wedlock'*. She consequently requested the Civil Court (Family Section) to order the plaintiff '*to indicate precisely and unequivocally under which article of the law he is basing his claim, and defendant further reserves her right at law to file an additional reply, if need be, once the articles are specifically indicated.'*

2.7. That on the 18th June 2018, after having seen the reply filed by the plaintiff, the Civil Court (Family Section) decided:

[2] Fol. 40.

'*In terms of Article 421 of Chapter 12 gives plaintiff 10 working days from today to file a note specifying the article/articles of the law which are the basis of the plaintiff's claim.'*

2.8. That in view thereof, plaintiff filed another note on the 12th July 2018, stating that his claims are based on Articles 99, 77(b) and 70 (1d) of The Civil Code;

2.9. That during the sitting of the 23rd January 2019,[3] the Civil Court (Family Section) upheld defendants' Irina Fenech Laudi's and Director of Public Registry's requests to file additional pleas;

2.10. That the additional sworn reply of defendant Irina Fenech Laudi[4] reads as follows:

'<u>Facts of the case</u>

- *"The minor child was born to the defendant on the 24th October, 2008;*
- *"The pregnancy initiated in February, 2008;*
- *"Prior to February, 2008 the plaintiff and the defendant had been in a relationship, however, they had become estranged by February and were living apart. Intimacy between them had ceased at the beginning of January, 2008;*
- *"In August, 2008 the plaintiff and defendant resumed their relationship and recommenced co-habitation;*
- *"Prior to recommencement of the relationship, defendant had informed plaintiff of her pregnancy and also of the fact that plaintiff was not the father;*

[3] Fol. 84
[4] Fol. 62 et seq.

- *"The child was due in November, 2008, but due to complications was born on the 24th October, 2008 as above mentioned;*

- *"Within a short time, plaintiff entered his name as the father of the child on the act of birth;*

- *"The plaintiff and defendant continued to cohabit de facto until November, 2010, when they were married;*

- *"The plaintiff considered the daughter to be his own legitimate offspring throughout all those years up to filing of his lawsuit, notwithstanding his having known prior to the birth, that she was not his biological issue;*

- *"Finally, the plaintiff claims in his affidavit that defendant consistently taunted him with the fact that the child was the issue of a relationship which she had during their period of estrangement in 2008. By the 25th March, 2017, when plaintiff left the matrimonial home with the child, he claims she had emphasized once more, the fact that he was not the natural father;*

- *"The case was filed by plaintiff on the 22nd February, 2018.*

"*<u>Points of Law</u>*

1. "By means of a note filed on the 12th July, 2018, plaintiff indicated that he is basing his claim on articles 70(1d), 77(b) and 99 of The Civil Code of the Laws of Malta. Defendant will show that none of these claims are valid.

2. "Art.101 of Cap.16 is very clear that any child born out of wedlock, shall be presumed iuris et de iure to have been born in wedlock, once the spouses shall have contracted a subsequent marriage.

3. "First, defendant raises the plea that any reference by the plaintiff to article 99 of the Civil Code which contemplates the action of disavowal for children <u>born outside of wedlock is inapplicable and should be dismissed with costs</u>.

4. "Second, Article 77(b), also indicated by plaintiff, provides that "without prejudice to the provisions of Art. 81, the filiation of a child born in wedlock may also be impeached by any person interested if he proves that, during the said time, the wife had committed adultery…." From this it is clear that no one (not even the child himself) can contest the status of a child, conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth. In this vein, Art. 80 also establishes a series of facts which demonstrate the filiation connection – eg. that the child has always borne the name of the father and that the parents have treated the child as their own and provided for the child's maintenance etc.

5. "From this it is clear that if a child's birth certificate indicates that such child was born in wedlock (as in this case) and the child has held the status of a legitimate child (as in this case) nobody can claim a status to the contrary and therefore any action based in this article must also be dismissed. Moreover, the action under Art.77 (b) further requires plaintiff to prove that the defendant (wife) had committed adultery, which is factually impossible, since plaintiff and defendant were not yet married in 2008.

6. "The only person who committed adultery during that time was plaintiff since he was still married and had not yet obtained an annulment.

7. "Finally, with regard to Art.70 (1)(d), this action requires the existence of one of out of two elements, namely the commission of adultery, or the concealment of the pregnancy and the birth. The facts of the case show clearly that this action cannot succeed. In primis, as already stated, the defendant did not commit adultery, as she was unmarried at the time of conception. Secondly, the pregnancy was not concealed and the plaintiff even attended the event of the birth at the hospital. Therefore, just on these facts, the action should be dismissed with costs.

8. "Additionally, and without prejudice to the above, the action is clearly time barred by operation of article 73(a) and (c) in that:-

- *"he acted well outside the period of six months after the birth as contemplated in paragraph (a) and*

- *"the birth was never concealed from him and therefore paragraph (c) is inapplicable, however, had it been applicable, the action would still be time-barred because his attendance at the birth would have alerted him to the event.*

- *"Even if plaintiff were to argue that the child was the issue of an adulterous relationship, which relation had been concealed from him, by his own admission, he was confronted directly with the "fraud" by not later than the 25th March, 2017, which is still more than the six months prior to the filing of the action 22nd February, 2018 and therefore time-barred.*

9. "The proviso to Art. 73 provides that any action under Art.70 can be filed outside the six month statute of limitation, after an application is filed and authorisation sought: once the court – after having heard the parties involved and considering the rights of the applicant and of the child – authorises the applicant to institute the action. This measure was not requested by the plaintiff and consequently:

10. "The action is null and in any case this authorisation is not open to plaintiff, because as indicated supra, the facts of the case exclude the operation of Art.70(1)(d).

11. "Therefore, for these reasons also, the claim should be dismissed with costs.

12. "Save further pleas in fact and at law.'

2.11. That the additional sworn reply of the Director of Public Registry reads as follows:

'1. That in view of the Court's minutes of the last sitting, the Court authorised the Director of the Public Registry to file further pleas to the ones which were already raised in the Director's sworn reply dated 27th March, 2018. The following are the additional pleas of the Director;

"2. That in limine litis, the Director pleads that first and foremost, Article 99 of the Civil Code cannot apply to the case in question since such article of the law can only be applied in those scenarios whereby a child was conceived and born out of wedlock. Despite the fact that the minor in question was indeed conceived and born out of wedlock, she was subsequently presumed to be conceived and born in wedlock by means of application of Article 101 of the Civil Code, due to the celebration of marriage of the parents.

"3. That in limine litis, and without prejudice to the aforementioned, the Director pleads that for actions of disavowal of a child who was conceived and born in wedlock, the action has to be filed within 6 months (i) from the day of birth, if the spouse was then in Malta, (ii) of his return to Malta, if the spouse was absent at the time of the birth, or, (iii) of the discovery of the fraud, if the birth was concealed. Therefore, depending from which circumstance applies to the present action, the plaintiff must prove to the satisfaction of the court that the action was indeed filed within the time stipulated in Article 73 of the Civil Code. Should the 6 months have elapsed and in view of the proviso of article of law referred to, the Director is of the humble opinion that the plaintiff should remedy the situation by filing an application demanding the authorisation of the Court to proceed with the action in terms of the law.

"4. Without prejudice to the above, the director pleads that Article 101 and Article 75 of the Civil Code, are merely being referred to in order to explain the procedure followed by the plaintiff, but not being used as the legal basis upon which the action was filed.

"Such are the defendant's additional pleas for the esteemed attention of the Honourable Court. With costs.'

2.12. That judgement delivered on the 30th May 2019, the Civil Court (Family Section) rejected the plaintiff's claims for disavowal of paternity on the grounds of Article 70(1)(d), 77(1)(b) and Article 99 of the Civil Code and upheld the defendants' pleas. The reasons given by the first court were the following:

> *'Plaintiff is basing his claims on Articles 99, 77B and 71D of the Civil Code.* ***Defendants are claiming the nullity of plaintiff's actions***[5]
>
> *"The Court is going to analyse the respective pleas raised by defendants in this case with respect to plaintiff's claims on the basis of the aforementioned articles of the law.*
>
> *"ARTICLE 99*
>
> *"The English version of the law and the Maltese version are not identical. The English version speaks of the impeachment of "An acknowledgment of a child conceived or born in wedlock," whereas the Maltese version refers to the right of impeaching the acknowledgement of a child "imnissel u mwieled barra miz-zwieg." This creates an anomaly as the English version is speaking of a legitimate child, whereas the Maltese version refers to an illegitimate child. In view of this conflicting interpretation, the Court believes that the Maltese version is the one that should prevail.*
>
> *"Essentially, this means that plaintiff brought forward his action for a disavowal of paternity, therefore attempting to impeach an acknowledged illegtimate child.*
>
> *"Both defendant and the Director of Public Registry are pleading the inapplicability of Article 99 to this claim. The Court has to agree with this plea, as from the facts of the case it transpires that the minor child was born outside wedlock, after defendant had a relationship with another man and later, plaintiff and defendant who had previously been in a relationship, decided to reconcile, get married and legitimate the child through the subsequent marriage.*
>
> *"Hence, having legitimated the child himself through marriage, the child cannot be conceived as an illegitimate child any longer and the presumption is that he/she was always conceived and born in wedlock*

[5] Enfasi ta' din il-Qorti

and this is confirmed in Article 101 of the Civil Code that states as follows:-

> *"Where parents of children conceived and born out of wedlock subsequently marry, or where the court of voluntary jurisdiction so decrees, such children shall be deemed iuris et de iure to have always been conceived or born in wedlock."*

"Once the parties celebrated a marriage and the child is considered for all intents and purposes at law as a legitimate child, the defendants plea on the inapplicability of Article 99 of the Civil Code are to be upheld.

"ARTICLE 70(1)(d)

"Article 70 (1) (d) states as follows:-

> *"(1) Any spouse, except for the spouse who gave birth to the child, may bring an action to repudiate a child born in wedlock:*
>
> *"(d) if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, the spouse had concealed the pregnancy and the birth of the child."*

"The interpretation of this disposition of the law is then subject to Article 73 that states:-

> *"Where it is competent for the spouses to bring an action to disown a child, they must bring such action:*
>
> *"(c) within six months of the discovery of the fraud, if the birth was concealed. Provided that, without prejudice to the provisions of article 70(4), the Family Court may, upon an application of any one of the spouses and, if possible, after having heard all the parties interested, and after having considered the rights of the applicant and of the child, at any time authorise the applicant to institute an action to disown a child born in wedlock to the other spouse."*

"From the evidence produced throughout the case, the parties only got married two years after the minor was born, so essentially there could have never been any adultery committed by the defendant. In his submissions, plaintiff has argued that since Article 101 leads to the presumption that the minor was always born in wedlock, then the presumption with regards the spouses has to be that they were married too when the child was born. Though the Court believes that it is justifiable to apply all dispositions of law that refer to the child conceived and born in wedlock, it cannot agree with the wide interpretation, plaintiff intends. The aim of the legislator by such a disposition of the law was to eradicate completely the distinction between a legitimate and an illegitimate child. His main concern was solely regarding the status of the child and marital status is not the scope behind such

dispositions. Therefore, repudiating the child born in wedlock because of adultery stands no ground for the aforementioned reasons.

"Again, plaintiff is attempting the repudiation of the child born and conceived in wedlock because the birth in his opinion was concealed from him. The Court finds it hard to believe that this was the case, since from the evidence gathered, the parties kept a good relationship between themselves and their respective partners. It is inconceivable, as defendant pointed out, that they used to frequent each other during the time of pregnancy and therefore her protruding tummy was more than visible and he still insists that the pregnancy was concealed to him.

"The Director of Public Registry also pleaded that before the said action under Article 70(1)(d) could be satisfied, the time-limit of six months as contemplated under Article 73 had to be adhered to. Nevertheless, he reiterated that in case of default, an application filed by the party after the lapse of the six months would save the day. Article 73 (c) necessitates that the six months start to run as from the date he discovers the fraud or concealment of the pregnancy. Considering that there seems to be no ground of fraud or concealment of the pregnancy from defendant's part, the application of the six month period becomes futile. In addition, from the acts of the case, it does not seem that at any stage of the proceedings did plaintiff file an application after the six-month period had elapsed.

"Therefore, basing the claim on Article 70(1)(d) is not justifiable.

"ARTICLE 77 (b) Article 77 (b) reads as follows:-

> *"Without prejudice to the provisions of article 81, the filiation of a child born in wedlock may also be impeached by any person interested:*
>
> *"(b) if he proves that, during the said time, the wife had committed adultery, and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude the husband as the natural father of the child."*

"This disposition of the law is subjected to the prevailing article 81 of the Civil Code, which goes on to state:-

> *"(1) No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith.*
>
> *"(2) Likewise, it shall not be lawful to contest the status of a child conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth."*

"For the plaintiff to proceed under Article 77 (b), the Court must first and foremost ensure that by proceeding by such an action, no prejudice would be caused to the minor in terms of Article 81. By creating such

presumption at law, the legislator wanted to uphold the social and legal interests of the child, more than the biological interests at stake, in the sense that it would be more detrimental to a child to find himself suddenly declared to be illegitimate once again, when he was legitimated for all intents and purposes at law. One cannot simply overturn a child's life upside down after having brought him up within a family structure, with a person who he always considered as his parent, who maintained him and even gave him his surname.

"Article 81 also derives from the presumption specified in Article 67 that states:-

> *"A child conceived in wedlock is held to be the child of the spouses."*

"The reasoning behind these two presumptions of the law was made clear in the case Anthony Grima vs Josianne Grima - "l-iskop centrali tal-ligi huwa l-protezzjoni tal-istabbilita' familjari li jkunu ghixu fiha l-ulied u li ghalhekk f'din ic-cirkostanza din l-istabbilita' familjari ghandha tipprevali fuq kwalunkwe dritt ta' terzi."

"In the case AB vs Direttur tar-Registru Pubbliku et. deciza fl-10 ta' Lulju, 2013 the Court reiterated as follows:-

> *"Ezaminati dawn l-artikoli appena citati, hija l-fehma tal-Qorti illi peress li lartikolu 77 u 77b A huma subordinati ghall-Artikolu 81, isegwi illi jekk l-att tat-twelid juri li tifel jew tifla huwa imnissla jew imwielda matul iz-zwieg u ghandhom il-pussess ta' stat ta' tifel jew tifla mnissla jew imwielda matul iz-zwieg, allura hadd, lanqas l-istess missier differenti mir-ragel ta' ommhom. Meta jikkonkorri l-elementi kontemplati fl-artikolu 81, il-ligi nostrana taghti valur notevoli lill-pussess ta' stat ta' wild imwieled minn koppja mizzewwga.*
>
> *"Necessarju ghalhekk jigi ezaminat f'hiex jikkonsisti il-pussess ta' stat ta' wild imnissel jew imwieled fiz-zwieg, imsejjah fil-ligi taghna bhala "l-istat ta' iben legittimu."*

"Artiklu 80 tal-Kap.16 intitolat "L-Istat ta' Iben Legittimu huwa maghmul minn gabra ta' fatti" jipprovdi illi:-

> *"(1) Il-pussess tal-istat ta' iben legittimu jigi stabbilit minn gabra ta' fatti li mehudin flimkien, jiswew biex juru r-rabta ta' filjazzjoni u ta' demm bejn ittifel u l-familja li hu jghid li hi l-familja tieghu.*
>
> *"(2) L-ewlenin fost dawn il-fatti huma:-*
>
> *"(a)Illi t-tifel ikun gieb dejjem il-kunjom tal-missier li tieghu hu jghid li huwa l-iben;*
>
> *"(b)Illi l-missier ikun trattah bhala ibnu, u, f'dik il-kwalita', haseb ghall-manteniment u edukazzjoni tieghu u sabiex jikkolokah;*
>
> *"(c)Illi t-tifel ikun gie dejjem maghruf bhala tali man-nies;*

" (d)Illi huwa jkun gie maghruf bhala tali mill-familja."

"The Court continued to explain the raison d'etre behind Article 81 of the Civili Code – "Il-kwistjoni ghalhekk tirriduci ruhha ghall-apprezzament tal-provi dwar jekk il-minuri ghandux stat ta' iben imwieled minn koppja mizzewwga jew inkella ghandux stat li huwa imwieled minn relazzjoni extra-matrimonjali bejn mara mizzewwga u ragel li ma hux zewgha.

"Fis-sentenza moghtija mill-Qorti tal-Appell fil-25 ta' Mejju, 2007 fl-ismijiet "Marco Vella vs Pauline Cassar et." iccitata ukoll mill-konvenut Direttur finnota tieghu jinghad hekk:-

> *"Dak li jissejjah ir-raison d'etre ta' din id-disposizzjoni tal-ligi nostrali jinsab enkapsulat fil-kumment tal-awtur Ricci meta huma jikkummenta dwar disposizzjoni analoga tal-Kodici Taljan "Egli ha osservato esistere nell'ordine stesso delle cose una presunzione che sta per la inviolabilita' dal talamo a per il rispetto della fedelta' coniugale, la quale presunzione viene avvolorata dalla vita comune degli sposi e fa riguardare il marito come il padre dei concepiti da sua moglie durante il matrimonio. I giuconsulti romani intesero questa presunzione come l'incarnazione della formula solenne "pater is est quem justae nuptiae demonstrat." (Diritto Civile Vol. 1 para 49 page 76).*

"Fil-kawza "Anthony Grima vs Josianne Grima et." deciza fid-19 ta' April, 2012, il-Qorti tal-Appell kellha dan xi tghid fir-rigward tal-Artikolu 81 (2) talKap.16:-

> *"L-azzjoni tallum hija mahsuba mhux biss biex icahhad lill-ulied mill-istat ta' ulied imnissla matul iz-zwieg izda ukoll biex icahhadhom mill-familja li fiha llum trabbew, interess li ukoll irid ihares l-art.81 (2) u huwa ghalhekk illi l-ligi ma tridx li tinbidel is-sitwazzjoni ta' min tnissel jew twieled matul iz-zwieg u ghandu stat li jaqbel ma' dak li jghid l-att ta' twelid tieghu."*

"However, the Court went a step further and expressed itself in this way:-

> *"Din il-Qorti tikkondividi l-fehma tal-awtoritajiet pubblici ntimati li kwalunkwe realta biologika ma ghandhiex tipprevali fuq il-presunzjoni legali li hija bbazata fuq realta' familjari u socjali. Fil-kaz tal-lum, il-presunzjoni legali hija mera tar-realta' familjari u socjali…..u l-presunzjoni naxxenti minn din ir-realta' m'ghandhiex tigi disturbata minhabba realta' biologika."*
>
> *"Din il-Qorti hija tal-fehma li l-presunzjoni legali hija skond il-ligi ghaliex parti mhijiex prekluza milli tikkontesta l-paternita'. Il-presunzjoni legali ghandha skop legittimu ghaliex qedgha hemm sabiex tipprotegi d-drittijiet u libertajiet tal-minuri u ghalhekk qeghda tissalvagwardja l-ahjar interess taghhom. Il-presunzjoni legali hija ukoll mehtiega f'socjeta demokratika sabiex thares ic-certezza legali fir-relazzjonijiet familjari sabiex fl-ahjar interess tal-ulied jipprevali."*

"The Court felt it was important to highlight the significance of Article 81 in that it contemplates and safeguards what are the rights of the minor child that are ultimately supreme. However, the Court cannot delve into the rationae materiae of this Article vis a vis the case at issue, as it would be delving into the merits of the case and its function today, is to determine whether on the facts produced, plaintiff satisfied the grounds to make a claim on the basis of Article 77(b),[6] because this would then lead to a very delicate and sensitive case, which outcome could leave positive or negative impacts on the persons involved.

"Essentially, plaintiff produced the genetic tests that confirm that he is not the child's biological father, but these do not suffice for the purposes of Article 77 (b) of the Civil Code. He pleads adultery, but this stands no ground as it has been confirmed by both parties, that they married when the child was two years old and therefore any allegation of adultery is inconceivable. Hence, the genetic tests per se are not sufficient and cannot be considered to be conclusive evidence on the biological paternity of the child. Consequently, one of the requisites for the proving of Article 77 (b) does not subsist so it becomes untenable for plaintiff to proceed further on the grounds of Article 77(b) and therefore offers no prejudice to Article 81 of the Civil Code.'

3. On the 18th June 2019 the plaintiff filed an appeal application, written in Maltese and complained that:

'*1) In primis, l-Ewwel Qorti ma messhiex imponiet fuq l-attur li jirrestrinġi ruħu fuq il-bażi legali ta' l-azzjoni;*

"2) Illi mingħajr preġudizzju għall-aggravji l-oħra, l-Ewwel Onorabbli Qorti ma messhiex akkordat it-talba tal-konvenuta appellata Irina Fench Laudi li tintavola Risposta Maħlufa ulterjuri;

"3) Illi, mingħajr preġudizzju għall-aggravji l-oħra, ir-Risposta Maħlufa Addizzjonali tal-konvenuta Irina Fenech Laudi hija effettivament nulla u għalhekk ma messhiex ġiet ikkunsidrata;

"4) Illi, mingħajr preġudizzju għall-premess, anke t-talba tal-konvenut Direttur tar-Reġistru Pubbliku sabiex jippreżenta eċċezzjonijiet ulterjuri kienet intempestiva, u għalhekk ma kellhiex tintlaqa';

"5) Illi, mingħajr preġudizzju, għall-aggravji l-oħra, u b' kull rispett lejn l-Ewwel Onorabbli Qorti, ma hux ċar mid-decide liema huma l-eċċezzjonijiet li ntlaqgħu biex it-talbiet attriċi ġew miċħuda, u lanqas ma jirriulta li effettivament l-azzjoni ġiet iddikjarata nulla, b' dan illi jiġi

[6] Enfasi ta' din il-Qorti.

ravviżat possibilment in-nullità tal-istess Sentenza appellata, naturalment mingħajr preġudizzju għal kull konsiderazzjoni legali oħra;

"6) Illi, mingħajr preġudizzju għall-aggravji l-oħra, l-Ewwel Onorabbli Qorti tidher illi, almenu mill-konsiderazzjonijiet tagħha, iddeċidiet dwar eċċezzjonijiet sollevati mill-konvenuti appellati jew min minnhom, li ma kienux l-eċċezzjoni tan-nullità imqajma mill-konvenuta appellata Irina Fenech Laudi, liema eċċezzjoni ġiet trattata u kellha tiġi deċiża hi, waħidha;

"7) Illi, mingħajr preġudizzju għall-aggravji l-oħra, ma hemm ebda nullità tal-azzjoni, kuntrarjament għal dak propost mill-konvenuta appellata Irina Fenech Laudi;

"8) Illi mingħajr preġudizzju għall-ewwel aggravju, id-deċide tal-Ewwel Onorabbli Qorti tfisser illi effettivament, la l-prova xjentifika tal-paternità, u lanqas l-ammissjoni tal-konvenuta appellata, m'għandhomx saħħa biżżejjed sabiex it-talbiet attriċi jintlaqgħu, u trid u ma tridx, l-Ewwel Onorabbli Qorti ssanzjonat sitwazzjoni li ma tirriflettix il-verità, bil-konsegwenzi legali kollha li dan iġib miegħu;

"9) Illi, mingħajr preġudizzju għall-aggravji l-oħra, l-applikazzjonijiet tar-regoli kif ċitati mill-konvenuta Irina Fenech Laudi u applikati mill-Ewwel Onorabbli Qorti jivvjolaw id-drittijiet fondamentali tal-esponenti, kif diġà sanċit b' ġurisprudenza tal-Qorti Ewropea tad-Drittijiet tal-Bniedem, u n-nuqqas tal-Ewwel Onorabbli Qorti ravviżat mill-esponenti huwa proprju li kkunsidrat u applikat regoli li teknikament huma, u digà ġew dikjarati leżivi tad-drittijiet fundamentali tal-esponenti, u għalhekk ma kellhom qatt jiġu applikati fil-każ odjern;

"10) Illi, mingħajr preġudizzju għall-aggravji l-oħra, l-Ewwel Onorabbli Qorti żbaljat meta ħadet il-linja investigattiva li effettivament intraprendiet u eventwalment ċaħdet it-talbiet attriċi in toto – semmai, fl-għar ipotesi għall-attur, l-Ewwel Onorabbli Qorti setgħet tilqa' l-ewwel talba attriċi u għar-raġunijiet mogħtija minnha sa fejn tirreferi għall-artikolu 81 tal-Kap. 16 tal-Liġijiet ta' Malta, fi stadju ulterjuri tiċħad, jew tipprovdi mod ieħor għat-tieni talba attriċi.'

4. In the application the plaintiff requested this Court:

'... sabiex, prevja kull dikjarazzjoni oħra neċessarja, tvarja, u/jew tirrevoka u tħassar s-Sentenza tal-Onorabbli Qorti Ċivili (Sezzjoni tal-Familja) tat-30 ta' Mejju 2019, billi tilqa' t-talbiet attriċi in toto, tiċħad l-eċċezzjonijiet tal-konvenuti in toto, bl-ispejjeż taż-żewġ istanzi kontra l-konvenuti appellati.'

5. The Director of Public Registry filed a reply on the 18th June 2019, requesting this court to dismiss the appeal filed by the plaintiff and to confirm the judgement delivered by the Court of First Instance. Subsequently on the 14th January 2021 he filed an English translation of his reply.

6. On the 5th December 2019 defendant Irina Fenech replied to the plaintiff's appeal by saying that, although she hasn't yet been formally served with the appeal application, she came to know about it and *'without prejudice to an additional reply that may be filed at a later stage, the appeal application filed by plaintiff is in the Maltese language and therefore null in virtue of s. 789(c) and 789(2) of the Code of Organisation and Civil Procedure'.* In support of this plea she referred to a judgement delivered by this Court in the names '***Simon Fiorini Lowell et vs Andrew sive Andy Botha***' on the 30th September 2011 whilst referring to the fact that in the present proceedings the Court of First Instance ordered proceedings to be held in the English language on the 18th April 2018 and said order was never revoked. In view of this she claims that any departure from this order constitutes a violation of the form prescribed by law in Article 2(d) of Chapter 189 and is prejudicial to her;

7. On the 28th May 2020, the plaintiff filed a translation in English of his appeal application;

8. Having also seen that on the 3rd July 2020, defendant Irina Fenech Laudi was notified with the appeal application, an English translation of the same and the notice of hearing;

9. By judgement delivered on the 10th December 2020 this Court rejected defendant's plea that the appeal application is null;

10. After the preliminary judgement, on the 28th December 2020 the defendant filed another reply wherein she gave reasons why plaintiff's appeal should be rejected.

Facts of the case.

11. In the judgement delivered by the first court the following facts are stated:

> *"1. Parties met in 2004 when plaintiff was on holiday in Russia.In March 2006 defendant came to Malta and they started a relationship, that then became intimate when she returned in October, 2007. Defendant remained pregnant and they had a daughter Isabelle Sophia.*
>
> *"2. Plaintiff states that there was a period when they broke up for around five months and he suspects that during such a period she was seeing another man, however Irina always assured him that the child was his.*
>
> *"3. The parties got married on the 6th November,2010 because plaintiff wanted to assume his responsibilities towards his daughter, who at the time of marriage was two years old. However, straight after the honeymoon, plaintiff states that defendant's attitude changed and started to deteroriate. During their arguments, she would mention that*

plaintiff was not the natural father of the minor. Defendant also told him that before their marriage, she had cheated on him with an Englishman.

"4. By the 30th October, 2017, they got legally separated and after that plaintiff submitted himself to the DNA tests to confirm his doubt as to whether the minor Isabelle was his daughter.

"5. From the DNA results it resulted that he was not the minor's natural and biological father.

"6. Joseph Fenech Laudi, plaintiff's brother, confirmed all the above and he added that he had received a message on Facebook from a certain David Clark who informed him that he was the natural and biological father of the minor D, as he had done the DNA tests that confirmed all this. When his brother had broke the news to him, as he really cared for Isabelle, he told him about the message he had received from this Englishman.

"7. Irina Fenech Laudi, defendant explains that she met plaintiff when he used to go out with a friend of hers in Russia. After he broke up with her friend he contacted her and in January, 2005 she communicated with plaintiff through texts and messages, but eventually their relationship developed into a romantic one and in March 2006 they move permanently to Malta.

"8. Defendant explains that their life together was a rollercoaster, because plaintiff suffered from mood swings and they used to argue very often, so much so that by December, 2007 things between them had become so bad. She used to open up with her colleagues, in particular a certain David, who then admitted to having feelings for her. This was in January, 2008 and she decided to leave Mark and she moved in with David about two or three weeks later and during such period she states that she did not have intimate relationships neither with Plaintiff nor with Defendant.

"9. On the 15th February, 2008, defendant moved in with David and in March 2008 she found out that she was pregnant. She admits that the child was David's and not plaintiff's. However, she explains that plaintiff did not give up and kept on trying to convince defendant that he would change and that it would be best for the child to be brought up within a family. She admits that plaintiff had told her that the best solution would be to register the child in his name, even more so because he was her legal partner and it was also to be able to retain her visa. Defendant confirms that they reunited in September 2008 and when Isabelle was two years old they got married.

"10. Defendant explains that after they got married, Mark's mood swings did not change and at times he would get angry at Isabelle or

reiterate that he couldn't get over the fact that she had a child from another man.

"11. In March 2017, defendant left the matrimonial home with Isabelle however she explains that both she had plaintiff had remained on good terms for the sake of the child. Until the separation she confirms that plaintiff helped out financially to prepare the minor for school, buy clothes and organise her birthday party. She explains that plaintiff acted as a father-figure for Isabelle.

"12. After the separation, defendant explains that plaintiff asked her to carry out DNA tests on the child and although she didn't object, she couldn't understand why he was doing these tests, when they both knew that Isabelle, was not his daughter. It ultimately transpired that he intended to open an annulment case on the grounds of deceit from defendant's end and for this reason he needed to open up a case to contest the paternity of the minor child and then he planned to adopt her at a later stage.

"13. Defendant is opposing the change to the minor's surname in view of the fact that she has always been known as Fenech Laudi and it would be very heartbreaking and confusing for her to have her identity taken away from her".

First complaint.

12. The appellant's first complaint is that the first court should not have forced him to declare on the basis of which provisions of law he based his action. He contends that the Court should not have upheld respondent's applicaiton filed on the 21st May 2018. This in view of the fact that in her original reply, defendant Irina Fenech Laudi did not raise the plea of nullity of the sworn application for reason of lack of clarity. He claims that hadn't the Court of First Instance upheld the defendant's request on the 18th June 2018, the chain of events would have been different in that he wouldn't have had to file the note of the 12th July 2018 indicating the articles of the law on which his claim was based, and

consequently defendant Irina Fenech Laudi wouldn't have filed an additional reply raising the plea of nullity of proceedings.

13. The Court notes that in the concluding paragraph of the appeal application the appellant only requested this Court to revoke and reverse the judgement delivered by the Court of First Instance on the 30th May 2019. There is no request for this Court to revoke any of the decrees delivered by the first court.

14. Furthermore, his complaint is unjustified. Briefly the facts that preceded the decree delivered on the 18th June 2018 were:

i. on the 18th April 2018,[7] the Civil Court (Family Section), in view of the first plea of defendant Fenech Laudi and of the second plea of the Director of Public Registry, the Court ordered the plaintiff to file a note indicating the article of the law on which he based his claims. An order that was justified;

ii. by means of a note filed on the 26th April, 2018[8] plaintiff stated that the present proceedings are based on Articles 101, 70(1)(d), 75, 77(b) and 99 of The Civil Code, without prejudice to any other applicable provision of the Law;

[7] Fol. 37.
[8] Fol. 40.

iii. on the 21st May 2018, with reference to the above declaration, defendant Irina Fenech Laudi filed an application alleging that: (i) the words '*without prejudice to any other applicable provision of the Law*' are in breach of the Court's decree and should therefore be ignored; and (ii) the articles quoted by the plaintiff are conflicting since Articles 70(1)(d), 75 and 77 refer to '*filiation of children conceived or born in wedlock'* whereas Articles 99 and 101 refer to '*filiation of children conceived and born out of wedlock'*. She consequently requested the Civil Court (Family Section) to order the plaintiff '*to indicate precisely and unequivocally under which article of the law he is basing his claim'* and reserved her right at law to file an additional reply, if need be, once the articles were specifically indicated;

iv. on the 14th June 2018 plaintiff replied that applicant's demands should be rejected;

v. on the 18th June 2018, the Civil Court (Family Section) decreed as follows:

> '*In terms of Article 421 of Chapter 12 gives plaintiff 10 working days from today to file a note specifying the article/articles of the law which are the basis of the plaintiff's claim.'*

vi. on the 12th July 2018, plaintiff filed a note stating that his claims are based on Articles 99, 77(b) and 70 (1d) of The Civil Code.

15. It is clear that the first court did not '*impose it*' on the appellant '*to restrict the legal basis of the action*', as alleged in the present complaint. The plaintiff was free to mention any provision of law, and at no point in time during the proceedings did he request or declare that he wanted to amend the note filed on the 12th July 2018. The plaintiff is incorrect when in paragraph 13 of his appeal, he claims that as a result of the decree delivered on the 18th June 2018, he lost the opportunity of benefitting from all other provisions of the law. Prior to filing the note of the 12th July 2018, the plaintiff had ample time and opportunity to declare the relevant articles of law. In any case he did not refer to any other provisions of law from which he could have benefitted. In any case, *iura novit curia*, and had the Court been of the opinion that a provision of law not mentioned by plaintiff was nonetheless relevant to the issue it would have informed the parties accordingly and invited them to make submissions thereon.

16. The Court rightly referred to its powers to make such an order in terms of Article 421 of the Laws of Malta provides as follows:

> *'Where the court, for a further and better statement of the claims, in view of the intricacy of the issues involved, shall deem an additional written pleading to be necessary, the court may order such additional written pleading and make any other special order which it may consider expedient.'*

17. In his reply the Director of Public Registry also referred to Article 173 of Cap. 12 of the Laws of Malta which allows the Court to give *in camera* all such orders and directives it may think fit *inter alia* in order to seek more detailed information.

18. Therefore, a court has a right to request either party to make any clarifications it deems necessary for the better administration of justice.

19. Moreover, appellant's first complaint is based on the hypothetical assumption of what he believes would have happened had the Court rejected the request made by defendant Irina Fenech Laudi on the 21st May 2018. Court decisions are not based on assumptions.

20. Therefore, the the Court rejects the first complaint.

Second complaint.

21. The appellant also complained that the first court should have never acceded to respondent Irina Fenech Laudi's request to file an additional reply, because: (i) it was premature since same could only be made between the exhaustion of plaintiff's evidence and the beginning of defendant's evidence;[9] (ii) there is no new fact that justifies a plea that

[9] In this context appellant refers to Art 158(1) of Cap 12.

could not have been raised in *limine litis*; (iii) the additional sworn reply was filed before the Court granted defendant Fenech Lauri permission to do so; (iv) in her application defendant Fenech Laudi did not indicate clearly the pleas she wanted to raise therefore putting the plaintiff in a situation where he could not properly object to certain pleas from being raised before the Court granted its authorisation; (v) the judicial act proposed as an additional reply does not reflect legal requirements set out in Article 158(3) of Cap. 12 of the Laws of Malta and is therefore null in terms of Article 789(1) of Chapter 12 of the Laws of Malta.

22. As in the case of the first grievance, from a procedural point of view, the appellant only requested this Court to revoke and reverse the judgement delivered by the Court of First Instance on the 30th May 2019. There is no similar request with respect to the decree of the 23rd January 2019 ordering the additional pleas filed by respondent Irina Fenech Laudi to be inserted in the Court file.

23. On the merits, the appellant claims that the Court allowed defendant Irina Fenech Laudi to file an additional reply prematurely and refers to Article 158(11) of Cap. 12 of the Laws of Malta which reads as follows:

> *'(11) The sworn reply, after the conclusion of the evidence of the plaintiff and before the defendant produces his evidence, may be amended by means of a separate statement either withdrawing any of the pleas set*

> *up or adding new pleas, saving those pleas which may be set up at any stage of the proceedings.'*

24. From the acts it transpires that the appellant filed various documents together with his sworn application of the 22nd February 2018. Soon after, on the 26th March 2018, he filed his affidavit. On the 13th April, 2018, which happens to be the same date that Irina Fenech Lauri filed her original reply, plaintiff also filed his brother Joseph Fenech Laudi's affidavit.[10] It was during the sitting held on the 18th April 2018 that the Court ordered plaintiff to declare under which provisons of law he based his lawsuit. Then during the sitting of the 29th May 2018, the Court issued the following order:

> *'Since defendant is alleging that both defendant and plaintiff knew that the child was not the biological daughter of plaintiff when the relative information was given to the proper authorities, the Court orders the suspension of the evidence being produced by plaintiff and also orders defendant Irina Fenech Laudi to start producing her evidence ...'*

25. Thereafter, defendant Irina Fenech Laudi filed an application requesting the Court's permission to file an additional reply dated 6th September 2018 and pending service thereof, filed her affidavit during the sitting of the 4th October 2018. Subsequently no further evidence was produced by any of the parties. Neither did the plaintiff cross-examine defendant Irina Fenech Laudi.

[10] Fol. 31.

26. Whereas it is true that the facts complained of by the appellant in his sworn application and affidavit remained unchanged, he only clarified the legal basis of the present proceedings at a much later stage. In this regard, he first filed a note on the 26th April 2018 stating that his claim is based on Articles 101, 70(1) (d), 75, 77(b) and 99 of the Civil Code and later, on the 12th July 2018, changed his position by declaring that his claims are based on Articles 99, 77(b) and 70(1) (d) of Cap. 16 of the Laws of Malta. This change of position is proof of the fact that the legal basis of his claim was not as straight forward and obvious as he now claims.

27. Given the circumstances, the first court was more than justified in granting permession to the respondent to raise additional pleas in terms of Article 728(2) of Chapter 12 of the Laws of Malta.[11]

28. Appellant also contends that defendant Fenech Laudi filed her additional reply before the Court granted her permission to do so. In this regard, although it is true that defendant Irina Fenech Laudi filed a copy of her additional reply as an annex to her application of the 6th September

[11] *'**728**.(2) No other pleas can be set up at a later stage; provided that the court may on an application by the defendant or respondent allow the setting up of additional pleas, if it is satisfied that there were valid reasons for not including them in the note of pleas or in the answer.'*

2018 asking leave of court to file same,[12] the Court took note of the pleas after it upheld the defendant's request to file an additional reply.[13]

29. The appellant further argues that the first Court should not have granted defendant Irina Fenech Laudi permission to file an additional reply because in her application defendant Fenech Laudi did not indicate clearly the pleas she wanted to raise therefore putting the plaintiff in a situation where he could not properly object to certain pleas from being raised before the Court granted its authorisation.

30. This is a frivolous complaint. The additional reply was attached to the application requesting court authorisation to file the same. So much so that when the first Court upheld the request, it simply ordered the additional sworn reply of defendant Fenech Laudi to be formally inserted in the acts of the proceedings.

31. In fact, the appellant himself refers to the '*additional sworn reply*' in his reply of the 9th October 2018[14] to the defendant's request for Court authorisation to file said additional reply. This Court therefore fails to understand the impediment the appellant claims to have had to properly object to the additional pleas before the Court authorised said defendant

[12] Fol. 60.
[13] Fol. 84.
[14] Fol. 67 *et seq*.

to file same on the basis of any alleged lack of clarity regarding the actual pleas in the application itself.

32. Finally, appellant claims that the judicial act proposed as an additional reply does not reflect legal requirements set out in Article 158(3) of Cap. 12 of the Laws of Malta, namely, '*the facts 'Facts of the Case' are not enumerated, and with due respect, it is unclear in 'Points of Law', which paragraphs constitute submissions and which paragraphs constitute pleas, with the exception of paragraph 10.'* Appellant claims that the additional reply is therefore null in terms of Article 789(1) of Chapter 12 the Laws of Malta and that the Court of First Instance should have never allowed it.

33. The appellant is clearly clutching at straws. Although the appellant objected to defendant Irina Fenech Laudi's request to file an additional reply, he never made any verbal or written submission as regards to the validity of the judicial act whereby defendant filed additional pleas. Nor was it shown that he suffered irreparable harm which could have not otherwise been remedied.

34. Without prejudice to this, Article 789 of Cap. 12 of the Laws of Malta, referred to by the appellant himself, reads as follows:

> *'**789**. (1) The plea of nullity of judicial acts is admissible –*

> *(a) "if the nullity is expressly declared by law;*
>
> *(b) "if the act emanates from an incompetent court;*
>
> *"(c) if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;*
>
> *"(d) if the act is defective in any of the essential particulars expressly prescribed by law:*
>
> *"Provided that such plea of nullity as is contemplated in paragraphs (a), (c) and (d) shall not be admissible if such defect or violation is capable of remedy under any other provision of law.*
>
> *"(2) The plea of nullity of an act, under sub-article (1)(c), shall not be admissible if the party pleading such nullity has proceeded, or has knowingly suffered others to proceed, to subsequent acts,without pleading such nullity.'*

35. Whereas the facts listed in the additional reply aren't numbered, they are clearly listed in bullet form. Additional pleas are thereafter clearly numbered and refer to the articles of the law that the appellant himself indicated. Any shortcomings are cosmetic and do not render defendant Irina Fenech Laudi's additional reply null.

36. The Court rejects the second complaint.

Third complaint.

37. The appellant complained that '*without prejudice to the other grievances, the Additional Sworn Reply of defendant Irina Fenech Laudi is effectively null and hence should not have been considered'.* The

appellant goes on to reiterate the arguments already made in his second grievance and insists that the additional sworn reply filed by defendant Fenech Laudi is not inconformity with Article 158(3) of Cap. 12 of the Laws of Malta.

38. The Court referes to all considerations made with reference to the second complaint and for the same reasons rejects the third complaint.

Fourth complaint.

39. Appellant further complains that '*even the demand of defendant Director of Public Registry to lodge further pleas was premature and should not have been upheld.'* Once more he quotes Article 158(11) of Cap. 12 of the Laws of Malta.

40. The defendant Director of Public Registry requested the authorisation of the Civil Court (Family Section) to file an additional reply during the sitting of the 23rd January 2019[15] after the first Court had already given permission to the other defendant to do so. By then the appellant had already filed his affidavit and other evidence. Although his version of facts remained unchanged, the legal basis of his claim wasn't clear. Once he declared the relevant articles of the law he was invoking

[15] Fol. 84.

and things were made more clear, the Court was correct in authorising defendants to file an additional sworn reply.

41. Therefore the Court rejects the fourth complaint.

Fifth and Sixth complaint.

42. Appellant also contends that '*it is unclear from the decide which are the pleas that were upheld for plaintiff's demands to have been rejected, and neither does it result that the action was effectively declared null; in this way it is possible that the same contested judgement is possibly null, naturally without prejudice to any other legal consideration.'* Appellant claims that at that stage of the proceedings only the plea of nullity, raised by respondent Fenech Naudi in her additional pleas, was up for decision.

43. The sixth complaint is related to the fifth one whereby appellant contends that '*the First Honourable Court seems, at least from its considerations, decided on pleas raised by the defendants that were not the plea of nullity raised by defendant Irina Fenech Laudi, which plea had to be debated and decided on its own':*

> *'61. For the sake of clarity, plaintiff clarifies that the fifth grievance is about the lack of clarity in the judgement about which pleas were actually upheld, and who raised them, and for what reason, and that it*

does not appear that any decision was delivered on the plea of nullity which was raised and debated.

"62. In the sixth grievance, plaintiff's complaint is, more specifically, about the fact that the First Honourable Court, in the most clear manner, failed to address the matter of nullity of the action, and failed to decide that plea, and instead examined and decided pleas that should not have been decided. As the First Honourable Court mentioned in page 15 of the contested judgement, the plea of nullity of the action was raised, and it was that plea alone that had to be examined and decided, and from all pleas raised, it is the only plea that was neither examined, nor decided. The only hint that there could be that this plea was also decided, even if it was not examined, and less so is there a declaration on this point in the contested judgement, is in the decide when it is stated: "... whereas it upholds defendants pleas.'

44. In his reply, the Director of Public Registry underlined that he never raised the plea of nullity and that same was only raised by Irina Fenech Laudi. This notwithstanding, he claims that it is not true that during the sitting of the 4th April 2019 the parties only made submissions with regards to the plea of nullity, and this for the following reasons:

(i) the minutes of the sittings do not specifically state that the submissions were limited to the plea of nullity. In fact, the sitting of the 14th March 2019 was intended for parties to make submissions regarding the additional pleas raised by defendants, however the parties asked for an adjournment and the case was then adjourned to the 4th April 2019 at 12:30 pm. From the transcript of the submissions made during that sitting, it is evident that the defendants made arguments regarding all their additional pleas;

(ii) During that sitting the Director of Public Registry also made submissions. If the submissions were supposted to be limited to the plea concerning nullity, as claimed by the appellant, he would not have made any submissions since he never raised that plea. It is clear that both defendants made submissions regarding all their additional pleas and the appellant did not object;

(iii) from the minutes of the proceedings there is no evidence that the first cout had to deliver a judgement only on the plea of nullity of the lawsuit. The wording of the judgement is clear in that it was, '*going to analyse the respective pleas raised by defendants in this case with respect to plaintiff's claims on the basis of the aforementioned articles of the law'*; and

45. From the acts of the proceedings it transpires that:

(i) during the sitting of the 29th May 2018, the Court ordered the suspension of the evidence being produced by the plaintiff and also ordered defendant Irina Fenech Laudi to start producing her evidence in view of the fact that she alleged that both plaintiff and herself knew that the child was not the biological daughter of plaintiff. The case was adjourned for the cross-examination of defendant Fenech Laudi;

(ii) during the sitting of the 4th October 2018 defendant Fenech Laudi served plaintiff with a copy of her application of the 6th September 2018 and also filed her affidavit;

(iii) the sittings of the 30th October 2018 and 15th January 2018 dealt with the application filed by defendant Fenech Laudi requesting Court authorisation to file an additional reply. The Court upheld her request during the sitting of the 23rd January 2019 and authorised the defendant Director of Public Registry to also file an additional reply. The case was adjourned for continuation;

(iv) during the sitting of the 14th March 2019 defendant Irina Fenech Laudi confirmed her additional sworn reply under oath and the case was adjourned to the 4th April 2019;

(v) during the sitting of the 4th April 2019 the parties made their submissions. Defendant Irina Fenech Laudi's lawyer started by referring to the notes filed by the appellant wherein he referred to the applicable provisions of law for this lawsuit. She mentions the alleged nullity only in relation to the six month time limit prescribed in Article 70(1)(d) of Cap. 16. The lawyer for the Director of Public Registry then went on to make her submissions by first stating that the lapse of the 6 month time period does not make the action null and then goes on to

make arguments regarding the interpretation of Article 101 of Cap. 16 stating that in the present case the provisions regarding children born in wedlock should apply. Subsequently, the plaintiff's lawyer made his submissions stating that he would first respond to the submissions made by the other lawyers and then go on to ask the Court to address '*something totally different'*. He then complains about alleged shortcomings in the law and refers to jurisprudence of the European Court of Human Rights. He concludes by saying that '*irrespective of what has been raised in terms of additional pleas, first of all, nullity does not sustain in any way, we have not been given an article of the law that in any way indicates that this action is null and void. Secondly, that any reference to terms, or deadlines, articles of law does not bring about nullity but se mai it's a matter of decadence .... thirdly, even if this Court were to disagree with these submissions, upholding these pleas, is technically going to bring a breach for my client's fundamental rights.'* Defendant Irina Fenech Laudi's lawyer then replied and the plaintiff's lawyer once again counter-argued that '*what my colleague has just addressed is an issue on merits and not on the matter of nullity that has been raised ... I must remind this Court that we are still at a stage where the stage of evidence has been suspended and not concluded, we are not at the end of the case, parties are still at the stage of bringing about evidence ... but again, we are here for the matter of nullity and therefore I reiterate what I said previously.'*;

46. All the above facts coupled with the reasons on which the Court based its decision, leads this court to understand that the judgement of the 30th May 2019 was intended to establish whether the plaintiff could proceed with his claim on the basis of the articles of the law he indicated in his note of the 12th July 2018. In fact, **all** the various pleas raised by both defendants in their respective additional replies, and not just the plea of nullity raised by defendant Fenech Laudi in paragraph 10 of her additional sworn reply, were debated during the oral submissions of the sitting held on the 4th April 2019 and consequently formed the merits of the judgement that ensued thereafter.

47. This Court finds no lack of clarity in the judgement delivered by the Court of First Instance on the 30th May 2019. The Articles of the law mentioned by the plaintiff were 99, 77(b) and 70(1)(d) of the Civil Code. In her additional reply defendant Irina Fenech Laudi claimed that:

(i) Article 99 of Cap 16 does not apply since it refers to children born out of wedlock whereas the child in question is presumed to have been born in wedlock (paragraph 3 of the additional sworn application);[16]

[16] Fol. 63.

(ii) any action based on Article 77(b) of Cap 16 should be dismissed since: (a) the child possesses a status in conformity with her act of birth; and (b) it is factually impossible for the plaintiff to prove adultery since at the time the child were conceived and born the parties were not yet married (paragraphs 4, 5 and 6 of the additional sworn application);[17]

(iii) any action based on Article 70(1)(d) of Cap. 16 should be dismissed since: (a) it is impossible for plaintiff to prove adultery given the parties got married only after the child was born; and (b) there was no concealment of pregnancy and birth (paragraph 7 of the additional sworn application);[18] and

(iv) moreover and without prejudice, insofar as the action is based on Article 70(1)(d) of Cap. 16 it is time barred by operation of Article 73(a) and (c) of Cap. 16 whereas the proviso thereto is inapplicable since plaintiff failed to seek the Court's prior authorisation before filing the present proceedings (paragraphs 8 and 9 of the additional sworn application);[19] and

[17] Fol. 63 – 64.
[18] Fol. 64.
[19] Fol. 64.

(v) The action is null since the facts of the case exclude the application of Art. 70(1)(d).[20]

48. On the other hand, the Director of Public Registry raised the following additional pleas:

(i) Article 99 is inapplicable to the present case since it refers to children born out of wedlock whereas the child in question is presumed to have been born in wedlock under Article 101 of Cap. 16;

(ii) insofar as the action is based on Article 70(1)(d) it is time barred by operation of Article 73(a) and (c) of Cap. 16 however the situation may be remedied if the plaintiff files an application in terms of the proviso thereto;

(iii) Articles 101 and 75 of Cap. 16 are not being used as the basis of the action filed by plaintiff.

49. The final paragraph of the judgement reads as follows:-

> *"For the above reasons, the Court decides that plaintiff's claims for a disavowal of paterninty on the grounds of Articles 70(1)(d), Article 77(1b) and Article 99 of the Civil Code are being rejected, whereas it upholds defendants pleas"*.

[20] Fol. 64.

50. Therefore, in the operative part of the judgement the Court said *"upholds defendants pleas"*. These words might lead one to understand that all pleas were decided. However, before giving the reasons on which the decision was based, the Court explained:

> *"Plaintiff is basing his claims on Articles 99, 77B and 71D of the Civil Code. Defendants are claiming the nullity of plaintiff's actions.*
>
> *"The Court is going to analyse pleas raised by defendants in this case with respect to plaintiff's claims on the basis of the aforementioned articles of the law"*.

51. From the first court's reasoning it is apparent that the Court upheld:

(i) the first plea raised by each defendant in their respective additional replies, dealing with the inapplicability of Article 99 of the Civil Code.

(ii) the second plea raised by defendant Irina Fenech Laudi in her additional reply regarding the inapplicability of Article 77(b) of Cap. 16 to the present case. Dfendant's argument was in the sense that since from conception to birth the parties were not married, there was no adultery in terms of Art. 77(b) of the Civil Code.

(iii) the third plea raised by defendant Irina Fenech Laudi in her additional reply regarding the inapplicability of Article 70(1)(d) of Cap. 16 to the present case;

52. Given that the Court found that '*plaintiff's claims for a disavowal of paternity on the grounds of Articles 70(1)(d), Article 77(1)(b) and Article 99 of the Civil Code are being rejected*', it is understood that there was no further scope for the Court to delve into the issue of nullity raised by defendant Irina Fenech Laudi in paragraph 10 of her additional reply.

53. As to the additional pleas that the claim under Art. 70(d) is time barred, there is no decision against the plaintiff. The first court merely concluded that Art. 73(c) of the Civil Code does not apply and that in any case the applicant did not file an application after the lapse of the six month period. In the relevant part of the judgement concerning Art. 73 of the Civil Code, the first court did not decide that the action filed by plaintiff is time barred. That plea was irrelevant once the Court decided that plaintiff's claim cannot succeed on the basis of Art. 70(d) of the Civil Code since at the time of conception he was not married to the defendant.

54. Even though the judgement of the first court could have been more clear in the operative part, the judgement is motivated and does not

give rise to any doubt as what was actually decided. The Court therefore rejects the fifth complaint.

55. As regards to the sixth complaint, there is nothing in the court file to convince the Court that the judgement had to deal only with the additional plea raised by respondent Fenech Laudi that the action is null because *"the facts of the case exclude the operation of Art. 70(1)(d)"*.

56. From the final submissions made by defence counsel during the sitting of the 4th April 2019, the Court understands that the judgement had to determine whether the actions contemplated under Article 70, 77 or 99 were applicable to the current case. It is a fact that none of the *proces verbal* contain a declaration that the parties have no futher evidence on the merits of the case. Furthermore, the *proces verbal* of the sittings of the 14 March 2019 and 4th April 2019 (regarding to the two sittings that preceded the judgement delivered on the 30th May 2019) do not help. Every *proces verbal* should expressly state the reason why a case is adjourned (Art. 212 of Chapter 12). For example the proces verabl of the sitting held on the 14th March 2019 merely states, *"Case adjourned, for the 4th April 2019 at 12:30"*. This lack of information is apt to give rise to more unnecessary issues between parties.

57. Notwithstanding based on the submissions made by counsel to the parties during the sitting held on the 4th April 2019, the Court concludes that the judgement had to address the issue whether the plaintiff could proceed with his claim on the basis of the articles of the law he indicated in his note of the 12th July 2018.

58. Therefore the Court also rejects the sixth complaint.

Seventh complaint.

59. The appellant complains that '*there is no nullity of plaintiff's action, contrary to what was raised by defendant Irina Fenech Laudi.'*

60. It has already been stated that the alleged nullity did not in any way form part of the considerations of the first court. Although respondent Fenech Laudi pleaded the nullity of the action and the first court upheld defendants pleas, no considerations were made with regard to the plea of nullity of the case. The action filed by plaintiff was rejected for other reasons, namely, the inapplicability of Articles 70(1)(d), 77(1)(b) and 99 to the present circumstances of the case, as explained above.

61. The Court rejects this complaint.

Eighth complaint,

62. The appellant also declares himself aggrieved with the fact that '*the decide of the First Honourable Court means that in effect, neither the scientific proof of paternity, nor defendant's admission, have sufficient legal strength for plaintiff's demands to be upheld, and whether it intended or not, the First Honourable Court condoned a situation which does not reflect the truth, with all the legal consequences that this brings with it.'* Appellant complains that the interpretation of Article 81 of Cap. 16 given by the Court of First Instance effectively means that '*any action he may have lodged would have been unsuccessful as in any case a person's status cannot be changed.'*

63. Once more the appellant is incorrect. The first court did not consider Art. 81 for obvious reasons. Once the Court concluded that Art. 77(b) did not apply because there was no adultery, since the parties married when the child was already two years old, then Art. 81 of the Civil Code is irrelevant. The Court expressly stated, that it *"…. cannot delve into the rationae materiae* (*recte, ratio*) *of this Article vis-a-vis the case at issue, as it would be deliving into the merits of the case and its function today, is to determine whether on the facts produced plaintiff satisfied the grounds to make a claim on the basis of Article 77(b),……."*.

64. On the other hand, the appellant failed to contest the conclusion of the first court that Art. 77(b) was not applicable to his case. The reason given by the first court for such a decision was because Art. 77(b) of the Civil Code requires that '*the wife committed adultery*'. The Court held that in this case defendant could not have *'committed adultery'* since the parties were married when the child was two years old. The Court emphasized that therefore, *".....any allegation of adultery is inconceivable. Hence genetic tests per se are not sufficient and cannot be considered to be conclusive evidence ... Consequently, one of the requisites for the proving of Article 77(b) does not subsist so it becomes untenable for plaintiff to proceed further on the grounds of Article 77(b) and therefore offers no prejudice to Article 81 of the Civil Code".* With regards to Art. 77(b) of the Civil Code this was the relevant issue which appellant should have addressed in his complaint. However, no such ground of appeal is included in the plaintiff's appeal application. Therefore, this Court cannot consider and decide on whether the first court's understanding of Article 77(b) is correct.

Ninth complaint.

65. The appellant also complains that '*the application of the rules as referred to by defendant Irina Fenech Laudi and applied by the First Honourable Court, violate plaintiff's fundamental rights, as has already*

been decided in the jurisprudence of the European Court for Human Rights, and the error which plaintiff attributes to the First Honourable Court is that it considered and applied rules that technically have already been declared in breach of fundamental rights, and therefore should never have been applied to this case.' In this respect he refers to the judgement ***Mizzi vs Malta*** (Application 26111/02) delivered by the European Court of Human Rights on the 12th January 2006.

66. This Court will limit itself to stating that the appellant is not justified in complaining that the first court should have never applied '*restrictions to the present action that have already been deemed to be in violation of fundamental human rights'* for the following reasons:

(i) Firstly, the judgement of the European Court of Human Rights in the case of ***Mizzi vs Malta*** applies to the parties in that specific case and the law was subsequently amended. As rightly pointed out by the Director of Public Registry in his reply to the present appeal:

> *'il-Qorti Ewropea għad-Drittijiet Fundamentali għal Bniedem, kienet tal-fehma illi kien hemm ksur tad-drittijiet tas-Sur Mizzi għaliex dan tal-aħħar ma kellu qatt l-opportunità illi jattakka l-paternità ta' bintu. Għandu jiġi nnutat illi fis-sentenza in kwistjoni, qatt ma jissemma' illi s-Sur Maurice Mizzi kellu r-rimedju li jinsab fil-proviso tal-Artikolu 73 tal-Kodiċi Ċivili, li jipprovdi li 'wara li jsir rikors mill-konjuġi u, jekk ikun possibbli, wara li tkun semgħet lill-partijiet interessati kollha, u wara li tkun qieset id-drittijiet kollha tal-applikant u tal-wild, f' kull żmien tawtorizza lill-applikant sabiex jibda kawża biex jiċħad wild imwieled matul iż-żwieġ lill-konjuġi tiegħu'. Dan ma sarx għaliex tali rimedju ma kienx disponibbli għas-Sur Mizzi u l-proviso in kwistjoni daħal fis-seħħ wara emendi leġislattivi li daħlu maż-żmien.'*

(ii) Secondly, the first court was bound to apply and interpret the ordinary law.

67. Furthermore in his appeal application wherein appellant continuously repeats the same arguments, he failed to complain about the first court's interpretation of Articles 70(1)(d) and 77(b) of the Civil Code with respect to the requisite of 'adultery'. The appeal was an ordinary and sufficient remedy whereby the appellant had an opportunity to contest the first court's reasoning in that regard. Unfortunately for him he failed to do so and therefore this court is precluded from reviewing the reasoning that led the first court to decide that Arts. 70(1)(d) and 77(b) are not applicable to this particular case since the requisite of adultery was not satisfied because appellant and respondent were not married at the time of conception.

68. For these reasons the Court rejects this complaint.

Tenth complaint.

69. The appellant's final complaint is that '*the First Honourable Court was wrong when it undertook the judicial investigation it actually did and eventually rejected plaintiff's demands – if anything, in the worst scenario for plaintiff, the First Honourable Court could have upheld the first demand and for reasons given by it when it refers to Article 81 of The*

Civil Code of the Laws of Malta, in a future stage, deny, or decide in another manner, the second demand.'

70. Based on the reasons that led the first court to conclude that Art. 77(b) was not applicable to case under review, and mentioned in the previous paragraphs in this judgement, it is obvious that the first court could not proceed to consider facts that are relevant for the purposes of Art. 81 of the Civil Code.

71. The Court also rejects this final complaint.

For the reasons stated the Court rejects the appeal filed by the appellant and confirms the judgement delivered by the Civil Court (Family Section) on the 30th May 2019. All judicial costs are at the charge of the appellant.

The Court orders the Registrar to notify the State Advocate with a copy of the judgement in view of the discrepancy between the Maltese and English version of Article 99 of the Civil Code.

Giannino Caruana Demajo President	Tonio Mallia Judge	Anthony Ellul Judge

Deputy Registrar
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