



**CIVIL COURT
(FAMILY SECTION)**

MR. JUSTICE MR. ANTHONY G. VELLA

Sitting of Wednesday 2nd June 2021

Application number: 45/2018 AGV

ABC

Vs

DBC

The Court,

Having seen the application of ABC respectfully submits:-

1. Since parties married on the 6th November 2010, with the civil rite, according to a copy of the marriage certificate hereby attached, exhibited and marked as Doc. A.

2. Since the marriage is vitiated because of inter alia, the fact that consent of one of the parties, was acquired through fraud or deceit about a quality of the other party. Which could in itself jeopardize married life, or with the positive exclusion of marriage, or one of its essential elements, or of the act of marriage, reasons , which are attributable to the parties, or one of them, in terms of Article 19 (1) © and (f), of Chapter 255 of Laws of Malta.

Let the defendant state why this Honourable Court, should not:-

1. Declare and decide that the marriage celebrated between the parties on the 6th November 2010 in the Public Registry is null and without effect at Law in terms of Article 19 (1), © and (f) of Chapter 255 of the Laws of Malta , or whichever of them.
2. Consequently, order service of this judgement to the Director of the Public Registry so that according to law an annotation may be made on the marriage certificate, with number 2154/2010, relative to the parties.

With costs against the defendant who is summoned as from now with reference to her oath.

The Court having seen the sworn reply of DBC pleads with respect and confirms on oath:-

1. That the Respondent confirm that the parties were married on the 6th November 2010 by civil rite.

2. That today, the parties, are legally separated by a separation agreement dated 30th October 2017, in the notarial acts of Dr Timothy Ellis.
3. That on Respondent's part, there was no defect in her consent, which give rise to any nullity, within marriage and any nullity therefore is not attributable to her.
4. Respondent contends that she was fully aware of what she was doing when she consented to the marriage and did so because, she loved the applicant and wanted to share her life with him, and raise their daughter (acknowledged by the applicant before the marriage), together. It was the applicant who did not understand the duties, and obligations of the marriage, as will be proved during the pendency of this case.
5. If there was any deception about the quality and obligations of marriage, this definitely is not imputable to the respondent.
6. Applicant's conduct even before marriage shows that he never understood the rights, duties and obligation of marriage, or at least he was not able to honour, his obligations, and rendered himself guilty of both psychological and physical violence against the respondent.
7. Save further exceptions.

Having seen all the acts and documents related to the case.

FACTS

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.

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 D always assured him that the child was his.

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 deteriorate. He also tried to convince her to have children, but from before their marriage, Defendant was not interested in having children and the more time passed the more he had given up. 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 and she left the matrimonial home on the 25th March 2017. He still tried to win her over by sending her Valentine's Day cards as well as Mother's Day cards. He confirms that they still remained in contact and they also used to frequent each other, since at the time he was courting another woman E.

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 F was his daughter. From the DNA results it resulted that he was not the minor's natural and biological father. He realised that Defendant had deceived him all through, because being Russian she did not believe in the permanence of marriage, she excluded having children and moreover she deceived him.

Regarding his first marriage, he admits to having exercised discipline with his children. He also admits that he could have been abusive with his ex-wife G if he would have lost his temper. He denies ever having spoke to a psychologist, but he did speak to a priest, a certain Fr.Calleja.

2. HCB, plaintiff's brother, confirmed all the above and he added that he had received a message on Facebook from a certain IJ who informed him that he was the natural and biological father of the minor F, as he had done the DNA tests that confirmed all this. When his brother had broken the news to him, as he really cared for F, he told him about the message he had received from this Englishman. At the time he received the message he did not inform Plaintiff, for the simple reason that at the time they were not on good terms. He admits that he was in contact with Plaintiff's ex-wife G and although she describes Plaintiff as being a liar, he was a good hearted and generous man. He considered him to be very disciplined with his children, but at the same time his ex-wife was not. He could not confirm whether Plaintiff was violent with his ex-wife and children, but this is what he was informed by G.

He also added that Plaintiff's ex wife had also told him that she had seen Defendant in Paceville kissing another man and he had confirmed with I whether it was him and he so confirmed.¹

Regarding the message from IJ, the latter had informed him that he had the DNA certificate as proof, though he never sent them to him.

¹ Vide Dok. JFL 1

3. DBC defendant explains that she met Plaintiff when he used to go out with a friend of hers in Russia, who was called D too. 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. She admits that initially her parents were not very happy with their courtship, since Plaintiff was married, and he was a father. However, when he spent some time living with them in Russia, he assured them that he was undergoing separation proceedings with his wife. He was very polite and gentle mannered, so much so that he won her family's approval.

Plaintiff's ex wife used to contact her to warn her to beware of him because according to her he had an unstable mental state and temper. Plaintiff used to deny this; however, she explains that she experienced frequent mood swings, short temper, shouting and constant control from Plaintiff's end. He was also unhappy that she worked as he expected her to stay at home.

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 I, who then admitted to having feelings for her. Initially they were good friends and they knew each other for a couple of years and then they started a romantic relationship. This was in January 2008 and she decided to leave A and she moved in with I 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.

On the 15th February 2008, defendant moved in with I and in March 2008 she found out that she was pregnant. She admits that the child was I's and not Plaintiff's. They used to frequent each other and at the time Plaintiff was also frequenting a certain E and they used to meet up altogether. 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. He also believed that in such a way the child would be given a proper family with a mother and a father. When her mother was in Malta, Plaintiff asked for her forgiveness and told her that he was ready to accept Defendant back because he loved her and was prepared to raise the child for her. Defendant confirms that they reunited in September 2008 and when F was two years old, they got married. She admits that the child's father would often come and make scenes behind their door accusing Plaintiff of stealing his wife and child.

Defendant explains that after they got married, A's mood swings did not change and at times he would get angry at F or reiterate that he couldn't get over the fact that she had a child from another man and they never had one of their own. However, Defendant denies having ever informed Plaintiff, even before marriage that she did not want children, but on the other hand, it was Plaintiff who was adamant because of financial issues, on account of his age, as well as of the limited space in their residence. However, she was always very grateful for what Plaintiff did for the minor child.

They had several arguments because Defendant worked and it was having its impact on the minor child, he used to be scared to stay alone with Defendant. There was an episode when the minor said that Plaintiff had hit her, and she had hurt her ear. In 2016, she was in fact contacted by the school, where they realised that her anxiety was all the result of the unstable atmosphere at home.

In March 2017, Defendant left the matrimonial home with F, however she explains that both she and 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 F.

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 F 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.

Defendant also added an incident that happened around two years into their marriage, when Plaintiff mentioned that a female colleague of his was harassing him. Her husband had sent them a judicial letter asking Plaintiff to stop harassing this M. It was in 2013, that KL, M's husband, had beaten up Plaintiff and he ended up at Mater Dei. At that point, he admitted that he had intimate relationships with M. She forgave him because she loved him, and she didn't want to break up the family. In March 2018 she adds that she had met up with KL and he had explained how flirtatious Plaintiff

was and how he had destroyed his marriage. She could now confirm that behind the charming noble gentleman there was a manipulative liar.

4. NOP , Defendant's mother confirmed Defendant's version that they were reluctant to accept Plaintiff since he was a father and a husband. However, after spending some time with them they approved their courtship.

She confirms that on hearing the news that Defendant was pregnant she came to Malta to stay with her daughter and I. They frequented Plaintiff at the time, and he asked for her forgiveness and that his behaviour was wrong. He promised to work on his anger issues and was prepared to bring up her child. She admits that Defendant still loved him, so she decided to get back with him.

Considering that Plaintiff was a controlling person, he managed to talk both Defendant and David into registering the minor child on his name for legal reasons, because he was still her partner and therefore responsible for her.

5. KL confirms that he knew Plaintiff because the latter was the cause of his separation. He explains that his wife and Plaintiff used to exchange messages about love and sex. He had found Defendant crying because Plaintiff was still annoying his wife, so he lost his temper and he had been abusive over Plaintiff and his family. The matter ended up in Court, but he was not found guilty, though he is obliged to keep his distance from her husband.

He explains that it was not the first time that Plaintiff had courted and flirted with other women. He was also made aware that he had informed his wife that he loved her, and he was unhappily married. Today he has

been five years separated from his wife and as far as he knows the courtship had been going on for a year, but his wife had interrupted this relation .

CONSIDERATIONS

A quick glance at the relevant provisions at law will reveal the elements necessary for a marriage to be declared null. These are outlined in the various sub-paragraphs of Article 19 of the Marriage Act, Chapter 255 of the Laws of Malta.

Article 19 (1)(c)

“Illi l-ewwel kawzali promossa mill-attrici hija bazata fuq id-dispost tal-parargafu [c] li jikkontempla bhala wahda mir-ragunijiet validi ghal-l-annullament taz-zwieg il-vizzju tal-kunsens ta’ wahda mill-partijiet, li jkun inkiseb “b’qerq dwar xi kwalita’ tal-parti l-oħra li tista’ mix-xorti tagħha tfixxkel serjament il-hajja mizzewga.” “In propositu jinsab ritenut fil-kawza App.C .Joseph Zammit vs Bernardette Zammit [27.01.2006] li biex tissussisti s-sitwazzjoni ravvizata fil-para.[c] iridu jikkonkorru erba affarijiet: [1] il-qerq perpetrat bil-hsieb li wiehed jikseb il-kunsens tal-parti; [2] li l-qerq tkun incida fuq il-kunsens tal-partijiet; [3] li l-qerq ikun jirrigwarda xi kwalita’ tal-parti l-oħra; u [4] li din il-kwalita’ tkun tista’ mix-xorta tagħha tfixxkel serjament il-hajja mizzewga. Il-qerq ravvizat fl-art.19[1][c] jindici direttament fuq l-intellett ta’ xi wahda mill-partijiet fiz-zwieg, u ndirettament fuq il-volonta’ tal-persuna ngannata. Għalhekk f’ din id-disposizzjoni dak li jintlaqat direttament mhux il-kunsens izda l-intellett. “Il dolo causa direttament errore nell’intelletto del paziente, il quale ex errore consente. Con la particella “ex” vogliamo significare l’immediate causalita’ dell’ errore sul

*consenso. L'atto di consentire pero' e' atto definitivamente di volonta', [Castano – Il Sacramento delMatrimonio]. Dan il-qerq jista' jigi kemm minn naha ta' wahda mill-partijiet fiz-zwieg kif ukoll minn terza persuna. "In definitiva, quello che conta e che il dolus abbia influsso nel consenso, cioe' che il consenso matrimoniale provenga dall'errore doloso, senza il quale il consenso non sarebbe mai stato espresso."*²

Plaintiff is contending that Defendant hid from him the paternity of the child and had he been aware that he was not the natural and biological father of the child he would not have gone ahead with the marriage. Defendant, on the other hand, insists that Plaintiff was totally knowledgeable of the fact that the child she was carrying was not his own.

As the facts emerge, the parties broke off their relationship as things had not been working out well between them and soon after Defendant started a relationship with a colleague of her IJ, and she moved in with him. The parties still frequented each other, as by that time Plaintiff was also dating another woman, a certain E and they used to meet as couples. IJ, in communicating with Plaintiff's brother HCB, confirmed that he and Defendant had lived together until she was seven months pregnant, following which they broke up and she returned to Plaintiff, only to return back to him after seven weeks.

The cards produced by Defendant, in themselves are proof that Plaintiff was still very much in love with Defendant and tried to ask for forgiveness because he knew he hurt her, In the said cards, it is also very evident that he was fully aware that the child was not his or at least he had concrete doubts, since she had been frequenting IJ and actually moved in with him.

² Seduta ta' nhar it-Tlieta 28 ta' Jannar 2020. Rikors nru: 174/2017 AGV AB Vs CD sive DE

Defendant confirms that from January 2008, when she left Plaintiff, she was not intimate with him and Plaintiff himself fails to bring evidence to prove the contrary. Thus, it becomes difficult to believe Plaintiff's version, when he insists that he was not aware that the child was his. Neither does he contradict the facts as related by IJ, when communicating with his brother.

IJ further supports Defendant's version, when he goes on to state that they had tried to get married, but when they had gone to the Public Registry, there existed problems related to her visa because she was granted the said Visa as she was Plaintiff's partner and they had to give up on the plans of getting married.

The Court must reiterate that IJ seems to have had his own doubts about the child's paternity and one does not blame him considering that the parties still retained a close bond and perhaps for this sole reason, when he and Defendant happened to be in Russia, with the child, he managed to carry out a DNA test wherein he confirmed that he was the child's biological father. He also informed Plaintiff's brother that both Plaintiff and Defendant were not aware of this test.

Nevertheless, I admits that Defendant was always after money and when he was not in a position to maintain their child properly, she turned to Plaintiff, who very willingly was ready to take her back, promising that it was in the interests of the child to have her legally registered as the father as he still appeared as the legal partner and guardian of Defendant and that would enable the reissuing of her Visa and unlike, I, he could offer her a stable and proper family. He also promised to leave her his St Julians apartment and that served more of an incentive to Defendant to go ahead

with the marriage, so much so that they got married when the child was two years old and Plaintiff legitimated the said child.

During such time, Defendant brought forward evidence to confirm, that Plaintiff was truly hurt in his pride, since whenever they argued he used to show how upset he was and could never come to terms with the fact that F was not his daughter.

Therefore, considering all the facts as above stated, the Court has no reason to believe Plaintiff's version as there was no error on the quality of the person because surely he did not marry Defendant because he wanted to assume the responsibilities, believing he had fathered a child.

Therefore, this ground of nullity does not subsist.

Article 19 (1)(f)

f) the consent of either of the parties is vitiated by the positive exclusion of marriage itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act.

As discussed in the judgment **Anthony Gallo vs Dr. Anthony Cutajar et nomine**³:-

"Meta wiehed jitkellem dwar l-eskluzjoni taz-zwieg jew wiehed mill-elementi essenzjali tieghu, wiehed irid jifli jekk il-kontendenti jew wiehed (jew wahda) minnhom, allavolja hu kapaci jaghti l-kunsens validu taz-

³ Prim'Awla tal-Qorti Civili deciza 28 ta' April, 2002

zwieg, pero` bl-att tieghu hu qabel u fil-hajja mizzewga, jew bl-ommissjoni tieghu, eskluda a priori z-zwieg... ..hu jew hi eskludew xi wahda jew aktar mill-elementi essenzjali tal-hajja mizzewga.” [sottolinejar ta’ din il-Qorti]

Furthermore, in the judgment **Al Chahid vs Mary Spiteri**⁴ the Court there reiterated that:-

"... wiehed jinnota li taht l-artikolu 19 (1) (f) trid issir distinzjoni cara bejn zwieg li jfalli minhabba cirkostanzi li jirrizultaw waqt iz-zwieg, u zwieg li jfalli ghax wiehed mill-partijiet minn qabel ma' ta l-kunsens tieghu, kien gja mentalment dispost li ma jottemperax ruhu ma' xi wahda jew aktar mill-obbligi matrimonjali. Fl-ewwel ipotesi hemm ir-ragunijiet li jaghtu lok ghas-separazzjoni u fit-tieni ipotesi hemm l-estremi tal-annullament taz-zwieg".

Jurisprudence is consistent regarding this ground for nullity to be satisfied. It necessitates that one of the parties excluded the marriage itself or one of the essential elements necessary for marriage, as well as that one of the parties simulated his consent to the marriage.

The judgment **Simon Cusens vs. Romina Cusens**⁵, considered that *“sabiex zwieg jigi kkunsidrat null ai termini ta’ dan is-subinciz, irid jirrizulta ppruvat li entrambi l-partijiet jew xi hadd mill-partijiet tkun hadet decizjoni li ghalkemm ser tippartecipa fic-cerimonja taz-zwieg, hija tkun qieghda teskludi xi wiehed mill-elementi essenzjali taz-zwieg. Fi*

⁴ Deciza mill-Prim'Awla tal-Qorti Civili fil-5 ta' Gunju, 2002

⁵ 104/2010, deciza minn dina l-Qorti kif presduta fl-10 ta' Dicembru, 2014 u kkonfermata mill-Qorti tal-Appell fis-16 ta' Frar, 2016.

kliem iehor, filwaqt li esternament tidher li qed taghti l-kunsens ghar-rabta matrimonjali, dik il-parti tkun fl-istess hin u minn qabel ma tat il-kunsens taghha, diga` mentalment eskludiet a priori d-dispozizzjoni taghha li tottempera ruhha ma' xi wahda jew aktar mill-obbligi matrimonjali.”

The case **Alfred Tonna vs Maria Tonna**⁶ explained that “**ikun hemm simulazzjoni meta fil-mument tal-ghoti tal-kunsens matrimonjali parti jew ohra (jew it-tnejn) esternament turi li qed taghti l-kunsens matrimonjali izda internament u b’att pozittiv tal-volonta’ taghha tkun qed tichad il-kunsens ghal dak iz-zwieg (simulazzjoni totali jew dejjem b’dak l-att pozittiv tal-volonta’, tkun qed teskludi xi element jew proprjeta’ essenzjali ghaz-zwieg (simulazzjoni parzjali).**”

Of the same opinion was the Court in the case **Charles Atkins vs Matilde Atkins**⁷:-

“Tezisti simulazzjoni parzjali meta persuna teskludi biss wahda jew aktar mill-elementi essenzjali rikjesti biex jigi stabbilit iz-zwieg bhal per ezempju, l-eskluzjoni tal-prokreazzjoni u trobbija ta' l-ulied, jew l-eskluzjoni ta' l-obbligu tal-fedelta` lejn il-parti l-ohra”.

The court went on to state:-

“... rigward x'inhuma l-obbligazzjonijiet essenzjali taz-zwieg, dawn huma daww l-elementi li dejjem gew ritenuti bhala l-obbligazzjonijiet tal-

⁶ Prim'Awla tal-Qorti Civili(VDG) 31 ta' Jannar, 1996

⁷ Deciza 2 ta' Ottubru, 2003 mill-Prim'Awla tal-Qorti Civili

hajja mizzewga u cioe` dik ta' unjoni permanenti, esklussiva u irrevokabbli, diretta ghal komunjoni ta' hajja u l-prokreazzjoni u t-trobbija ta' l-ulied."

The First Hall of the Civil Court in the case **Abdel Wahed vs. Dr. Yana Micallef Stafrace et noe**.⁸, held that the essential elements of marriage are the following -“*komunjoni tal-hajja konjugali, l-indissolubilita' tar-rabta taz-zwieg, id-dritt ghall-fedelta' u d-dritt ghall-prokreazzjoni ta' l-ulied*”⁹ L-istess elementi gew ikkonfermati wkoll fil-kawza **Aquilina vs. Aquilina**¹⁰ u fis-sentenza **Grech vs. Grech**.

From the evidence produced the Court has no doubt that the parties did not exclude marriage itself.

Both parties contend however, that there was an exclusion of the essential elements of marriage, namely the exclusion of procreation, the exclusion of the indissolubility and permanence of marriage, as well as the exclusion of the obligation of fidelity, each one placing the blame on the other.

Exclusion of children

Both parties have given contrasting views on this element. Plaintiff insists that from before marriage, Defendant excluded having children, but he fails to produce any concrete evidence to show that during their marriage, Defendant either used the contraceptive pill or whether their intimate

⁸ Prim'Awla tal-Qorti Civili, deciza 14 ta' Lulju, 1994

⁹ Citata mill-Qorti tal-Appell fil-kawza 237/14

¹⁰ Prim'Awla tal-Qorti Civili deciza 30 ta' Jannar, 1991

relations were such so as to prevent procreation. This already puts in doubt Plaintiff's version. Defendant, on the other hand, insists that it was the Plaintiff who refused to have children, for a number of reasons, these being primarily because of his advanced age, secondly for financial reasons and thirdly because of house space, since they already had F living with them. Defendant also attributes the indecisiveness to proceed with having children because she realised that her marriage with Plaintiff was not always working out because of his mood swings and his aggressive behaviour and moreover, she admits that they did not have much living space and another child would have led to problems, so essentially they were postponing rather than excluding having children.

Defendant's version seems to be the more credible one, even more so when Plaintiff did not really produce any evidence to rebut Defendant's claims.

Permanence/Indissolubility of marriage

There is no doubt that Plaintiff was very much in love with Defendant and the cards he gave her all confirm his strong feelings for her, despite his shortcomings. Nonetheless, it is the opinion of the Court that he approached this commitment with a certain immature attitude, and possibly there was more of an infatuation with defendant rather than an actual permanent and lifelong commitment towards her and towards their relationship together. On the other hand, the evidence produced raises no doubt as to whether Defendant entered into this marriage thinking about its permanence, even though divorce is nowadays the order of the day and she was the daughter of divorced parents. Her commitment appeared more genuine than Plaintiff's, as did her injury caused by his behaviour. For this

reason, the Court cannot attribute any fault or defect or a positive exclusion of one of the essential elements in Defendant's consent before marriage.

Obligation of Fidelity

Although Plaintiff tries to attribute infidelity as being one of Defendant's main flaws, he fails to bring evidence to show that throughout their marriage she had another relationship. Her leaving Plaintiff and moving in with IJ was before the marriage itself. The same thing repeated itself, as when she left Plaintiff in 2017, she moved in with her boyfriend, who she had known for a couple of years, but she states that they were romantically involved only for a month prior to her moving in with him. It is difficult to believe that this man was not one of the reasons that ultimately led her to leave Plaintiff, but this element arose after the relationship with her then husband had ended. The Court cannot attribute a positive exclusion just on the basis of Defendant's having left Plaintiff after their marriage had in fact ended.

Plaintiff too has his story as Defendant brought forward evidence to show that two years into their marriage, Plaintiff had an affair with a colleague of his, ML. Her husband KL was brought to testify to confirm that there was this relationship, so much so that he blames Plaintiff for the breakdown of their marriage and the whole affair led to the former beating up Plaintiff and with ensuing court proceedings.

This circumstantial evidence leads to one conclusion, that Plaintiff was not completely determined to retain his fidelity in the marriage and therefore satisfy another exclusion of the essential elements of marriage.

DECIDE:

For the abovementioned reasons, the Court decides and determines that the marriage be declared null because Plaintiff excluded one or more of the essential elements of marriage in terms of Article 19(1)(f) of the Marriage Act.

The costs are to be borne by Plaintiff.

Onor. Mr. Justice Anthony J. Vella

Registrar