



MALTA

**QORTI CIVILI, PRIM AWLA
MALTA**

**ONOR. IMHALLEF
PACE RAYMOND C.**

Seduta tat-13 ta' Novembru, 2002

Citazzjoni Numru. 2469/1997/1

Carmelo *sive* Charles Mifsud

VS

Anna Mifsud *nee'* Ignacakova

Il-Qorti,

I. PRELIMINARI.

Rat ic-citazzjoni attrici a fol. 1 fejn gie premiss:-

Illi l-kontendenti ccelebraw ic-cerimonja taz-zwieg fit-28 ta' Dicembru 1988 fl-ufficju tar-Registratur taz-Zwieg fil-Belt Valletta (Dok. "A");

U illi z-zwieg imsemmi hu annullabbi ai termini tal-artikolu 19 (c), (e), (f) u (g) tal-kapitolu 255 tal-Ligijiet ta' Malta, peress li l-kunsens tal-attur gie ottenut b'qerq dwar kwalita' tal-konvenuta li mix-xorta taghha tfixkel serjament il-hajja mizzewga, il-konvenuta kienet impotenti qabel iz-

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zwieg u l-kunsens tal-attur kien marbut ma' kundizzjoni li tirreferi ghal futur u wkoll kien hemm esklużjoni pozittiva ta' wiehed mill-elementi essenzjali tal-hajja mizzewga da parti tal-konvenuta;

Illi l-istess attur talab lil din l-Onorabbli Qorti sabiex:

1. Tiddikjara z-zwieg celbrat bejn il-kontendenti fit-28 ta' Dicembru 1998 null u bla effett;

Bl-ispejjez, il-konvenuta hija ngunta ghas-subizzjoni.

Rat id-dikjarazzjoni attrici a fol. 3 tal-process;

Rat il-lista ta' xhieda u d-dokumenti esebiti a fol. 4 tal-process;

Rat il-verbali tal-11 ta' Marzu 1999 utal-14 ta' Mejju 1999.

Rat ir-rikors ta' l-attur Carmelo Mifsud tal-10 ta' Mejju 1999 fejn talab l-awtorizzazzjoni biex in-notifika lill-konvenuta ssir wara l-hinijiet legali.

Rat id-digriet tal-Qorti tat-12 ta' Mejju 1999 fejn laqghat it-talba.

Rat in-nota tal-eccezzjonijiet tal-konvenuta tal-1 ta' Gunju a fol. 14 fejn gie except:

1. Illi t-talbiet attrici huma nfondati fil-fatt u fid-dritt *stante* li mhux minnu li z-zwieg iccelebrat bejniethom huwa null u bla effett minhabba r-ragunijiet dedotti fic-citazzjoni kif jirrizulta waqt it-trattazzjoni.

2. Illi specifikament, l-eccipjenti tirrespingi bhala nfondati t-talba ta' nullita' a bazi ta' qerq, impotenza u kunsens kwalifikat kif jirrizulta waqt it-trattazzjoni.

3. Illi *inoltre* l-eccipjenti ma eskcludietx il-hajja mizzewga jew wahda mill-elementi essenzjali taghha kif jirrizulta waqt il-kawza;

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4. Ghaldaqstant it-talbiet attrici ghandhom jigu respinti bl-ispejjez.

5. Salvi eccezzjonijiet ulterjuri.

Rat id-dikjarazzjoni u l-lista tax-xhieda tal-konvenuta a fol. 15 u 16 tal-process.

Rat il-verbal tat-13 ta' Lulju 1999.

Rat in-nota tal-konvenuta tal-20 ta' Lulju 1999.

Rat il-verbali tal-14 ta' Ottubru 1999 fejn il-Qorti nnominat lil Dr. Audrey Demicoli bhala Perit Legali; tas-16 ta' Marzu 2000; tad-9 ta' Ottubru 2000; tat-12 ta' Frar 2001; tas-17 ta' Settembru 2001; tat-2 ta' Novembru 2001 fejn il-Qorti giet infurmata li hemm sentenza ta' annullament mit-tribunali ekklesjastici fiz-zewg cirkustanzi u l-Qorti tal-appell awtorizzat ir-registrazzjoni ta' dawn is-sentenzi; tas-7 ta' Jannar 2002; tat-18 ta' Frar 2002 fejn il-kawza giet differita biex tkompli tinstema' minn din il-Qorti kif prezentament presjeduta mill-Onor. Imhallef Raymond C. Pace LL.D.; tat-13 ta' Marzu 2002 fejn il-Qorti rrevokat l-inkarigu tal-Perit Legali Dr. Audrey Demicoli; tat-28 ta' Mejju 2002.

Rat il-verbal tal-5 ta' Novembru 2002 fejn Dr. Joseph Azzopardi ghall-attrici esebixxa kopja tad-decizjoni finali fil-kawza quddiem it-Tribunal Metropolitan moghtija fid-29 ta' Novembru 2000 (prot.No. 96.65) u konfermata b'Digriet ta' Ratifika mahrug minn dan l-istess Tribunal Regionali tat-Tieni Istanza fil-21 ta' Frar 2001 (Prot.No. 01.07) li gie rez esekuttiv b'Digriet ta' Ezekutivita' "*Nullitatis Matrimonii*" datat 26 ta' Marzu 2001 fil-kaz fl-ismijiet tal-partijiet odjerni "**Charles Mifsud u Anna Ignacakova**".

Rat is-seduti mizmuma mill-Perit Legali.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET

Illi l-kawza odjerna hija giet ibbazata fuq talba ghan-nullita' taz-zwieg abbazi tal-**artikolu 19 (1) (c) (e) (f) u (g) tal-Kap 255 tal-Ligijiet ta' Malta**.

Illi l-attur ibbaza ruhhu fuq is-sentenza tat-Tribunal Ekklesjastiku fuq indikata li ddikjarat iz-zwieg bir-rit kattoliku li sar fil-Knisja tanp-Naxxar fit-28 ta' Lulju 1990 bhala null u bla effett stante li kien hemm zball mill-attur odjern fuq il-kwalita' tal-persuna skond **canon 1097 (2)** skond il-**Kodici Kanonika**.

Illi normalment konsegwenti ghall-tali decizjoni din tigi registrata mill-Onorabbli Qorti tal-Appell kif propost fl-**artikolu 24 tal-Kap 255 tal-Ligijiet ta' Malta**, izda f'dan il-kaz qamet id-diffikolta' li z-zwieg bir-rit kattoliku gie celebrat fit-28 ta' Lulju 1990, mentri iz-zwieg civili bejn il-partijiet kien sar fit-28 ta' Dicembru 1988, kif premess fic-citazzjoni attrici, w allura tali dikjarazzjoni ta' nullita' taz-zwieg mit-Tribunal Ekklesjastiku kienet tirrefri biss ghaz-zwieg celebrat bir-rit kattoliku f'dik id-data, u ma setghax ikollha effett ghaz-zwieg civili bejn l-istess partijiet kkuntrattat f'data precedenti, u ghalhekk inholqot l-anomalija li hemm zwieg kattoliku li gie dikjarat null, li ma setghax jigi moghti rikonnoxximent civili, stante li tali zwieg civili sar f'data ohra; dan certament huwa *lacuna* fis-sistema legistlattivu li ghandhu jigi debitament rimedjat, stante li hawn qeghdin f'sitwazzjoni fejn zwieg skond il-ligi tal-pajjiz u skond it-Tribunal kompetenti gie dikjarat null, izda tali decizjoni ma jistax ikollha rikonnoxximent civili, stante li dak iz-zwieg civili gie kontrattat f'data ohra.

Illi pero' la saret rikjesta lill din il-Qorti, din il-Qorti, bhal kull Qorti ohra ghandha tfittex rimedju, u dan huwa li ghar-rigward z-zwieg civili tat-28 ta' Dicembru 1988 taghti d-decizjoni taghha hija, stante li fuq dan iz-zwieg ma hemm l-ebda procedura ohra pendent quddiem Tribunal kompetenti, u r-registrazzjoni tieghu ghada sallum veljanti, b'dan li ghall-istat l-istess partijiet ghadhom maghduda bhala mizzewgin ghall-finijiet u effetti kollha tal-ligi. Certament li sitwazzjoni bhal din hija imbarazzanti u fl-

opinjoni ta' din il-Qorti ma ghandhiex terga sseh, u ghalhekk l-intervent legistattiv f'dan is-sens huwa mill-iktar desiderabbli u fl-opinjoni tal-Qorti "*sine qua non*".

Illi l-provi li ingabhu f'din il-kawza huma limitati ghall dak li kkonkluda it-Tribunal Ekklesjastiku fl-istess decizjoni tieghu fuq premess u cjoe":-

"30. All the witnesses confirm that this marriage was brought to an end simply because Charles could not accept the fact that he could not have a child from his marriage. His mother testifies that "... the trouble which cropped up was due to the fact that Anna could not have children and Charles wanted them" (31/50). And his brother is more explicit since he does not only testify that "The problem which arose in the marriage was because Anna could not fall pregnant"- but he does give details about the medical advice they sought and, when this was not successful (31/56). He affirmed that Anna did tell him that "Charles was quarrelling with her and she even tried to put the blame on him for not falling pregnant due to the tension there was between them", evidently referring to the period they were trying IVF intervention. What is important in this testimony is that Charles "At last decided that the marriage could not function and he sent Anna away.... When Charles realized that he had been tricked and he could not have a family his only solution was to send Anna away and start looking for some other partner" (Ex officio 2/56).

30. The Judges are, therefore, morally convinced that all the elements, which constitute error of quality in the terms of canon 1097 §2, as has been expounded in the Law section have been fulfilled in this case. The Judges cannot accept the argumentation brought forward by the Deputy Defender of this Bond (Animadversiones, p. 209-210, n 23). The case in hand is not one of deceit, in fact both Petitioner and Respondent, immediately before their wedding, were convinced about the possibility that Anna could bear children. They were given high hopes from the doctors under whose medical care Anna was then, as has been shown above. And it is precisely here that error of

*quality does arise, not because of some direct intention on the part of Respondent but simply because she could not fulfil Petitioner's expectation to give him a child, an intention which he did directly and principally intend from his marriage. All the other arguments brought up by the Deputy Defender of the Bond are simply beside the point. Petitioner in his Restrictus did indicate his intention at the time of his exchange of consent: "... my priority in getting married was the promise of Anna that she is able to give birth to children. She herself admitted this priority. In fact this was the very reason of the breakdown of our marriage" (Restrictus, p. 217). This position is fully proved in the Acts of the case. The Judges, therefore, after having carefully examined the Brief presented by Petitioner and the Animadversiones of the Deputy Defender of the Bond, uphold the claim of Petitioner and they return an **AFFIRMATIVE** decision that this marriage is to be declared null because Petitioner was led into error about a quality of Respondent which he did principally and directly intend when exchanging his marital consent".*

Illi wahda mir-ragunijiet li l-attur qed jibbaza l-azzjoni tieghu huwa fejn qed jallega li l-kunsens tieghu kien vizzjat minhabba qerq dwar xi kwalita' tal-parti l-ohra li tista' mix-xorta taghha tfixxkel serjament il-hajja mizzewga skond l-**artikolu 19 (1) (c)**.

Illi l-legislatur Malti llimita l-qerq fuq "*xi kwalita tal-parti l-ohra li tista' mix-xorta taghha tfixxkel serjament il-hajja mizzewga*". Din il-kawzali giet ikkonsidrata minn din il-Qorti diversament presjeduta fil-kaz "**John Borg vs Paula sive Polly Borg**" (P.A. (VDG) 22 ta' Meju 1995 - Cit. Nru. 591/94VDG) fejn gie osservat li:-

"kieku dak il-paragrafu 19(1)(c) gie formulat b'mod differenti, wiehed ikun jista' jghid li japplika ghaz-zwieg civili l-art.981 tal-Kodici Civili li evidentement hu aktar wiesgha fil-portata tieghu. Il-legislatur Malti, izda, ghazel li jillimita l-qerq, bhala kawza ta' nullita' ta' zwieg, ghall-qerq dwar dawk il-kwalitajiet, oggettivament gravi, li jincidu fuq l-essenza, il-proprietajiet u l-ghanijiet taz-zwieg".

*“The object of deceit must be a quality of the other contracting party which, in itself, will have to cause serious disturbance in the partnership of conjugal life; with this formula, the legislator intends that the quality **must be objectively grave and establishes the partnership of conjugal life as an objective point of reference for the gravity of the quality so that the qualities are related to the essence, properties and ends of marriage. Therefore, those subjective qualities which cannot be objectively reconciled with conjugal partnership are irrelevant and, in this sense, they are merely arbitrary or trivial”.*** (**Viladrich P.J. Matrimonial Consent. Code of Canon Law Annot.** - Caparros, E. et al. ed)1993, Wilson and Lafleur , Montreal).

Illi l-Qrati taghna dejjem sostnew li z-zwieg ikun null skond dan is-sub-artikolu jekk wahda mill-partijiet taghti l-kunsens taghha ghax tkun giet imqarrqa jew mill-parti l-ohra jew minn xi haddiehor dwar xi kwalita tal-parti l-ohra (“**Fattah xebba Perry vs Dr.A. Mifsud et**” (P.A. 22 ta Novembru 1982) Skond il-gurisprudenza fuq citata, element importanti ta’ dan is-subartikolu hu li l-qerq irid ikun serju bizzejjed li fixkel serjament il-hajja mizzewga.

Illi mill-provi prodotti u senjatament mill-fatti kif esposti fl-istess sentenza citata tat-Tribunal Ekklesjastiku din il-Qorti thoss li ghandha taqbel mar-regonament tal-istess sentenza li ma giex ippruvat sodisfacentement li l-konvenuta kienet qarrqet bl-attur dwar xi kwalita’ taghha u ghalhekk din il-kawzali ma gietx ippruvta. Anzi jidher li l-istess konvenuta ma ghamlet xejn sabiex tingana lill-attur dwar il-kwalita’ taghha jekk jistax ikollha tfal jew le, tant li jidher car li f’dan il-kaz l-qerq mill-konvenuta ma giex ippruvat u anzi jista’ jigi eskluss ghall kollox peress li l-konvenuta dejjem informat lill-attur bit-testijiet medici li kienet qed taghmel, ghalkemm jidher li fil-fatt hija fil-kondizzjoni li kienet ma setghax ikollha tfal, u dan kif certifikat minn esperti ginokoligi li gew ikkonsultati fuq il-kaz.

Illi ‘nfatti fl-istess sentenza jinghad li:-

“The result of Anna’s medical examination was a blockage in her fallopian tubes, because of which she was operated upon. All the same Anna could not fall pregnant and Charles testifies that:

“All the gynaecologists agreed that her fallopian tubes were totally blocked and it was impossible for Anna to fall pregnant. I recall that the Maltese gynaecologist Dr. Mark Brinact told us that Anna’ fallopian tubes were obliterated and that even her ovaries were buried under dense adhesions.....” (31/32; 31/38; p.75)”.

Illi ma hemmx dubju li l-prokreazzjoni tal-ulied hija wahda mill-elementi essenzjali taz-zwieg, sew dak civili u kemm religjuz, pero' dan ma huwiex l-unika element essenzjali taz-zwieg, u fil-fatt l-elementi essenzjali taz-zwieg huma *“unity and fidelity (bonum fidei) and indissolubility” (George V Lobo – “The New Marriage Law” – pg.77).*

Illi hawn jidhol aggravju iehor li l-attur ibbaza fuqhu f'din il-kawza ghall dikjarazzjoni ta' nullita' taz-zwieg u dan huwa dak indikat fl-**artikolu 19 (1) (f) tal-Kap 255** li jipprovdi:-

Illi min-naha l-ohra fl-**Artikolu 19 (1) (f)** jinghad ukoll li z-zwieg ikun null:

19 (1) (f) *“jekk il-kunsens ta’ xi wahda mill-partijiet ikun inkiseb bl-eskluzjoni pozittiva taz-zwieg innifsu jew ta’ xi wiehed jew aktar mill-elementi essenzjali tal-hajja mizzewga, jew tad-dritt ghall-att taz-zwieg”.*

Illi dan is-sub-artikolu wkoll gie diskuss u ezaminat fis-sentenza **“Nicolai Balzan vs Simone Cremona”** minn din il-Qorti kif presjeduta (Cit. Nru. 1019/98/RCP – deciza fid-9 ta' Marzu 2000) u **“Mark Spiteri vs Susan Margaret Spiteri”** (P.A. (RCP) 27 ta' Frar 2001) u a skans ta' ripetizzjoni qed issir referenza ghall-principji hemm enuncjati. Illi *inoltre* fis-sentenza **“Theresa Taguri nee Spiteri vs Avukat Christopher Cilia et noe”** (Cit. Nru. 3130/96/NA – deciza P.A. (NA) fl-10 ta' Novembru 1999) gie ritenut illi:-

“Fl-interpretazzjoni ta’ dan is-sub-inciz gie ritenut mill-Qorti taghna illi l-eskluzjoni pozittiva ma kellhiex neccesarjament tirrizulta biss minn xi haga espressa direttament izda setghet tigi espressa bl-imgieba ta’ xi

parti fil-perjodu mmedjatement qabel u wara li jkun inkiseb l-istess kunsens".

Illi tal-istess portata hija s-sentenza "**Josette Lungaro mart Jesmond Lauro vs Jesmond Lauro**" (P.A. (RCP) l-1 ta' Frar 2001); "**Joseph Gabriel vs Dr. Georg Sapiano nomine**" (P.A. (RCP) 8 ta' Novembru 2000); "**Carmen El Shimi gja Tanti vs Ibrahim Mohamed Mohamed Ibrahim El Shimi**" (P.A. (NA) 20 ta' Gunju 2000); "**Mary Rose Abder Rahim vs Esam Abder Rahim**" (P.A. (NA) 31 ta' Mejju 2000); "**Ousama William Hfez Sadallah vs Doris Dalli**" (P.A. (RCP) 4 ta' April 2000) u "**Albert Grech vs Josette Grech**" (P.A. (RCP) 30 ta' April 2002 Cit. Nru. 793/01/RCP).

Illi rigward l-artikolu **19 (1) (f) tal-Kap 255 tal-Ligijiet ta' Malta**, dan l-artikolu jikkonsidra kemm is-simulazzjoni totali ("*colorem habens, substantiam vero nullam*") kif ukoll dak parzjali (*colorem habens, substantiam vero alteram*) tal-kunsens.

Illi rigward it-tifsira tal-frasi "*eskluzjoni pozittiva taz-zwieg innifsu*", jew kif maghruf ukoll bhala simulazzjoni totali, l-Qorti fil-kawza "**Bonnici vs Bonnici**" (P.A. 30 ta' Lulju 1982) qalet illi biex ikun hemm simulazzjoni totali jrid jigi ippruvat il-'*finis operis*' taz-zwieg gie effettivament eskluż mill-vera rieda ta' parti jew ohra, ghalkemm formalment tkun sehhet ic-celebrazzjoni taz-zwieg.

Illi fis-sentenza "**Cali vs Dr. Albert S. Grech nomine**". (P.A. 22 ta' Gunju 1988) il-Qorti qalet illi jekk tmur ghaccerimonja tat-tieg u nternament tissostitwixxi l-ideat tieghek fuq x'inhu zwieg jew inkella xort'ohra teskludi l-veru kuncett taz-zwieg, hi forma ta' simulazzjoni totali. Fid-decizjoni "**Galea vs Walsh**" (P.A. 30 ta' Marzu 1995) il-Qorti spjegat simulazzjoni bhala "*meta l-atti, gesti jew kliem esterni ma jikkorrispondux ghall-kunsens intern li jkun inghata*". Illi fis-sentenza "**Muscat vs Borg Grech**" (P.A. 14 ta' Awissu 1995) il-Qorti spjegat il-kuncett ta' simulazzjoni b'dawn il-kliem:-

“Ghalhekk min esternament ikun wera li qed jghati l-kunsens matrimonjali izda jkun internament u b'att positiv tal-volonta' tieghu qed jichad il-kunsens ghal dak iz-zwieg ikun qed jissimula l-kunsens tieghu”.

Illi kif gie insenjat fid-decizjoni fi-ismijiet **“Francesco Teuma vs Liugi Camilleri et”**, (K. 1 ta' Ottubru 1884 - Vol.X p.912) :-

“a poter dedursi la invalidita dell'atto e' necessario che risulti chiaro, che cio' che si contrattava non era la yenta, ma una simulazione, cioe' 'fictio seu ostensio falsi pro vero'.

Illi fil-kawza **“Anthony Gallo vs Dr. Anthony Cutajar et nomine”** (P.A. (RCP) 28 ta' Mejju 2002) inghad li *“meta wiehed jitkellem dwar l-eskluzjoni taz-zwieg jew wiehed mill-elementi essenzjali tieghu, wiehed irid jifli jekk il-kontendenti jew wiehed minnhom, alavolja hu kapaci jghati l-kunsens validu taz-zwieg, pero' bl-att tieghu qabel u fil-hajja mizzewga, jew bl-ommissjoni tieghu, eskluda a priori certu obbligi essenzjali tal-hajja mizzewga, cioe', issimula l-kunsens tieghu totalment fejn eskluda a priori z-zwieg, jew inkella fejn filwaqt il-kunsens hu jew hi eskcludew xi wahda jew aktar mill-elementi essenzjali tal-hajja mizzewga, u cioe' saret simulazzjoni parzjali”.*

Illi fil-fatt din il-Qorti taqbel mal-istess definizzjoni u fil-fatt fis-sentenza **“Al Chahid vs Mary Spiteri”** (P.A. (RCP) 5 ta' Gunju 2002 inghad li *“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 jottemprax ruhu ma xi wahda jew aktar millobbligi matrimonjali. Fl-ewwel ipotesi hemm ir-ragunijiet li jaghtu lok ghas-separazzjoni u fit-tieni ipotesi hemm l-estremi tal-annullament taz-zwieg”.*

Illi fil-fatt ghal dak li jolqot l-kuncett ta' *“l-eskluzjoni pozittiva ta' xi wiehed jew aktar mill-elementi essenzjali tal-hajja mizzewga”*, u cjoe' simulazzjoni parzjali, il-Prim'Awla tal-Qorti Civili fil-kawza **“Abdel Wahed vs Dr.**

Yana Micallef Stafrace et" (P.A. (NA) 14 ta' Lulju 1994) elenkat l-element essenzjali taz-zwieg bhala li jikkonsistu fil-*"kommunjoni tal-hajja konjugali, l-indissolubilita' tar-rabta taz-zwieg, id-dritt ghall-fedelta' u d-dritt ghall-prokreazzjoni ta' l-ulied"*. L-istess elementi gew ikkonfermati wkoll fil-kawza **"Aquilina vs Aquilina"** (P.A. (NA) 30 ta' Jannar 1991) u fis-sentenza **"Grech vs Grech"** (P.A. (NA) 9 ta' Ottubru 1990). Dawn huma wkoll l-elementi fil-ligi kanonika.

Illi l-komunjoni tal-hajja konjugali u l-*"consortium vitae"* tikkompreni zewg elementi u cioe' l-imhabba konjugali u r-responsabilita` tal-familja. Kif qalet il-Prim'Awla tal-Qorti Civili fid-decizjoni **"Magri vs Magri"** (14 ta' Lulju 1994):-

"Jekk din il-"consortium vitae"* hija nieqsa, l-oggett innifsu tal-kunsens taz-zwieg huwa wkoll nieqes. Din il-*"Consortium Vitae"* tikkompreni zewg elementi li huma l-imhabba konjugali u r-responsabilita' tal-familja."*

Illi fil-fatt l-element ta' l-indossibilita` taz-zwieg jehtieg li l-kunsens ikun ibbazat fuq rabta dejjiema bejn ragel u mara wahda, mibnija fuq il-fedelta' u formazzjoni tal-familja. Il-Ligi Maltija tippresuponi *'uris tantum'* dan l-element ta' indossolubilita' fiz-zwieg.

Illi fil-fatt, **J. Edwards Hudson** (pg. 164-165), jispjega car li *"indissolubility can be excluded from consent in two different ways: either because the spouse, knowing the true nature of marriage, nevertheless contract with the understanding that he will have the option of dissolving the bond and recovering his former free status, or because the spouse formulates his own doctrine on marriage, from which the idea of indissolubility is absent and to which he adheres totally with both intelligence and will power"*.

Illi wkoll, **D.J. Burns**, fii-kummentarju tieghu (**D.J. Burns, "Matrimonial Indissolubility: Contrary Conditions. A Historical Synopsis and Commentary"**. pg.151) jghid li *"it is not necessary that this intention (i.e. li teskludi l-indossolubilita') was formulated as an express agreement,*

it can be inferred either from an explicit declaration of one or both parties, or consequent on certain words or actions implying that effect, or as a result of the narration of the circumstances of the contract.”

Illi hawn ukoll il-Qorti tirreferi ghall dak li inghad fis-sentenza **“Sharon Lanzon mart Francis Attard vs Francis Attard”** (P.A. (RCP) 15 ta' Marzu 2000) u cjoe':-

“Meta wiehed jittellem dwar l-eskluzjoni taz-zwieg jew wiehed mill-elementi essenzjali tieghu, wiehed irid jifli jekk il-kontendenti jew wiehed minnhom, allavolja huwa kapaci li jaghti kunsens validu taz-zwieg, pero' fl-atti tieghu qabel u fil-hajja mizzewga, jew bl-omissjoni tieghu eskluda a priori certu obbligi essenzjali tal-hajja mizzewga, cioe' issimula l-kunsens tieghu totalment fejn eskluda a priori iz-zwieg, jew inkella fejn waqt li l-kunsens hu jew hi eskludew xi wahda jew aktar mill-elementi essenzjali tal-hajja mizzewga, u cioe' saret simulazzjoni parzjali”.

Illi applikati dawn il-principji ghall kaz in ezami jidher li l-attur rabat il-kunsens tieghu taz-zwieg mal-kondizzjoni huwa jkollu l-ulied mill-attrici, u dan bl-esklussjoni tal-elementi kollha essenzjali tal-istess zwieg, tant li meta induna u rrealizza li l-konvenuta ma setghax ikollha tfal ghalih iz-zwieg kien spicca; dan jidher car mill-insistenza li ghamel kemm qabel iz-zwieg u kemm wara z-zwieg dwar l-fatt li huwa ried jizzeweg biex ikollu wild mill-istess unjoni; fih innifsu dan ma fih xejn hazin, izda meta dan issir bhala kondizzjoni ghall-istess zwieg, b'mod li jekk dan ma javverax ruhhu l-elementi kollha l-ohra tal-istess istitut jigu eleminati, allura hemm jirrizulta li hemm vizzju ta' kunsens dwar elementi essenzjali tal-istess zwieg, ghaliex dawn ge positivamente ikkondizzjonati ghall-element wiehed tal-istess unjoni, li importanti kemm huwa importanti, ma jistax jintuza sabiex jelimina lill-ohrajn kollha.

Illi fl-opinjoni ta' din il-Qorti dak li ghamel l-attur, u ghalhekk l-attur ppruva ukoll li dan huwa kaz ta' annullament taz-zwieg li jaqa' taht id-diposizzjoni tal-**artikolu 19 (f) tal-Kap 255**, minhabba dak premiss.

Illi fil-fatt dan lanimu li l-attur dahal bih fiz-zwieg tieghu ma-konvenuta jikkontrasta sew ma dak li gie ritenut fil-gurisprudenza nostrali bhala li jikkomponu d-drittijiet u d-mirijiet u l-elementi essenzjali taz-zwieg, tant li fis-sentenza **“Mary Mustefa Al Muhamed vs Mustefa Mustefa Al Muhammed”** (P.A. (NA) 27 ta' Lulju 1999) inghad li:-

*“Fil-kawza **“Haidin vs Haidin”** (PA. (Q.K) 7 ta' Lulju 1994), il-qorti qalet illi m'ghandu jkun hemm ebda motivazzjoni li ggieghel persuna tersaq ghaz-zwieg ghajr l-imhabba lejn persuna ohra w ix-xewqa li tqatta' l-kumplament ta' hajjitha fil-kumpanija taghha. Fiz-zwieg wiehed irid ikun lest li jaghtiha t-totalita' tieghu nnifsu esklussivament lill-persuna l-ohra, u din l-ghotja trid tkun mhux biss reciproka izda motivata bi hsieb genwin li vermament ikun irid johloq ‘ a partnership for life”.*

*“Mill-gurisprudenza nostrana, jista' jinghad illi d-dmirijiet u drittijiet tal-mizzewgin fiz-zwieg huma dawk li komunament wiehed jistenna fi zwieg normali fis-socjeta' taghna. Fost dawn, wiehed isemmi l-fedelta' u l-assistenza, l-unita' u l-indossibilita' taz-zwieg, l-hajja komuni flimkien, id-dritt u d-dmir illi jittiehdu decizjonijiet flimkien intizi fl-ahjar interess tal-familja w il-prokreazzjoni ta' l-ulied. Il-hajja mizzewga timporta li l-mizzewwgin jaqsmu kollox flimkien u li jkunu ta' ghajnuna u ta' assistenza lil xulxin, b'impenn biss a favur ta' xulxin u taz-zwieg taghhom l-element tal-‘communio vitae’. Fil-kawza **“Micallef vs Micallef”** deciza fl-4 ta' Meju 1993, il-Prim' Awla tal-Qorti Civili enuncjat illi ‘element essenzjali tal-hajja mizzewga skond il-ligi taghna huwa d-dritt tal-mizzewgin ghall-komunjoni tal-hajja (‘communio vitae’) bejniethom”.*

Illi huwa ghalhekk li din il-Qorti wara li hadet in konsiderazzjoni l-provi kollha prodotti thoss li anke fuq din il-bazi hemm ragunijiet sabiex tintlaqa' t-talba attrici abbazi tal-**artikolu 19 (1) (f) tal-Kap 255**.

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Illi l-attur ibbaza wkoll l-azzjoni tieghu fuq dak li jipprovdi l-**artikolu 19 (1) (g)** li jghid li z-zwieg huwa null:-

“(g) jekk xi wahda mill-partijiet torbot il-kunsens taghha ma’ kundizzjoni li tirreferi ghall-futur”.

Illi dwar l-**artikolu 19 (1) (g)** jinghad skond **J. Edward Hudson** *“a condition could either be suspensive or resolutive. It is suspensive if it delays the entry in effect of the obligation of an act until the condition itself is fulfilled. It is resolutive if it dissolves the obligation only if it verifies itself and therefore renders it null. e.g. “I will live in marriage with you until I find someone who is more wealthy than you” (“Handbook II for Marriage Nullity Cases” pg. 107).*

Illi skond **George V. Lobo** *“it may be noted that a marriage is truly conditional if (1) the condition proceeds from a positive act of will although this may be implicit; (2) must have been freely placed; (3) must have been present and not revoked at the time of marriage”. (“The New Marriage Law” – 1997).*

Illi skond kif inghad fis-sentenza **“Emanuel Walter Vella vs Mona Lisa Vella”** (P.A. (RCP) I-1 ta’ Ottubru 2002) *“huwa mportanti li wiehed jinnota li din l-kundizzjoni tapplika biss ghall-kaz ta’ annullament taz-zwieg jekk din il-kundizzjoni tirreferi ghall-avveniment fil-futur”,* u mill-provi prodotti, kif fuq *di piu’* ampjament spjegat jirrizulta li l-kunsens tal-attur kien ibbazat fuq il-kundizzjoni li l-konvenuta seta’ jkollha tfal u xejn izjed, b’mod li b’tali kundizzjoni l-attur elimina l-elementi kollha essenzjali l-ohra taz-zwieg kif fuq ampjament spjegat.

Illi dan jirrizulta car fl-opinjoni ta’ din il-Qorti mill-paragrafi 5, 6, 7, 8 u 9 minn pagni 3 sa 5 tad-decizjoni esebita tat-Tribunal Ekklessjastiku fejn jinghad *inter alia* li *“Charles, however during the last period of courtship at least insisted greatly with Anna that from this marriage he wanted children at all costs”* u *“I cannot say that the marriage was ever happy and this because from the very start I wanted to have a child, since my ultimate aim in*

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marrying was to have a family”; “ When I realized in the late 1996 that all hope was lost for me to raise a family, I decided that our ounly solution was separtion....”.

Illi ghalhekk abbazi tal-premess it-talbiet attrici ghandhom jigu milqugha abbazi tal-**artikolu 19 (1) (f) u (g) tal-Kap 255 tal-Ligijiet ta' Malta** ghar-ragunijiet imputabli lill-attur.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi filwaqt li tichad l-eccezzjonijiet tal-konvenuta in kwantu l-istess huma nkompattibbli ma' dak fuq premess u deciz, **tilqa' t-talba attrici** b'dan illi:-

1. Tiddikjara z-zwieg celebrat bejn il-kontendenti fit-28 ta' Dicembru 1998 null u bla effett abbazi tal-**artikolu 19 (1) (f) u (g) tal-Kap 255** ghar-ragunijiet imputabbli lill-attur.

Bl-ispejjez kollha kontra l-attur.

Moqrija.

Onor. Imhalef Raymond C. Pace LL.D.
13 ta' Novembru 2002

Mario Debono
Deputat Registratur
13 ta' Novembru 2002