

**CIVIL COURTS  
(FAMILY SECTION)**

**MADAM JUSTICE  
JACQUELINE PADOVANI GRIMA LL.D., LL.M. (IMLI)**

**Hearing of 6th July 2023**

**Application no. : 85/2020 JPG**

**Case no. : 32**

**ZM**

**Vs**

**Dr Mark Mifsud Cutajar and Legal  
Procurator Katrina Zammit Cuomo  
Curators appointed by virtue of the decree of  
this Honourable Court dated 13 September  
2019 to represent the absent DZ**

**The Court:**

Having seen the sworn application filed by Plaintiff on the 11<sup>th</sup> June 2020 for the personal separation and ancillary requests;

Having seen that the application and documents, the decree and notice of hearing have been duly notified according to law;

Having seen the reply of Dr Mark Mifsud Cutajar noe dated 7<sup>th</sup> July 2022 (at page 96a) wherein Defendant raised the plea of lack of jurisdiction of this Court;

Having seen that the Court granted both parties sufficient time to tender evidence on the matter and to make final submissions on the same;

Having seen the exhibited documents and all the case acts;

Having heard testimonies viva voce;

Having heard final submissions on the plea of jurisdiction;

### **Considers**

This is a preliminary judgement on the question of the jurisdiction or otherwise of this Court to hear and determine Applicant's requests.

On the plea of lack of jurisdiction, our Courts have held that:

*eccezzjoni li kawza ma tkunx ta' gurdizzjoni tal-Qrati ta' Malta hi in effetti eccezzjoni ta' l-inkompetenza tal-Qorti. Bhala tali hi eccezzjoni dilatorja per excellenza anke jekk il-Qorti tista' tissolleva l-materja ta' nuqqas ta' gurdizzjoni ex officio...<sup>1</sup>*

The present proceeding is essentially one involving the pronouncement of the parties' separation and/or divorce, the dissolution and liquidation of the community of acquests and other ancillary requests.

### **Considers:**

In his testimony Plaintiff explained that the family came to Malta towards the end of the year 2015 with the intention of renting a house in Gozo. In fact they had eventually moved to these islands in January of the year 2016. Prior to their settlement in Malta, Plaintiff explained that they had been living in A, C, L and various other places while working on their software project. There were multiple incentives to move to Malta including financial ones.

Plaintiff explained that the parties entered into mediation proceedings<sup>2</sup>, however the parties failed to reach an amicable agreements. At this stage, his wife attempted to ground jurisdiction in C.

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<sup>1</sup> [Appell Civili, Raymond Calleja vs L-Avukat Dottor Raymond Pace et noe, 31 ta' Jannar 1996, Kollez. Vol. LXXX.ii.320].

<sup>2</sup> 26<sup>th</sup> July 2019 the first mediation proceedings; and 14<sup>th</sup> June 2022 second mediation proceedings; both proceedings are annexed with these proceedings

Subsequently, they were advised to proceed with mediation in Malta, where they reached an agreement which was minuted by his wife's solicitor and which Plaintiff had signed. However, at a subsequent stage, Plaintiff realized that his wife had not in fact signed this agreement, thus, although Plaintiff did all that was required by virtue of this agreement, Defendant did not carry out any of the obligations on her part as indicated in this agreement.

After having moved to Malta in January 2016, Plaintiff explains that the contending parties had applied for residence permits and these were subsequently granted. Plaintiff together with his wife also established a company in Malta i.e., ZX Off Works Product Limited.

Plaintiff affirms that currently, there are no proceedings which are pending before the C Courts. However, when Defendant had initiated proceedings before the C Court, Defendant had requested her Maltese Lawyer, Dr Robert Thake, to provide an opinion regarding jurisdiction, which was in fact done by means of an affidavit. In this opinion Defendant's lawyer affirmed that the Maltese Courts had a superior claim on jurisdiction. After this affidavit was submitted to the C Courts, his wife ceased all further action in C. In fact Plaintiff contends that the case has not progressed further since 2021.

Defendant, in spite of raising the plea of the lack of jurisdiction of this Court failed to proffer any evidence on the matter.

**Considers:**

From the acts of the case it appears that the parties contracted marriage on the 24<sup>th</sup> October 1993 in NSW, A and from this marriage had two children, MO who was born on X and has now attained the age of majority and MJ, who was born on Y and is now also X years old. It appears that Defendant has relocated to C together with the younger child, and is living in a property that is co-owned by the parties together with her partner and former ex-fiancée.

The parties, together with their children, had decided to settle in Malta in January 2016. It appears that Plaintiff has resided here in Malta ever since.

Dr Mark Mifsud Cutajar for Defendant contends that this Court lacks jurisdiction since the marriage contracted between the parties was never registered in Malta and that the matter is currently being determined in a foreign Jurisdiction.

Plaintiff on the other hand, contends that plea regarding this Court's lack of jurisdiction was never raised in Defendant's sworn reply and that the basis for jurisdiction of the Maltese Courts is Plaintiff's habitual residence in Malta as indicated in Article 66N of Chapter 16 of the Laws of Malta.

The Court observes that notwithstanding the fact that Defendant made contact with its Deputy Registrar via email, Defendant has failed to correspond with the Deputy Curator Dr Mark Mifsud Cutajar, who was appointed to represent her interests, in the judicial proceedings, and in spite of the fact it was Defendant herself who invoked the lack of jurisdiction of these Courts, she failed to proffer any testimony of documentary evidence to corroborate the said plea.

**Considers:**

Article 742 of Chapter 12 of the Laws of Malta provides:

*742.(1) Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned:*

- (a) citizens of Malta, provided they have not fixed their domicile elsewhere;*
- (b) any person as long as he is either domiciled or resident or present in Malta;*
- (c) any person, in matters relating to property situate or existing in Malta;*
- (d) any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta;*
- (e) any person who, having contracted an obligation in some other country, has nevertheless agreed to carryout such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;*
- (f) any person, in regard to any obligation contracted in favour of a citizen or resident of Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta;*
- (g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.*

*(2) The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.*

*(3) The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that there exists among the parties any arbitration agreement, whether the arbitration proceedings have commenced or not, in which case the court, saving the provisions of any law governing arbitration, shall stay proceedings without prejudice to the provisions of sub-article (4) and to the right of the court to give any order of direction.*

Article 66N of Chapter 16 of the Laws of Malta provides:

*66N.(1) Notwithstanding the provisions of any other law, the courts of civil jurisdiction shall have jurisdiction to hear and determine a demand for divorce only if at least one of the following requirements is satisfied:*

- (a) at least one of the spouses was domiciled in Malta on the date of the filing of the demand for divorce before the competent civil court;*
- (b) at least one of the spouses was ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.*

*(2) Notwithstanding the provisions of sub-article (1), where a cause for personal separation in accordance with Sub-Title III of this Title is pending before a court of civil jurisdiction in Malta, including a cause being heard at appeal stage, and the court has jurisdiction to hear and determine that cause, the courts of civil jurisdiction in Malta shall also have jurisdiction to hear and determine a demand for divorce between the same parties.\**

**Deliberates:**

The Court notes that Plaintiff instituted mediation proceedings on the 26<sup>th</sup> July 2019, and Defendant had, throughout the said mediation proceedings, been represented by her lawyer Dr Robert Thake in three sessions: namely the sessions of the 7<sup>th</sup> November 2019, that of the 23<sup>rd</sup> January 2020 and that of the 20<sup>th</sup> of February 2020. Although the Court notes that in the documentation produced relating to the proceedings in BC, this Court could not pinpoint the actual date of the filing of the said proceedings, it appears that these proceedings were filed in the year 2020.

It has consistently been held that according to Maltese Law and Jurisprudence, separation proceedings must necessarily be initiated by filing a letter in the Registry of the Civil Court (Family Section) to initiate mediation proceedings, which must precede contentious separation proceedings in Court in the event that an amicable agreement is not reached between both parties within the prescribed time. After the end of mediation proceedings and where an agreement has not been reached between both parties, on the Court's authorization, either party may file litigation for personal separation. In the event that litigation proceedings failed to be filed in the prescribed time, the proceedings are deemed to have been abandoned.

The first mediation proceedings were initiated on the 26<sup>th</sup> July 2019, and these proceedings were filed on the 11<sup>th</sup> June 2020.

On this matter, it has been held that:

*'il- kontendenti jibdew l-iter gudizzjarju hemm involut b'din il-procedura...u effettivament hi parti integrali mill-procedura tas-separazzjoni vera u proprja, u mhux separata minnha.'*<sup>3</sup>

Therefore, it appears that the first Court seized with separation proceedings between the parties was in fact the Maltese Court. Additionally, Defendant's participation in the mediation proceedings and her engagement of a Maltese lawyer to represent her, signifies that Defendant

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<sup>3</sup> Vide Ivanka Jovanovic Axisa vs Ronald Axisa deciza nhar it-18 ta' Dicembru 2013 mill-Onor Imhalled S Meli.

has in fact submitted to the jurisdiction of the Maltese Courts in accordance with Article 742(1)(g) of Chapter 12 of the Laws of Malta.

The Court has also taken cognizance of the legal opinion submitted by Defendant's lawyer in the proceedings before the C Courts in BC (vide affidavit at page 55 et seq) who held that:

***It appears that the court first seised with separation proceedings was the Maltese Civil Court (Family Section) According to local jurisprudence most notably the case of Breakwell vs Breakwell, a Maltese Court is deemed to be seised when a spouse files for mediation. My understanding is that this happened prior to any proceedings being formally commenced in BC. <sup>4</sup>***

From the documents exhibited *at page 83 et seq*, particularly the affidavit of Ruth Summers, paralegal at Nasser Allan LLP, the law firm representing Plaintiff MZ before the BC Courts, it also appears that the last adjournment in proceedings in BC was scheduled for March 2022. The Court also notes that the settlement Plaintiff made reference to in his testimony *at page 86 et seq* dated 5<sup>th</sup> February 2021, lacks Defendant's signature.

Additionally, since these proceedings have now been converted to divorce proceedings in accordance with Article 66F of Chapter 12 of the Laws of Malta, this Court holds that Article 66N of Chapter 16 of the Laws of Malta also confers jurisdiction on the Maltese Courts to hear and determine a demand for divorce. In fact Article 66F provides that jurisdiction of the Maltese Courts is grounded where:

- (a) at least one of the spouses was domiciled in Malta on the date of the filing of the demand for divorce before the competent civil court;***
- (b) at least one of the spouses was ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.***

The Court observes that Plaintiff exhibited documentary evidence showing that he has been residing in Malta since 2016. In fact this Court notes that the residence documentation first issued to Plaintiff dates back to the 9<sup>th</sup> February 2016 (*vide document at page 34*) and to this effect, Plaintiff has also exhibited the declaration of residence in Malta to the Inland Revenue Department dated 24<sup>th</sup> February 2007. In this document, Plaintiff indicated the 1<sup>st</sup> of January

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<sup>4</sup> Vide page 56.

2016 as his date of arrival in Malta (*vide document at page 46*). These documents provide independent and incontrovertible evidence of habitual residence of Plaintiff in Malta. This evidence satisfies the requisite envisaged in sub-article (b) of Article 66N (1), and thus this Court as presided has jurisdiction to determine the matter also on the basis of Article 66N of Chapter 16 of the Laws of Malta.

**Therefore and in light of the above considerations, this Court finds that it has jurisdiction to determine the proceedings as initiated by Plaintiff on the basis of article 742(1)(g) of Chapter 12 of the Laws of Malta and article 66N(1)(b) of Chapter 16 of the Laws of Malta, and orders the progression of the said proceedings.**

**Costs reserved for final judgement.**

**Read.**

**Mdm. Justice Jacqueline Padovani Grima LL.D. LL.M. (IMLI)**

**Lorraine Dalli  
Deputy Registrar**