MALTA

QORTI CIVILI
(SEZZJONI TAL-FAMILJA)

ONOR. IMHALLEF
RAYMOND C. PACE

Seduta tad-29 ta' Jannar, 2004

Citazzjoni Numru. 1505/2001/1

David Pons

vs

Elena Solovieva Pons

Il-Qorti,

I. PRELIMINARI.

Rat ic-citazzjoni attrici datata 6 ta' Settembru 2001 a fol. 1 tal-process fejn gie premess:-

Illi l-partijiet izzewgu fis-17 ta' Gunju 2000 kif jindika c-certifikat anness bhala dokument "A";

Illi l-kunsens tal-partijiet kien eskluz minhabba zball fuq l-identita' tal-parti l-ohra; **artikolu 19 (1) (b) Kap 255;**

Illi l-kunsens tal-attur inkiseb b'qerq dwar xi kwalita' tal-parti l-ohra li tista' mix-xorti taghha tfixkel serjament il-hajja mizzewga – **artikolu 19 (1) (c) Kap 255**;

Illi l-kunsens tal-partijiet kien vizzjat b'difett srju ta' diskrezzjoni ta' gudizzju fuq il-hajja mizzewga jew fuq id-drittijiet essenzjali tagha, jew b'anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg – **artikolu 19 (1) (d) Kap 255;**

Illi l-kunsens ta' wahda mill-partijiet gie miksub bl-eskluzjoni pozittiva taz-zwieg innifsu, jew ta' xi wiehed jew aktar mill-elementi tal-hajja mizzewga, jew tad-dritt tal-att taz-zwieg – **artikolu 19 (1) (f) Kap 255;**

Illi l-konvenuta hi Russa u llum l-attur jaf li l-konvenuta zzewget sabiex tkun tista' tibqa' tirresjedi f'Malta, fil-fatt il-partijiet izzewgu biss bir-registru.

Illi kienu f'okkazjonijiet rari wara z-zwieg li l-konvenuta kienet lesta li taghmel l-att taz-zwieg mal-attur u f'dawn il-kazijiet il-konvenuta kienet trid tuza' kontracettivi;

Illi l-konvenuta sa minn qabel iz-zwieg ma riditx tfal. Hi kienet tobbliga lill-attur jixtri l-kontracettivi ghal dan il-ghan.

Illi l-attur qabel iz-zwieg iltaqa' mal-konvenuta fl-1999 meta kienet damet Malta xahrejn, wara rega' ltaqa' maghha ghal cirka xahrejn ohra fl-istess sena, wara regghet giet f'Marzu tal-2000 u damet xahrejn u wara giet xi tliet xhur qabel iz-zwieg.

Illi fil-fatt il-konvenuta bil-kemm kienet taf titkellem bl-Ingliz u l-partijiet bil-kemm kienu jikkomunikaw sewwa ma' xulxin u dan kemm ghaz-zmien qasir qabel iz-zwieg kif ukoll wara.

Illi z-zwieg kien hazin mill-bidu nett tant li mill-bidu kienu jkunu okkazjonijiet rari li l-konvenuta kienet lesta li torqod fl-istess sodda tal-attur.

Illi l-konvenuta qalet lill-attur li hi fil-fatt qatt ma habbitu izda biss kienet tirrispettah bhala persuna. Dan ukoll ikompli juri li l-iskop ghaz-zwieg taghha kien biss li tibqa' tirrisjedi f'Malta.

Illi l-attur lanqas biss qatt ra lill-genituri tal-konvenuta li lanqas biss gew ghaz-zwieg. Fil-fatt lanqas biss kienu saru preparamenti ghaz-zwieg. Il-jum taz-zwieg kien minghajr tifsira ghall-partijiet.

Illi l-attur ukoll kien gie attirat mill-persuna fizika tal-konvenuta u ma hares lejn xejn aktar kien ghami u ghalkemm ried li jizzewweg bil-Knisja xorta accetta li jizzewweg biss bir-registru.

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

1. Tiddikjara illi z-zwieg kontrattat bejn il-partijiet fis-17 ta' Gunju 2000 huwa null *ai termini* tal-**artikolu 19 (1) (b) (c) (d) (f) tal-Kap 255 tal-ligijiet ta' Malta** u ghal finijiet u effetti kollha tal-ligi.

Bl-ispejjez.

Il-konvenuta hija ngunta biex tidher ghas-subizzjoni.

Rat id-dikjarazzjoni attrici a fol. 3 u 4 tal-process;

Rat il-lista ta' xhieda u d-dokumenti esebiti a fol. 4 sa 7 tal-process;

Rat il-verbal tas-seduta tas-6 ta' Frar 2002 fejn il-kawza giet differita biex tkompli tinstema' minn din il-Qorti kif prezentament presjeduta mill-Onor. Imhallef Raymond C. Pace.

Rat in-nota tal-eccezzjonijiet tal-konvenuta tal-1 ta' Marzu 2002 a fol. 14 fejn gie eccepit:-

1. Illi *in linea* preliminari t-talba attrici ghandha tigi michuda bl-ispejjez kontra l-attur *stante* l-fatt illi l-kawza attrici hija bbazata fuq inkapacitajiet allegatament ezistenti fil-konvenuta fil-mument li gie kkuntrattat iz-zwieg u tirreferi ghad-dispozizzjonijiet tal-Ligi Maltija filwaqt illi bl-operazzjoni tal-**artikolu 18 (b) tal-Kap. 255 tal-Ligijiet ta' Malta** tali azzjoni ma tistax tirnexxi peress illi l-konvenuta fil-mument taz-zwieg kienet domiciljarja Russa.

2. Illi fil-meritu huwa eccepit illi tali zwieg gie kkontrattat mill-kontendenti regolarment u validament a tenur tal-Ligi applikabbli ghaz-zwieg hekk ikkontrattat.

3. Salv eccezzjonijiet ulterjuri.

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

Rat il-verbal tat-18 t'April 2002 fejn inghata digriet affidavit tal-partijiet b'terminu ta' tletin (30) gurnata kull wiehed. Il-Qorti nnominat lil Dr. Kenneth Gulia bhala Assistent Gudizzjarju sabiex jiffissa erba' (4) seduti ghall-provi tal-partijiet.

Rat in-nota tal-attur tat-23 ta' Mejju 2002 li permezz taghha pprezenta l-affidavit tieghu u ta' Tiberio Scicluna.

Rat in-nota ohra tal-attur tat-13 t'Awissu 2002 li permezz taghha esebixxa l-affidavit t'ohtu Patricia Leccese.

Rat in-nota tal-konvenuta li permezz taghha esebiet l-affidavit taghha stess.

Rat in-nota tal-attur li pprezenta quddiem l-Assistent Gudizzjarju fis-16 ta' Settembru 2002 fejn biha pprezenta affidavit ulterjuri tieghu b'risposta ghal dak ipprezenta mill-konvenuta.

Rat in-nota tal-konvenuta fejn permezz taghha pprezentat kopja tal-kwalifiki taghha gewwa r-Russja.

Rat il-verbali tal-24 t'Ottubru 2002 fejn Dr. Ray Zammit ghall-attur iddikjara li ghalaq il-provi tieghu. Il-Qorti estendiet it-terminu ghall-prezentata tal-affidavits tal-konvenuta bi tletin (30) gurnata ohra u ordnat lill-Assistent Gudizzjarju jiffissa l-ahhar zewg seduta ghall-provi taghha, wara liema l-provi tal-partijiet jigu dikjarati maghluqa; u tad-9 t'April 2003 fejn il-Qorti giet infurmata li l-provi fil-fatt gew maghluqa. Dr. Ray Zammit ghall-attur ipprezenta nota t'osservazzjonijiet seduta *stante* b'kopja lid-difensur tal-kontro-parti. Il-Qorti pprefiggiet terminu ta' hamsin (50) gurnata lill-konvenuta ghal nota responsiva. Il-kawza giet differita ghas-sentenza ghas-7 ta' Jannar 2004, fejn regghet thalliet ghal darb'ohra ghas-sentenza ghall-lum 29 ta' Jannar 2004.

Rat is-seduti mizmuma mill-Assistent Gudizzjarju Dr. Kenneth Gulia, ix-xhieda hemm moghtija u d-dokumenti hemm esebiti.

Rat id-dokumenti esebiti.

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

II. KONSIDERAZZJONIJIET.

(i) PROVI PRODOTTI.

Illi l-**attur David Pons** permezz tal-procedura tal-affidavit sostna hekk:-

"Ahna zzewwigna fis-17 ta' Gunju 2000 kif jindika c-certifikat anness bhala dokument "A". Jiena sirt naf lill-konvenuta cirka April tal-1999. Hi kienet qaltli li dik kienet l-ewwel darba li giet Malta. Jiena kelli xi hamsa u ghoxrin sena. Jiena kont nahdem go 'bar' fejn kien jahdem certu David Bonavia. Dan kien mizzewweg Russa u missierha kien jghix hawn Malta. Dan missierha Vladimir Plotnikov kien hajjarni biex permezz ta' ittri nikkomunika ma' tfajla Russa li hu kien qalli li kienet bil-ghaqal, gustuza u li kienet waslet biex tiggradwa. Qabel ma giet l-ewwel darba konna ktibna xi tleit ittri lil xulxin. L-ittri taghha kitbithom bl-Ingliz ghalkemm wara meta giet, hi kienet

qaltli li ma kenitx taf titkellem u tikteb bl-Ingliz. B'hekk meta giet hawn Malta ndunajt li dawk l-ittri bilfors kien kitibhomlha xi hadd. Fil-fatt nghid li meta konna nohorgu flimkien l-ewwel darba li giet Malta konna nohorgu bid-dizzjunarju maghna. Hi kienet tfittex kull kelma li kont nghidilha fid-dizzjunarju. Wara li zzewwigna kienet qaltli li meta qabel izzewwigna kont incemplilha fuq it-telefon ma kenitx tifhem x'qed nghidilha u ma kenitx qed tifhem.

Jiena bniedem timidu u misthi w introvert b'hekk kont hsibt li l-uniku mod li stajt naqbad tfajla kien permezz tal-posta – jiena ma tantx kont nohrog. Lil din ir-Russa kien issuggerihieli Vladimiru Plotnikov wara li kien staqsieni jekk kontx qed nohrog ma' xi hadd. Jiena ghalhekk hallastilha l-passagg biex tigi Malta. Meta giet kienet damet xi xahrejn u jidhirli li qaghdet ghand din il-familja Russa. Jien kont naraha u konna nohorgu bhala hbieb ma kellniex kunfidenzi ma' xulxin. Fis-sajf tal-istess sena ergajt hallastilha l-passagg biex tigi u din id-darba qaghdet ghandna hi ma kellhiex flus biex thallas. Hawn hi regghet ghamlet xahrejn ohra. Hi kienet tohrog hafna specjalment ma' dik il-familja Russa. Kienet tmur ghandhom u tqatta' hafna hin maghhom. Jiena dejjem hassejtha bierda minni pero' jiena kont ghamejt fuqha u kont nahseb li dak huwa l-karattru tipiku Russu. Sirt naf ukoll li hi kienet ghaddiet minn xi trawma minn 'boyfriend' li kienet tiffrekwenta fir-Russja u hsibt li hi ghalhekk kellha wkoll xi ftit ta' biza' minni. F'din il-migja taghha hi kienet giet mieghi biex naraw post biex nixtrih jiena. Ghandi nghid li hi kienet issuggeriet li nizzewgu u jiena htaftha fil-kelma u bdejt immedjatament infittex post.

Illi hi kienet tfajla sabiha jiena kif gja' ghidt ghamejt fuqha. Hi regghet giet fi Frar pero' nghid f'Novembru 1999 jiena gja' kont ghamilt konvenju biex nixtri post. Ghandi nghid fil-fatt li jiena xtrajt l-ewwel post li rajna ma qghadtx infittex u ndur. Meta issa giet ghat-tielet darba fi Frar 2000 ukoll kienet toqghod ghandna u wkoll kont hallastilha l-passagg jiena. Ahna qatt ma ghamilna l-att taz-zwieg qabel iz-zwieg – hi kienet bierda u kienet tagixxi b'mod li ma naslux ghall-att taz-zwieg innifsu. Fil-fatt nghid li hi kienet ukoll tevita li jkollna sess goff bejnietna. Bil-kemm kont

immissha. Nghid li hi ma kenitx turi herqa jew entuzjazmu. L-affarijiet gew malajr wisq b'nuqqas anzi b'hafna ta' hsieb. F'Gunju cjoe' fit-tieni darba li giet, iddecidejna li ser nizzewgu u wara ddecidejna d-data meta kienet giet it-tielet darba fi Frar. Fil-fatt fi Frar iddecidejna li nizzewgu f'Gunju cjoe' biss erba' xhur wara. Kollox sar ta' malajr u minghajr hsieb, la kien hemm preparamenti.

Hi marret lura f'pajjizha u meta giet ir-raba' darba giet fil-post li jiena kont gja' xtrajt biex nizzewgu fih. Hi giet f'Mejju tal-2000 u ahna zzewwigna f'Gunju tal-istess sena. Nghid li kif giet f'Mejju mill-ewwel qabdet tahdem minghajr permess kwazi kuljum fil-ghaxijiet. Kienet il-habiba Russa taghha li sabitilha dan ix-xoghol. Kienet tadhem taht isem haddiehor. Ghandi nghid li anke din id-darba kont jiena li hallast il-vjagg. Kont jiena wkoll li hallast ghat-tieg. Fil-fatt kulma ghamilna kien 'party' zghir ghand ziti li sar ta' malajr. Ma kellniex mistednin hlief ix-xihieda u anzi nghid li wahda minnhom ghandi l-impressjoni li lanqas biss ma giet. Ghandi nghid li la ommha u lanqas missierha ma gew ghal dan iz-zwieg – ma kien hawn hadd mill-familja taghha. Kien car li ghaliha dan ma kien ifisser xejn. Nista' nara d-differenza bejn dan iz-zwieg u dak ta' ohti.

Ahna zzewwigna fis-17 ta' Gunju 2000 bir-registru biss u peress li ma kontx cert minn dan iz-zwieg u peress li hi qatt ma semmietli biex nizzewgu bil-Knisja, iddecidejt illi ma nizzewwigx bil-Knisja ghalkemm jiena nisrani. Jiena hsibt li jkun ahjar li nizzewweg bir-registru biss ghax ma kontx cert li dan iz-zwieg jista' jirnexxi.

Ghandi nghid ukoll li jiena eskludejt li qatt ikolli tfal minn dan iz-zwieg ghaliex jiena kont aktar miz-zwieg irrid lilha – barra minn hekk ma kontx cert mill-futur tieghi maghha u ghalhekk kont iddecidejt minn qabel iz-zwieg li minn dan iz-zwieg ma jkollix tfal. Jiena ma hassejtx li nista' nafdaha pero' kif ghidt jiena kont ghamejt fuqha.

Mill-attitudini taghha ndunajt li hi kienet ghamlet l-istess decizjoni minghajr ma kienet qaltli. Lanqas jiena ma kont ghidtilha pero' kont cert fir-rizoluzzjoni tieghi. Ghandi

nghidli dan qatt ma hassejtu bhala zwieg, qatt ma kien ghaqda fonda bejnietna, rari konna nitkellmu u meta nitkellmu qabel iz-zwieg rari konna niftehmu sew. Qatt ma tkellimna dwar emozzjonijiet u / jew affarijiet personali jew sentimentali. Qatt ma ddiskutejna problemi taghna. Hi kien mohhha biss fix-xoghol u biex tavvanza fil-karriera. Jiena ma kontx nidhol xejn fil-pjani u / jew fil-hajja taghha. Qatt ma ddiskutiet mieghi xi ghazla jew decizjoni li kellha taghmel, lanqas per ezempju qatt ma staqsietni jekk kontx kuntent jew irrid li hi tmur tahdem fil-ghaxijiet kif fil-fatt kienet taghmel. Hi dejjem ghamlet ta' rasha.

Jiena nghid li qatt ma qist il-konsegwenzi ta' hajja mizzewga u / jew l-obbligi li jigu maghha – jiena biss ridt li jkolli lil din it-tfajla. Min-naha taghha hi wkoll ma tantx kienet turi hegga ghalija. Hi anke wara z-zwieg baqghet bierda minni, hi qatt ma kienet tfittixni, anzi nghid li kienet tevitani u tivvinta minn kollox biex ma tidholx torqod mieghi. Huwa car li anke hi mhux veru li riedet dan iz-zwieg.

Il-problemi bdew jinqalghu mill-ewwel, nghid li mill-bidu bdiet tevitani kif gja' ghidt u wara sitt xhur telqet go sodda ohra. Hi telqet mid-dar qisu sena u xahar wara z-zwieg pero' ghandi nghid illi sa ftit xhur qabel gja' kienet avvicinat lil hbiebha Russi biex tmur tghix ghandhom, pero' huma ma accettawx. Hi tul iz-zmien qasir domna flimkien wara z-zwieg kienet tinsisti li l-ftit drabi li kellna x'naqsmu l-att isir bl-uzu tal-'condoms'. Peress li jiena ma ridtx tfal jiena ma oggezzjonajtx ghal dan. Id-drabi li kellna x'naqsmu flimkien kienu ftit u dejjem bil-kontracettivi. Meta darba aljenajt rasi u ma kontx ilbist 'condom' (f'dan il-kaz jiena ovvjament kont ser nigi barra) hi kienet waqqfitni. Hi wkoll urietni li qatt ma riedet tfal minghandi. Bil-kemm riedet l-att taz-zwieg.

Hi kienet aktar mohhha fix-xoghol u kienet tivvinta kull skuza biex ma tkunx id-dar. Hi issa ammettiet mieghi li kienet tivvinta x-xoghol biex tevita u tiskarta lili. Hi la riedet lili u lanqas riedet verament dan iz-zwieg – kulma riedet kien li jkollha permess li tghix u tahdem hawn. Kien

car mill-bidu li x-xoghol ghaliha kien aktar importanti minni.

Illi kunsens taghna kien eskluz minhabba zball fuq l-identita' tal-parti l-ohra; ***artikolu 19 (1) (b) Kap 255****. Illi l-kunsens tieghi nkiseb b'qerq dwar xi kwalita' tal-parti l-ohra li tista' mix-xorta taghha tfixkel serjament il-hajja mizzewga* ***artikolu 19 (1) (c) Kap 255****. Hi ngannatni u wrietni wara z-zwieg li hi ma riditnix u qatt ma habbitni. Hi issa bdiet tohrog mal-hbieb taghha u kompliet tiskartani.*

Illi l-kunsens tal-partijiet kien vizzjat b'difett serju ta' diskrezzjoni ta' gudizzju fuq il-hajja mizzewga jew fuq id-drittijiet u dmirijiet essenzjali taghha, jew b'anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg Art 19 (1) (d) Kap 255; iz-zwieg gie malajr pjan u minghajr ma rajt x'kienu l-obbligi taz-zwieg. Jiena kont mitluf fuqha u kont biss ferhan li rnexxieli nsib fi zmien sabih mara sabiha – haga li ma kellix possibbilta' naghmel f'cirkostanzi normali minhabba l-karattru timidu u misthi tieghi. Hi wkoll ma tantx qatt kienet interessata li ssir taf il-karattru tieghi qabel iz-zwieg. Nghid li hi izjed riedet iz-zwieg milli riedet lili u dan rieditu biss ghal skopijiet ta' konvenjenza. Nghid li fil-fatt la jiena ma kont naf lilha u lanqas hi ma kienet taf lili.

Illi l-kunsens taghna gie miksub bl-eskluzjoni pozittiva taz-zwieg innifsu, jew ta' xi wiehed jew aktar mill-elementi essenzjali tal-hajja mizzewga, jew tad-dritt tal-att taz-zwieg Art 19 (1) (f) Kap 255. Nghid li miz-zwieg taghna kienu eskluzi kemm it-tfal kif ukoll il-vera mhabba. Jiena kont iddecidejt li minn dan iz-zwieg ma jkollix tfal. Fil-fatt ghalkemm nisrani jiena ddecidejt li ma nizzewwigx bil-knisja.

Illi l-konvenuta hi Russa u llum jiena naf li l-konvenuta zzewget sabiex tkun tista' tibqa' tirresjedi f'Malta, fil-fatt ana zzewwigna biss bir-registru.

Illi kienu f'okkazjonijiet rari wara z-zwieg li l-konvenuta kienet lesta li taghmel l-att taz-zwieg mieghi u f'dawn il-kazijiet il-konvenuta kienet trid tuza kontracettivi.

Illi fil-fatt il-konvenuta bil-kemm kienet taf titkellem bl-Ingliz u ahna bil-kemm konna nikkomunikaw sewwa ma' xulxin u dan kemm ghaz-zmien qasir qabel iz-zwieg kif ukoll wara.

Illi z-zwieg kien hazin mill-bidu nett tant li mill-bidu kienu jkunu okkazjonijiet rari li l-konvenuta kienet lesta li torqod fl-istess sodda tieghi.

Illi l-konvenuta qaltli li hi fil-fatt qatt ma habbitni izda kienet tirrispettani bhala persuna. Dan ukoll ikompli juri li l-iskop ghaz-zwieg taghha kien biss li tibqa' tirresjedi f'Malta.

Illi jiena lanqas biss qatt rajt lill-genituri taghha li lanqas biss gew ghaz-zwieg. Fil-fatt lanqas biss kienu saru preparamenti ghaz-zwieg. Il-jum taz-zwieg kien minghajr tifsira ghalina t-tnejn. Kien jum bhall-ohrajn.

Illi jiena wkoll gejt attirat mill-persuna fizika tal-konvenuta u ma harist lejn xejn aktar. Kont ghami u ghalkemm nemmen illi l-veru zwieg huwa dak bil-Knisja jiena ghazilt minflok li nizzewweg biss bir-registru anke ghaliex ma kontx cert mill-pass li kont ser naghmel."

Illi *inoltre* l-attur xehed ukoll in kontro-ezami quddiem l-Assistent Gudizzjarju Dr. Kenneth Gulia.

Illi gew ipprezentati mill-attur ukoll l-affidavits ta' **Tiberio Scicluna**, ta' ohtu **Patricia Leccese.**

Illi min-naha taghha l-konvenuta **Elena Solovieva Pons** tat ix-xhieda taghha wkoll permezz tal-procedura tal-affidavit fejn bil-lingwa Ngliza stqarret hekk:-

"My relationship with my husband started when I received a call in Russia from my friend Natalja whose family has been resident in Malta for many years. I was twenty-four years and David was twenty-six. My friend Natalja told

me taht she knew a man called David who was interested to meet a girl and she immediately thought of me. Shortly after David called me and than we started corresponding with each other. I was not very fluent in English and in fact I used to consult the dictionary whenever I replied to his letters. After two months, David invited me to come to Malta to visit him. At the time I was working as a secretary in an office and as a part-time coach in Volgograde. My wages were not high enough to pay for the flight ticket to Malta and so I told him that I could not afford it. However, David insisted that he wanted to see me and consequently he offered to pay the ticket himself.

My first visit to Malta was on the 18th March 1999 and I stayed at Natalja's parents' house for the whole stay which lasted for about one month. During my stay I helped Natalja's parents with the house work since they paid for my everyday expenses. I met David every day during my stay and we started to get to know each other.

Thereafter I visited David a second time from the 23rd June 1999 for another two months until the 25th August 1999. This time I was living at his parents' house and I got to know David and his family much better. I became very close to his sister Patricia. David this time was asking me to live in Malta, however I could not give him an answer there and then because I was confused and I found it very hard to leave my family, friends and my job in Russia. David asked me about our future together and he proposed to marry me, but I replied that I needed some time to think it well. At that stage I was not feeling ready to leave my country. After this visit I returned to Russia to finalize my studies and to sit for an exam which would have allowed me to start coaching rhytmic gymnastics.

In my last days in Russia I had long talks with my mother who advised me that, if I felt that David was a reliable and trustworthy person and I respected him and loved him, then I should decide whether I should marry him and leave Russia or not. So I made my decision and set my mind accordingly, having the honest intention of getting

married in order to set up a happy family life with David and have children.

The third visit took place from the 3rd March 2000 till the 6th May 2000. This time we got on very well and became closer with each other and we got engaged and started the marriage procedures.

After having successfully passed my exams I came to Malta on the 10th June 2000 and we moved to David's flat which he had bought in the meantime. On the 17th June 2000 we got married in the Public Registry and we had a small reception at David's aunt flat. We decided to get married in the Public Registry and not in the Catholic Church because I am Orthodox whilst David is Catholic. Everything was prepared by his aunt who cooked all the food. We did not go abroad for our honeymoon because David always insisted that he had just bought the flat and he had to pay monthly installments to the Bank.

Right away I started my life as a housewife and David was so spoilt at home that he would never help me at home. I intended to learn English so I could communicate better with the Maltese people. Whenever, I asked David to help me he told me to leave him alone as he was too tired to assist me. Soon I recognised that he would not support me any money to do so, I started to work, first as a waitress at the Marina Hotel and later at the Bay Street Games Room as a cashier. When I started to earn my own money David asked me to pay towards the running costs of the flat and sometimes even for meals when we went out with friends. I felt that somehow he wanted to lead 'separate lives' now that I had started working and wanted to contribute as well to our daily expenses. I always felt that I could do much better than a waitress since I studied in Russia for four years and wanted to find a job in the rhythmic gymnastics sector as I always wanted besides being a house-wife.

The problem throughout marriage was money. David was always complaining that he did not have enough money and at the same time he would complain if I worked long

hours. Throughout our marriage we had planned to save money to go to Russia to meet my parents because David never saw them. In fact, I wanted to earn money by working so that we would be in a position to do this since David always insisted that we did not have the money. In fact we were making plans as to when we should go either in Summer or in Winter. My parents could not afford to come to Malta not even to our wedding so the only way to see them was to go to Russia.

My parents used to send us presents by post, however David seemed interested in them whilst on the other hand I felt very close to his parents and sister. However I must also state that I noticed that David was also very inconsierate towards his own family. On special occasions like birthdays I used to ask him what kind of presents he would like to get for them, but he would reply as usual that he did not care and that they knew that he had not enough money for himself let alone for others. So I would end up getting them presents and cards myself to maintain a good relationship and show my respect and gratitude for their help.

In Summer 2001 I started my current part-time job as receptionist in the Westin Dragonara Resort Fitness Club. After a short while my manager offered me to start teaching aerobic classes. As I did not have much experience in this field, he advised me to take a course finalising with the Oxford Cambridge RSE exan in order to be able to work as an instructor. I could not afford to pay for it myself, therefore I asked my husband to help me out. However he refused. My manager at the fitness club insisted that I should pass the exam and thus I had to borrow money from friends and then I reimbursed them.

Another instance that I recall where my husband failed to support me was when I intended to get a driving licence. In order to minimize the cost I asked David to show me how to drive so I would not have to take too many driving lessons. He took me out once and when I made a mistake he started shouting at me saying that this was the

first and last time and that he only had one car and could not risk to damage it.

More and more I noticed that the atmosphere between us became very cold and that David seemed to have no intention to improve our relationship but was merely interested in having a housewife to cook and clean for him and render all other services expected from a good housewife without realising what were my needs as a person.

When I married David I wanted to have children however we had agreed not to have children during our first year of marriage because we needed to save money to bring them up well."

Illi l-attur **David Pons** ipprezenta affidavit ulterjuri b'risposta ghal dak tal-konvenuta fejn sostna:-

"Niftakar li lil Elena kont infurmajtha mill-bidu nett rigward il-pozizzjoni finanzjarja tieghi. Jiena kont ghamilt ix-xoghol tat-tibjid mad-dar kollha, minkejja li qatt ma kont ghamilt dan ix-xoghol qabel. F'kull okkazjoni fejn hrigna flimkien, dejjem kont jien li nhallas u qatt ma staqsejt lil Elena biex naqsmu l-kont. Jien dejjem hallast ukoll ghax-xirja li konna naghmlu flimkien mis-'supermarket'. Niftakar li darba offrejtilha li nhallas ghall-biljett biex il-genituri taghha jkunu jistghu jigu hawn Malta, izda hi rrifjutat.

L-ghazla li tibda tahdem kienet taghha, u jien qatt ma ndhaltilha. Hi bdiet tahdem ghal sieghat twal minn fil-ghodu sa tard fil-ghaxija. Jiena deherli li dan kienet qed taghmlu biex kemm jista' jkun tevitani. L-interess taghha ma kienx il-hajja mizzewga, izda l-avvanz tal-karriera taghha. Minflok ma fehmet il-pozizzjoni finanzjarja tieghi u ghenitni, hi bdiet hajja ndipendenti u wzat iz-zwieg ghall-konvenjenza taghha. Hi qatt ma ghenitni finanzjarjament, ghalkemm jien qatt ma tlabtha xejn. Anke wara s-sieghat twal ta' xoghol hi lanqas biss kienet tfittixni biex nitkellmu u naqsmu hajjitna u l-hin liberu taghna flimkien. Anzi nghid li kienet konsistentement tevitani.

Mhux minnu li l-problema li kissret iz-zwieg kienet il-flus. Il-flus kienet wahda mill-iskuzi li gabet biex tfarrak ir-relazzjoni, li ma kenitx ibbazata fuq ir-rispett u l-imhabba. Kienet relazzjoni ta' konvenjenza minghajr imhabba min-naha taghha, u relazzjoni ta' fissazzjoni ghamja min-naha tieghi. Illum nirrealizza li z-zmien li ghamilna flimkien qabel iz-zwieg, li ma kienx ta' aktar minn hames xhur, zgur li ma kienx bizzejjed biex insiru nafu sew lil xulxin, aktar u aktar meta kien hemm il-problema tal-lingwa.

Jiena ghamilt kull sforz sa l-ahhar biex nara nistax insalva s-sitwazzjoni, izda d-decizjoni taghha kienet ilha li ghamlitha, u ma kellha l-ebda nteress li tirranga. Kien ovvju li l-ghan taghha kien li tizzewweg, u tizzewweg malajr. Dan jikkonfermah anke punt numru tlieta ta' l-affidavit ipprezentat minn Tiberio Scicluna."

<u>(ii) Principji Legali.</u>

Illi l-attur qed jibbaza t-talba tieghu fuq l-**artikolu 19 (1) (b), (c), (d) u (f) Kap 255.**

Illi **artikolu 19 (1) (b) tal-Kap 255** li jipprovdi li:-

"jekk il-kunsens ta' xi wahda mill-partijiet ikun eskluz minhabba zball fuq l-identita tal-parti l-ohra."

Illi kif inghad fis-sentenza **"Antionette Agius vs Joseph Gauci"** (P.A. (RCP) 19 ta' Frar 2003 l-izball jikkonsisti f'gudizzju falz dwar xi haga jew xi hadd u kwindi jista' jigi kkunsidrat bhala difett tal-intellett. Il-persuna fl-izball ma tkunx nieqsa mill-gharfien shih izda jkollha gharfien zbaljat dwar il-persuna jew l-oggett. Dik il-persuna, imbaghad taghmel gudizzju jew tifformula opinjoni bbazata fuq dak illi li zbaljatament tkun qed tippercepixxi.

Il-**"*Castano'*"** jaghti s-segwenti definizzjoni dwar zball fil-ktieb tieghu: **"Il Sacramento del Matrimonio"**:-

"*L'errore infatti e' un atto del'intelletto che consiste in un 'iudicium falsum', gudizio che ha come causa una falsa 'rei apprehensio'. Come abbiamo detto ripetutamente, la*

volonta – facolta' che consente – non si muove se l'intelletto non le presenta un oggetto che attiri la sua appetibbilita'. Ma l'intelletto, proprio a causa del 'iudicium falsum (errore), presenta alla volonta' un oggetto falso distorto, un oggetto cioe' che non corrisponde alla verita'. E' per questo che la volonta' viene erroneamente indotta ad emettere un consenso che non risponde alla realta' e quindi il vero consenso viene a mancare".

Illi huwa minhabba f'din ir-raguni illi l-izball jitqies bhala vizzju tal-kunsens u dan ghaliex dak il-kunsens ikun qed jigi moghti taht gudizzju falz li il-persuna li tkun qieghda taghtih tkun ghamlet fuq il-parti l-ohra fiz-zwieg. L-izball *inoltre* jrid ikun tali illi min-natura tieghu jfixkel serjament il-hajja mizzewga bejn il-partijiet. Jekk il-persuna fi zball, wara l-gharfien ta' dak l-izball thoss illi l-hajja matrimonjali taghha ma hijiex imfixkla b'dan l-gharfien allura l-kunsens matrimonjali minnha moghti ikun wiehed validu u dana peress illi l-volonta tieghu jew taghha ma tkunx giet effettwata b'dak il-gudizzju falz li ikun sar. Fil-fatt fil-ligi kanonika, issir distinzjoni bejn zball fuq il-persuna u zball rigward xi kwalita' tal-persuna, liema kwalita trid tkun *"directly and principally intended"*, u cjoe' li fil-mument taz-zwieg, il-kunsens matrimonjali jkun qed jigi marbut ma' dik il-kwalita' fil-parti l-ohra, li jekk tkun nieqsa allura ggib in-nullita' ta' dak iz-zwieg minhabba vizzju tal-kunsens.

Illi l-attur jirreferi wkoll ghan-nullita' taz-zwieg abbazi tal-**artikolu 19 (1) (c) tal-Kap 255** u kif inghad fis-sentenza **"Michelle El Hossayes vs Pauline Mintoff"** (P.A. (RCP) 20 ta' Marzu 2003) l-legislatur Malti llimita l-qerq fuq *"xi kwalita tal-parti l-ohra li tista' mix-xorta taghha tfixkel 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' Mejju 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-proprjetajiet 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-sub-artikolu hu li l-qerq irid ikun serju bizzejjed li fixkel serjament il-hajja mizzewga.

Illi l-attur jissottometti wkoll li z-zwieg bejnu u bejn il-konvenuta ghandu jigi dikjarat null *inter alia* abbazi ta' l-**artikolu 19 (1) (d) tal-Kap 255** li jghid:-

*"**(d)** jekk il-kunsens ta' xi wahda mill-partijiet ikun vizzjat b'difett serju ta' diskrezzjoni ta' gudizzju fuq il-hajja mizzewga, jew fuq id-drittijiet u d-dmirijiet essenzjali taghha, jew b'anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg".*

Illi dwar dan is-sub-artikolu din il-Qorti kif presjeduta diga' kellha okkazjoni tezaminah, u ghalhekk taghmel referenza ghas-sentenza **"Joseph Borg vs Maria Nicolina Cutajar**

gia` Borg" (Cit. Nru. 1564/97/RCP – deciza fil-21 ta' Ottubru 1999) u ghall-principji hemm enuncjati.

Illi fis-sentenza **"Kevin Spiteri vs Avukat Dr Renzo Porella-Flores et noe"** (Cit. Nru. 2443/97/RCP – deciza 18 ta' Jannar 2000) il-Qorti ghamlet referenza ghall-espozizzjoni ta' ***Viladrich****:*

*"Thus, there is grave lack of discretion of judgement when it is proven that a contracting party lacks intellectual and volitional maturity necessary to discern, in view of binding oneself in an irrevocable manner, the essential rights and duties of marriage, which are the object of mutual surrender and acceptance. The discretion of judgement refers to that degree of maturity of comprehension and of will of the contracting parties which enables them to give and receive each other, through a juridical bond, in a unique community of life and love. This community is indissolubly faithful, ordered to the good of the spouses as well as to the procreation and education of the offspring" (****Viladrich, P.J.,*** **"Matrimonial Consent in Code of Canon Law Annotated."** (Montreal, 1993), p. 686).

Illi kwantu ghall-obbligazzjonijiet essenzjali taz-zwieg, din il-Qorti tifhem li, fin-nuqqas ta' definizzjoni jew indikazzjoni fil-**Kap. 255**, dawn l-obbligazzjonijiet essenzjali huma dawk li fis-socjeta` Maltija dejjem u nvarjabbilment gew ritenuti bhala l-obbligazzjonijiet essenzjali taz-zwieg. Dawn huma *"the obligation concerning the conjugal act or carnal union, as bodily union and basis of procreation; the obligation of the community of life and love as an expression of the union between man and woman, mutual well-being, which is inseparable from the provision of an environment conducive to the reception and education of children; and the obligation to receive and bring up children within the context of a conjugal community. It is important to remember that these essential obligations must be mutual, permanent, continuous, exclusive and irrevocable so that there would be incapacity if one of the contracting parties should be, due to a psychological cause, incapable of assuming these obligations with these*

essential characteristics" (***Viladrich, P.J.,*** *op.cit.,* pg. 687).

Illi wkoll fis-sentenza **"Alexandra sive Sandra Farrugia vs Raymond Farrugia"** (P.A. (VGD) 10 ta' Settembru 1997) inghad wkoll li:-

"Kwantu ghad-difett serju ta' diskrezzjoni ta' gudizzju – ***Art. 19 (1) (d)*** *– biex ikun hemm nuqqas serju ta' diskrezzjoni ta' gudizzju jrid ikun hemm inkapacita' psikika (mhux necessarjament anomalija psikologika fis-sens mediku psikjatriku) jew kostituzzjonali li wiehed jaghraf u jirrifletti, jew li jiddeciedi liberalment, fuq l-oggett tal-kunsens matrimonjali* ***("Isabelle Zarb vs Stephen Attard"*** *– P.A. 21 ta' Novembru 1995). Mhix ghalhekk kwistjoni ta' nkompatibbilta' ta' karattru, jew ta' decizjoni jew decizjonijiet zbaljati. Il-paragrafu* ***(d)*** *ikompli jitkellem dwar "anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg". Il-Qorti tosserva li l-ligi taghna tirrikjedi mhux biss anomalija psikologika tkun wahda serja, izda li tkun taghmilha mpossibbli mhux sempliciment difficli, li wiehed jaqdi l-obbligazzjonijiet essenzjali taz-zwieg ossia jassumihom".*

Illi ghalhekk b'difett serju ta' diskrezzjoni ta' gudizzju l-legislatur ma riedx ifisser semplicement kwalsiasi stat ta' mmaturita` li parti jew ohra fiz-zwieg tista' tkun fiha fil-mument li jinghata l-kunsens reciproku (**"Nicholas Agius vs Rita Agius gja' Caruana"** – P.A. (VDG) tal-25 ta' Mejju 1995).

Illi kif inghad fis-sentenza **"Joseph Mizzi vs Pauline Mizzi"** (P.A. (RCP) l-1 ta' Ottubru 2002) li kieku l-legislatur irrikjeda maturita` shiha u perfetta, ftit jew addirittura ebda zwieg ma kien ikun validu. In-nuqqas ta' *"discretio judicii"* hu kuncett guridiku ntrinsikament marbut mal-kapacita` ta' parti jew ohra fiz-zwieg li taghti l-kunsens liberu u xjenti taghha ghar-rabta taz-zwieg. Kif jispjega l-gurista ***Colagiovanni*** meta sostna li:-

“Il matrimonio, in quanto patto ossia “foedus” ……… richiede una capacita` intelletuale e volitiva al di sopra di ogni altro contratto che e` per lo meno rescindibile, in casi determinati dalla legge, richiede quindi una integrita` di mente e di liberta`, dato che ……… si tratta di assumersi una “servitus” per tutta la vita” (**Forum**, 1990, Vol. 1 part I, p. 72).

Illi pero`, kif gia’ nghad, b’immaturita` jew difett serju ta’ diskrezzjoni ta’ gudizzju d-dottrina u l-gurisprudenza *“non si riferiscono ad una piena e terminale maturita`, non esigono nei nubenti una conoscienza perfetta ed esaustiva di cio` che comporta il matrimonio, non richiedono una preveggenza chiara ed assoluta di cio` che puo compartare la vita coniugale, ne` un perfetto equilibrio volitivo-affettivo, ne` infine una conscienza perfetta delle motivazioni della scelta matrimoniale. Ecco perche` riesce piu` appropriato l’ uso del termine discrezione di giudizio, che fa riferimento ad un certo discernimento ma non implica il raggiungimento di una maturita` piena”* (***Pompedda, M.F.,* “Il Consenso Matrimoniale in Grocholewski” – Pompedda – Zagglia, “Il Matrimonio nel Nuovo Codice di Diritto Canonico”** (Padova, 1984), p. 46).

Illi kif gie affermat diversi drabi minn din il-Qorti, inkluz fis-sentenza **“Alessandra *sive* Sandra Mc Monagale qabel Mamo vs Mario Mamo”** (P.A. (VDG) 26 ta’ Ottubru 2000) ikun hemm id-difett serju ta’ diskrezzjoni ta’ gudizzju fis-sens ta’ l-ewwel parti tal-paragrafu **(d)** imsemmi kemm-il darba jirrizulta li, *“fil-mument ta’ l-ghoti tal-kunsens matrimonjali, parti jew ohra tkun priva b’mod sostanzjali, ossia gravi, minn dik il-fakolta` kritiko-estimativa jew kritiko-valutativa dwar l-oggett tal-kunsens taz-zwieg, jew minn dik il-maturita` affettiva li hija presuppost ghal ghazla libera dwar l-imsemmi oggett. Id-difett serju ta’ diskrezzjoni ta’ gudizzju, ghalhekk, ma hux semplicement nuqqas ta’ hsieb, nuqqas ta’ riflessjoni; anqas ma jfisser li wiehed jaghmel ghazliet jew jiehu decizjonijiet zbaljati – infatti decizjoni jew ghazla zbaljata hi perfettament kompatibbli ma’ diskrezzjoni ta’ gudizzju”* (*ara,* **“Emanuel**

Camilleri vs Carmen Camilleri", P.A., 10 ta' Novembru 1995*).*

Illi l-istess sentenza tkompli tghid *"Li parti fiz-zwieg ma tkunx fehmet sufficjentement, fis-sens li ma tkunx hasbet bizzejjed jew ma tkunx irriflettiet bizzejjed fuq il-hajja mizzewga jew fuq id-drittijiet u d-dmirijiet essenzjali tal-hajja mizzewga, ma jammontax necessarjament ghal difett (serju) ta' diskrezzjoni ta' gudizzju (**"Selina-Maria Vella Haber vs Joseph Gatt"**, P.A., 15 ta' April 1996)".*

Illi ghalhekk biex ikun hemm in-nuqqas jew difett serju ta' diskrezzjoni ta' gudizzju kif ravvizat fl-**artikolu 19(1)(d)** irid ikun hemm l-inkapacita` psikika (mhux necessarjament anomalija psikologika fis-sens mediku/psikjatriku) jew kostituzzjonali li wiehed jaghraf u jirrifletti, u li jiddeciedi liberament, fuq l-oggett tal-kunsens matrimonjali (ara f'dan is-sens, fost ohrajn, **"Jacqueline Cousin vs Bernard Simler"**, P.A., 3 ta' Gunju 1998; **"Roseanne Cassar vs Kenneth Cassar",** P.A. 19 ta' Ottubru 1998; u **"Carmelo Grima vs Mary Andrews"**, P.A., 2 ta' Novembru 1998).

Illi proprju ghalhekk ukoll il-legislatur jirrikjedi li d-difett ta' diskrezzjoni irid ikun wiehed serju u l-anomalija psikologika tkun wahda serja.

Illi kif jispjega ***Bersini****,* id-diskrezzjoni ta' gudizzju tikkonsisti f'zewg elementi distinti izda konkorrenti w interdipendenti:-

"La piena avvertenza e il deliberato consenso … … … La piena avvertenza si riferisce alla sfera intellettiva, il deliberato consenso a quella volitiva. In altri termini, la discrezione di giudizio comprende la maturita` di giudizio e la maturita` affettiva … … … La maturita` di giudizio comporta una conoscenza critica proporzionata all' atto da compiere, agli obblighi essenziali da assumersi e ai doveri coniugali che ne derivano proiettati nel futuro. La maturita` affettiva comporta generalmente quella adequata evoluzione degli istinti, degli affetti, dei sentimenti, della emotivita` che se sono turbati o inadeguati intaccano direttamente la volonta` e possono

privare della libera scelta interiore. Abbiamo cosi` una mancanza di consenso libero (immaturita` affettiva) e ponderato (immaturita` di giudizio)" (***Bersini, F.,*** **"Il Diritto Canonico Matrimoniale."** (Torino, 1994), p. 97).

Illi l-istess awtur, imbaghad ikompli jispjega dwar kemm irid ikun serju d-difett ta' diskrezzjoni biex wiehed ikun jista' jghid li hemm id-difett fil-kunsens u l-konsegwenti nullita` taz-zwieg:-

"Se ci si chiede quale grado di discrezione di giudizio possa ritenersi proporzionato al matrimonio, rispondiamo anzitutto che, sia per la conoscenza intellettiva come per la deliberazione volitiva, dovra' essere maggiore di quello richiesto per peccare mortalmente e per stipulare gli altri contratti. Il motivo sta nel fatto che il consenso matrimoniale riguarda obbligazioni che si proiettano nel futuro ed e` ordinato all' assunzione di uno stato di vita che incide su tutta l' esistenza con un contratto perpetuo e irrescendibile che comporta una serie di gravi obblighi ad esso inerenti. Per dare un valido consenso, non e` sufficiente il grado di ragione col quale speculativamente uno sappia che cosa e` il matrimonio; e` necessaria la maturita` di giudizio capace di ponderare in concreto i doveri e i diritti che uno deve assumersi per tutta la vita. In altri termini, e` necessaria la discrezione non tanto per l' atto in se, al momento di emettere il consenso, quanto per gli impegni che da quell' atto derivano. Una discrezione che impegni per il futuro. Ovviamente si richiede una ponderazione degli impegni sostanziali del matrimonio e non di tutto il suo valore etico, religioso, sociale, giuridico ed economico, altrimenti ben pochi sarebbero in grado di emettere un valido consenso. Ogni volta che i contraenti abbiano raggiunto l' eta prescritta dal legislatore per poter contrarre matrimonio, si presume che essi siano in possesso della debita discrezione di giudizio; tale presunzione, tuttavia, ammette prove in contrario. Pertanto, qualora si possa dimostrate, per qualsiasi motivo, la capacita` intellettiva e volitiva sopra descritta sia gravamente alterata o addirittura mancante, si dovra` ritenere che il vincolo matrimoniale sia nullo per difetto di discrezione di giudizio" (ibid. pp. 97-98).

Illi hawnekk il-Qorti, pero`, tixtieq tippreciza li ghazla libera, kunsens hieles, ghar-rabta taz-zwieg mhux sinonimu mal-kuncett ta' ghazla facli, u dan kif gja' gie ndikat fis-sentenzi fuq kwotati, tant li nghad li:-

"… … ... se il sogetto non e` in grado di superare [i] condizionamenti interiori, allora si dira` che la scelta di lui non e` stata libera; lo sara` invece qualora pur pressato da tali impulsi provenienti dal proprio psichismo, da un' affettivita` non sufficientemente matura o anomala, e quindi anche di fronte a conflitti interiori, sara` stato capace di superarli, di dominarli razionalmente, di scegliere con autonomia ... ... In ogni caso, i nubenti debbono aver coscienza di assumere vere obbligazioni (e reciprocamente di concedere veri diritti) di creare cioe` col matrimonio un patto che vincola a un comportamento idoneo e adeguato alla specifica societa` coniugale, sia nei rigwardi dell' altra parte sia nei riguardi della prole" (***Pompedda, M.F.,*** **"Incapacita` di Natura Psichica in Matrimonio Canonico: Fra Tradizione e Rinnovamento."** (Bologna, 1991), pp. 231, 233).

Illi kwantu ghad-difett fil-kunsens dovut ghall-anomalija psikologika serja li taghmilha mpossibbli ghal dik il-parti li taqdi l-obbligazzjonijiet essenzjali taz-zwieg, il-ligi taghna, bhad-dritt kanoniku **(Can. 1095 (3))** tirrekjedi mhux semplici diffikulta` izda mpossibbilta` li wiehed jaqdi ossia jassumi l-obbligazzjonijiet essenzjali taz-zwieg. Inkapacita` jew impossibbilta` vera f' dan il-kuntest hi ipotizzabbli biss fil-prezenza ta' anomalija psikologika serja li, independentement minn kif wiehed jaghzel li jiddefiniha jew jiklassifikaha fil-kamp tal-psikjatrija jew tal-psikologija, tintakka sostanzjalment il-kapacita` *"di intendere e/o di volere". "L' incapacita` di assumere gli oneri essenziali della vita coniugale",* kif jghid ***Bersini***, *"rende la persona inabile al matrimonio, anche nell' ipotesi … … … che al momento di contrarre le nozze abbia avuto la discrezione di giudizio sufficiente per un valido consenso" (op. cit.,* p. 99).

Illi ghal dak li jirrigwarda l-obbligazzjonijiet essenzjali taz-zwieg, din il-Qorti tifhem li, fin-nuqqas ta’ definizzjoni jew indikazzjoni fil-**Kap. 255**, dawn l-obbligazzjonijiet essenzjali huma dawk li fis-socjeta` Maltija dejjem u nvarjabbilment gew ritenuti bhala l-obbligazzjonijiet essenzjali taz-zwieg.

Illi dawn huma *“the obligation concerning the conjugal act or carnal union, as bodily union and basis of procreation; the obligation of the community of life and love as an expression of the union between man and woman, mutual well-being, which is inseparable from the provision of an environment conducive to the reception and education of children; and the obligation to receive and bring up children within the context of a conjugal community. It is important to remember that these essential obligations must be mutual, permanent, continuous, exclusive and irrevocable so that there would be incapacity if one of the contracting parties should be, due to a psychological cause, incapable of assuming these obligations with these essential characteristics” (**Viladrich, P.J**., op. cit., p. 687).*

Illi tal-istess portata huma s-sentenzi **“Anthony Gaffiero vs Juanita Gaffiero nee’ Sultana”** (P.A. (VDG) 17 ta’ Novembru 2000 u **“Anna Galea vs John Walsh”,** (P.A. (VDG) tat-30 ta’ Marzu 1995). Inerenti, ghalhekk, f’dawn l-obbligazzjonijiet hemm l-obbligu tal-partijiet li jaghtu lilhom infushom lil xulxin fit-totalita` taghhom sabiex tigi stabbilita bejniethom *“the community of life and love”.*

Illi fl-ahharnett din il-Qorti taghmel riferenza ghal dak li nghad fis-sentenza fl-ismijiet **“Nathalie O’Toole vs Patrick O’Toole”** (P.A. (N.A.) 25 ta’ Marzu 2002) fejn inghad li:-

“Il-kunsens moghti fiz-zwieg skond din l-istess gurisprudenza mhuwiex dak il-kunsens semplici rikjest fil-kuntratt in generali ghaliex il-kuntratt taz-zwieg huwa wiehed “sui generis” u ta’ ordni pubbliku. Illi ghalhekk il-partijiet f'kuntratt ta' zwieg mhux biss irid ikollhom il-kapacita' li jaghtu dak il-kunsens, izda li l-istess irid jigi moghti bl-aktar mod liberu u xjenti ghal dak kollu li

tirrikjedi r-rabta taz-zwieg. Il-kuntratt taz-zwieg ghandu jigi apprezzat mhux biss bl-ghajnejn oggettivi tal-ligi, izda jrid isib is-sinifikat tieghu fir-relazzjonijiet ta' koppja u l-iskop ahhari taz-zwieg, cjoe' li tnejn minn nies jaghtu lilhom nfushom lil xulxin ad eskluzjoni ta' kollox u kulhadd. Meta ghalhekk ghal xi raguni jew ohra dak il-kunsens ma jkunx gie moghti bil-konoxxenza shiha ta' dak li jgib mieghu z-zwieg, allura jinholoq dubju kemm dak il-kuntratt matrimonjali huwa wiehed validu".

Illi kif inghad fis-sentenza **"Al Chahid vs Mary Spiteri"** (P.A. (RCP) 5 ta' Gunju 2002) *inoltre* l-kunsens irid ikun wiehed tali li permezz tieghu l-parti li tesprimih trid tkun konxja ta' l-obbligi, id-dmirijiet u r-responsabbiltajiet li ggib maghha l-hajja mizzewga bhalma huma l-elementi ta' unjoni permanenti, esklussiva w irrevokabbli.

Illi dawn il-principji kollha gew kkonfermati f'diversi sentenzi moghtija minn din il-Qorti nkluzi **"Maria Rita Calleja vs Mohamed Ben Mohamed Khemiri"** (P.A. (RCP) 17 ta' Frar 2000); **"Nicolai Balzan vs Simone Cremona"** (P.A. (RCP) 9 ta' Marzu 2000); **"Ousama Sadalah vs Doris Tanti"** (P.A. (RCP) 4 ta' April 2000); **"Josephine Gabriel vs Dr. Georg Sapiano et nomine"** (P.A. (RCP) 8 ta' Novembru 2000); **"Josette Lungaro mart Jesmond Lauro vs Jesmond Lauro"** (P.A. (RCP) l-1 ta' Frar 2001); **"Mazen Dadouch vs Maria Dadouch xebba Galea"** (P.A. (RCP) 22 ta' Marzu 2002); **"Albert Grech vs Josette Grech"** (P.A. (RCP) 30 ta' April 2002); **"Marco Tanti vs Catherine Azzopardi"** (P.A. (RCP) 30 ta' Mejju 2002); u **"Giulio Farrugia vs Raquel Anne Farrugia"** (P.A. (RCP) 29 ta' Mejju 2002) fost ohrajn.

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

"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' repetizzjoni 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 necessarjament tirrizulta biss minn xi haga espressa direttament izda setghet tigi espressa bl-imgieba ta' xi parti fil-perjodu mmedjatament qabel u wara li jkun inkiseb l-istess kunsens".

Illi tal-istess portata huma s-sentenzi **"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).

(iii) APPREZZAMENT TAL-PROVI.

Illi fl-ewwel dwar l-ewwel eccezzjoni sollevata mill-konvenuta abbazi tal-**artikolu 18 tal-Kap 255** jirrizulta li din hija assolutament minghajr ebda fondament *stante* li jidher li l-partijiet kienu domiciljati Malta, u fil-fatt it-tnejn jammettu li stabbilew ir-residenza taghhom Malta fejn fil-fatt illum it-tnejn ghadhom qed jghixu ghalkemm huma in effetti seperati *de facto.* Mill-provi ma hemm xejn x'juri li l-partijiet ma kienux kapaci li jidhlu ghall-kuntratt ta' zwieg skond il-ligi tad-domicilju taghhom Maltija, u fil-fatt fix-xhieda u sottomissjonijiet taghha l-konvenuta lanqas biss

accennat ghall-istess eccezzjoni. Anzi l-istess konvenuta tghid u tamemetti li hija giet Malta sabiex tghix bhala familja mal-attur hawn Malta u allura din tikkontrasta sew mal-ewwel eccezzjoni minnha sollevata. Ghalhekk din l-ewwel eccezzjoni qed tigi michuda *stante* li hija frivola u nfondata fil-fatt u fid-dritt.

Illi dwar il-provi l-ohra prodotti jidher car li qabel ma zzewgu l-partijiet kienu ftit li xejn jafu lil xulxin, u kollox sar ta' malajr, min-naha tal-attur ghaliex jidher li kien infatwat bil-persuna tal-konvenuta, u ghall-konvenuta peress li hija dehret li riedet tibqa' tghix hawn Malta, ghalkemm jidher li s-suggeriment u l-insistenza ghaz-zwieg saret mill-istess attur. F'dawn ic-cirkostanzi jidher car li l-partijiet verament lanqas biss kienu jafu lill-xulxin qabel ma ghamlu l-pass taz-zwieg, u jidher car li l-istess partijiet qatt ma setghu jaghmlu dan il-pass id-diskrezzjoni necessarja dwar il-hajja mizzewga bejniethom, proprju ghaliex lanqas biss kienu jafu l-karattru ta' xulxin; in verita' kellhom problemi ta' komunikazzjoni minhabba l-lingwa, u tant l-affarijiet graw malajr u nstantanji, li certament ma setghu qatt kienu konxji ta' dak li kienu qed jaghmlu. Probabbilment dan kien jakkomodahom f'dak il-mument ghaliex jidher li hadd minnhom ma' kellhu oggezzjona taz-zwieg f'dak il-mument, pero' dan kien biss ghall-interess egoistici taghhom, kienu x'kienu ghall-mument, izda certament mhux ghaliex b'xi mod irriflettaw fuq il-hajja komunali bejn u ghal xulxin.

Illi f'dan il-kuntest din il-Qorti ssib li l-kunsens tal-partijiet kien vizzjat b'difett serju ta' diskrezzjoni fuq il-hajja mizzewga u l-elementi essenzjali tal-istess u mhux l-anqas fuq id-dmirijiet u drittijiet essenzjali minnha naxxenti li jwasslu ghall-annullament taz-zwieg abbazi tal-**artikolu 19 (1) (d)** ghar-ragunijiet imputabbli liz-zewg partijiet.

Illi mill-istess provi prodotti jirrizulta wkoll li l-kunsens tal-attur kien vizzjat peress li huwa zzewweg meta eskluda pozittivament li jkollu tfal mir-relazzjoni tieghu mal-konvenuta u dan huwa jammettih b'mod mill-aktar palez u car ghaliex sostna li huwa mhux zwieg ried izda lilha, kliem li juri li kobor tal-infatwazzjoni tieghu fizika lejn l-

istess konvenuta. Dan huwa konsistenti mal-fatt li l-istess attur bla tlaqliq u misthija stqarr li huwa zzewweg lill-konvenuta mhux ghaliex ried jinghaqad maghha, tant li ghazel li jizzewweg bic-civil u mhux bil-Knisja ghalkemm qal li huwa nisrani. Dan fil-fatt juri l-intenzjoni tal-attur kien li l-ewwel jipprova jghix mal-konvenuta u jekk din ir-relazzjoni ma tirnexxix huwa bhal speci rraguna li jkun jista jahrab minnha. Dan juri li l-istess attur eskluda pozittivament elementi essenzjali taz-zwieg kemm ghal dak li huwa l-element essenzjali tal-prokreazzjoni ta' ulied, u wkoll eskluda mill-ewwel u fil-kunsens tieghu hekk simulat li r-relazzjoni tieghu mal-konvenuta f'dan is-suppost zwieg la kienet permanenti u lanqas f'mohhu indossolibbli, tant li huwa kien gja' preparat li jekk ma jhossu komdu fl-istess hajja johrog minnha. Certament dan kollu huwa kontra kull kuncett taz-zwieg u ghalhekk din il-Qorti thoss li taht dan l-aspett il-kunsens tal-attur kien vizzjat skond id-dispozizzjonijiet tal-**artikolu 19 (1) (f) tal-Kap 255.**

Illi min-naha tal-konvenuta, u minkejja x-xhieda taghha, din il-Qorti thoss li l-istess ssimulat ukoll il-kunsens taghha peress li hija eskludiet li jkollha tfal mill-istess relazzjoni anke wara s-suppost cerimonja taz-zwieg, u fil-fatt nnegat lill-attur diversi drabi l-att taz-zwieg innifsu u meta dan sar, dan sar dejjem b'attenzjoni kbira sabiex ma jkunx jista' jwassal ghal xi frott; haga li *nonostante* li llum l-attur jidher li qed jilmenta dwarha, kienet fil-fatt komda ghalih peress li huwa stess kien eskluda dan l-element essenzjali taz-zwieg f'dan ir-rigward, kif gja' espost f'din is-sentenza. Ghalhekk il-kunsens tal-konvenuta wkoll kien ivvizzjat skond id-dispozizzjonijiet tal-**artikolu 19 (1) (f) tal-Kap 255.**

Illi fl-opinjoni ta' din il-Qorti l-artikolu 19 (1) (b) u (c) tal-Kap 255 ukoll citati mill-attur fic-citazzjoni tieghu ma japplikawx ghall-kaz in ezami, ghalkemm din hija problema ormai akkademika, u ghalhekk l-azzjoni attrici fuq dan il-bazi biss qed tigi michuda.

Illi abbazi tal-premess din il-Qorti tiddikjara li t-talba attrici ghandha tigi milqugha stante li l-kunsens tal-kontendenti

ghaz-zwieg taghhom tas-17 ta’ Gunju 2000 kien ivvizzjat skond id-dispozizzjonijiet tal-artikolu 19 (1) (d) u (f) tal-Kap 255 tal-Ligijiet ta’ Malta.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta’ u tiddeciedi,** billi filwaqt li tichad l-ewwel eccezzjoni tal-konvenuta bhala nfondata fil-fatt u fid-dritt, u filwaqt li tichad wkoll it-tieni eccezzjoni tal-konvenuta, **tilqa’ t-talba attrici** b’dan illi:-

(1) Tiddikjara li z-zwieg kontrattat bejn il-partijiet fis-17 ta’ Gunju 2000 huwa null *ai termini* tal-**artikolu 19 (1) (d) u (f) tal-Kap 255 tal-Ligijiet ta’ Malta** ghar-ragunijiet imputabbli liz-zewg partijiet *stante* li l-kunsens moghti ta’ kull parti ghall-istess zwieg kien hekk vizzjat.

Bl-ispejjez kollha jinqasmu bin-nofs bejn il-partijiet hlief li dawk tal-ewwel eccezzjoni jibqghu a karigu esklussiv tal-konvenuta.

Moqrija.

< Sentenza Finali >

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