



QORTI TA' L-APPELL

**S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO**

**ONOR. IMHALLEF
ALBERT J. MAGRI**

**ONOR. IMHALLEF
TONIO MALLIA**

Seduta ta' l-1 ta' Dicembru, 2006

Appell Civili Numru. 12/2006

Maria Dolores sive Doreen Polidano

v.

Carmel Polidano

Il-Qorti:

1. Din hija decizjoni wara rikors intalvolat fis-17 ta' Mejju 2006 minn Doreen Polidano li permezz tieghu talbet, skond dak li jipprovdi l-Artikolu 24(1) tal-Att dwar iz-Zwieg (Kap. 255), li din il-Qorti tordna r-registrazzjoni tad-decizjoni tat-Tribunal Ekklesjastiku li ddikjara null iz-zwieg

taghha, u dan ghall-finijiet tar-rikonoxximent kif kontemplat fil-Artikolu 23 tal-imsemmi Att. L-intimat Carmel Polidano, b'risposta datata 5 ta' Gunju 2006, oppona din it-talba.

2. Il-fatti li taw lok ghall-vertenza huma s-segwenti. Doreen Polidano (xebba Vella) u Carmel Polidano zzewgu fil-Knisja Parrokkjali ta' San Guzepp, fl-Imsida, fis-27 ta' Lulju 1996. Fil-15 ta' Marzu 2000 l-imsemmija rikorrenti ppresentat petizzjoni lill-Arcisqof fejn talbet li jigi ezaminat mit-Tribunal appositu z-zwieg taghha ma' Carmel Polidano ghall-fini li l-istess zwieg jigi dikjarat null. Fis-sentenza ta' l-ewwel grad, moghtija fit-30 ta' Novembru 2004¹, jinghad hekk:

“During the session for the joinder of the issue, Carmel declared that he was in favour of a declaration of nullity of his marriage but on the ground of his wife’s inability to assume marital obligations. He denied all her claims that he did have a mental disorder and that he was incapable of assuming marital obligations. Whereupon the Judicial Vicar decreed that the Joinder of the issue had to be thus formulated: *Whether this marriage is to be declared null because of the inability to assume marital obligations on the part of both parties.*”

3. It-Tribunal Metropolitan ta' Prim Istanza, fis-sentenza msemmija, iddecieda hekk:

“*Constare de nullitate in casu ob inhabilitatem assumendi onera conjugalia ex parte viri conventi. Non constare de nullitate in casu ob inhabilitatem assumendi onera conjugalia ex parte mulieris actricis.*”

It-Tribunal ghadda biex jimponi wkoll *vetitum* fir-rigward tar-ragel. Carmel Polidano appella minn din id-decizjoni; huwa ressaq ukoll *querela nullitatis* fir-rigward tal-ewwel sentenza fuq il-bazi li tlett sacerdoti li kienu ddeponew fl-proceduri quddiem it-Tribunal Ekklesiastiku kienu marbuta

¹ U ppublikata fit-3 ta' Jannar 2005.

bis-sigriet tal-qrar u ghalhekk kienu inkapaci li jixhdu². It-Tribunal ta' l-Ewwel Istanza rrespinga din il-kwerela, u ddikjara l-allegazzjoni bhala wahda frivola u vessatorja (ara kopja tad-digriet ezibit fis-seduta tat-3 ta' Ottubru 2006 quddiem din il-Qorti, Dok. LSO1). B'sentenza moghtija mit-Tribunal Regionali tat-Tieni Istanza fis-16 ta' Dicembru 2005, id-decizjoni tat-30 ta' Novembru 2004 giet konfermata. Id-Digriet ta' Ezekuttivita` (ghall-finijiet tal-Artikolu 24(4)(b) tal-Kap. 255) inhareg fis-17 ta' Jannar 2006. Kopji awtentikati taz-zewg sentenzi kif ukoll tad-Digriet ta' Ezekuttivita` jinsabu ezibiti fil-process u mmarkati bhala "B", "C" u "D".

4. Fir-risposta tieghu tal-5 ta' Gunju 2006, aktar 'l fuq imsemmija, l-intimat Carmel Polidano jghid li din il-Qorti m'ghandiex tiddikjara d-decizjoni tat-Tribunal Ekklesiastiku ezegwibbli u konsegwentement tordna r-registrazzjoni taghha ghar-raguni msemmija fil-paragrafu (ii) tas-subartikolu (5) tal-Artikolu 24. Dan il-paragrafu jipprovdi illi:

"...id-digriet [ta' registrazzjoni] ma ghandux jinghata kemm-il darba l-Qorti ta' l-Appell ma tkunx sodisfatta illi...matul u waqt il-procedimenti quddiem it-Tribunal il-partijiet tgharrfu sew bid-dritt taghhom ta' azzjoni u ta' difiza b'mod sostanzjalment mhux differenti mill-principji tal-Kostituzzjoni ta' Malta."

L-intimat fl-imsemmija risposta jillanja b'mod specifiku hekk:

"Illi bhal ma gja kellu okkazjoni jirrileva quddiem it-Tribunal ta' l-Arcidiocesi ta' Malta, kemm ta' l-Ewwel Istanza kif ukoll tat-Tieni Istanza, l-esponent jissottometti bir-rispett illi d-drittijiet fundamentali tieghu ghal smigh xieraq gew mittiefsa matul u waqt il-procedimenti quddiem dawn it-Tribunali.

² Kanone 1550(2): "Incapaces habentur...sacerdotes, quod attinet ad ea omnia quae ipsis ex confessione sacramentali innotuerunt, etsi poenitens eorum manifestationem petierit; immo audita a quovis et quoquo modo occasione confessionis, ne ut iudicium quidem veritatis recipi possunt." Din id-disposizzjoni hija konsegwenza logika ta' dak li jiddisponu, fost ohrajn, il-Kanoni 983(1) u 984(1).

“L-esponent gab a konjizzjoni tat-Tribunal Ekklesjastiku illi gew mismugha tliet xhieda inammissibbli kemm skond il-ligi Kanonika kif ukoll skond il-ligi civili u kriminali tal-pajjiz, u dana stante illi thallew jixhdu tliet qassisin li kienu konfessuri tal-kontendenti fil-proceduri.

“L-esponent ukoll ilmenta dwar il-fatt illi minkejja illi d-Difensur tal-Vinkolu nghata access shih u liberu ghar-rapport psikologiku imhejji mill-espert psikologu appuntat mit-Tribunal ta' Prim' Istanza, id-difensur tal-esponent ma nghatax l-istess opportunita`.

“Bhal ma gie spjegat fl-appell tieghu ghat-(sic!)Tribunal tat-Tieni Istanza, l-esponent hass illi dawn il-fatti taw lok ghal vjolazzjoni tad-dritt tieghu ghal smigh xieraq, stante illi gew accettati bhala xhieda tliet persuni li ma kienux ammissibbli bhala tali, u wkoll minhabba vjolazzjoni tal-principju ta' ‘equality of arms’.”

5. Id-Direttur tar-Registru Pubbliku ma opponiex ghar-registrazzjoni, izda gibed biss l-attenzjoni ta' din il-Qorti ghal-fatt li fir-rikors promotorju ta' Dorren Polidano in-numru tal-Att ta' Zwieg gie indikat hazin.

6. Din il-Qorti appuntat ir-rikors ghas-smigh ghas-27 ta' Gunju 2006, izda ghal dik l-udjenza l-intimat Carmel Polidano ma kienx gie notifikat bl-avviz tas-smigh. Ir-rikors ghalhekk thalla ghat-trattazzjoni da parti ta' l-abbili difensuri tal-partijiet ghat-3 ta' Ottubru 2006, u insegwitu ghas-sentenza ghal-lum.

7. Kif jidher mis-suespost, l-intimat Carmel Polidano qed jistieden lil din il-Qorti li tirrifjuta li tirregistra d-decizjoni tat-Tribunal Ekklesjastiku a bazi ta' dak li jipprovdi 24(5)(ii) tal-Kap 255, u dan ghar-raguni li (a) instemghu xhieda li kienu inammissibbli kemm skond il-ligi kanonika kif ukoll dik civili, u (b) ghax ma kienx hemm “equality of arms” peress li d-Difensur tal-Vinkolu kellu access “shih u liberu” ghal

certi dokumenti meta l-intimat "ma nghatax l-istess opportunita`".

8. Jibda biex jinghad li, kif gie osservat minn din il-Qorti, diversament komposta, fis-sentenza taghha tal-5 ta' Dicembru 2002 fl-ismijiet **Joseph Bongailas v. Annunziata sive Nancy Bongailas et**, il-ligi – il-Kap. 255 – ikkonferiet fuq din il-Qorti u fuq din il-Qorti biss (u ghalhekk anke ad esklużjoni tal-Qorti Kostituzzjonali) il-kompitu u s-setgha li tinvestiga w tiddeciedi dwar ilmenti bhal dawk imqajma mill-intimat odjern, u cioe` l-ilment li hu ma nghatax smigh xieraq mit-Tribunal Ekklesiastiku.

9. Fis-sentenza ta' din il-Qorti, ukoll diversament komposta, tas-16 ta' Jannar 2006 fl-ismijiet **Helen Meli Attard v. Joseph Mary Meli** gie spjegat li meta l-Kap. 255 jezigi li l-partijiet quddiem it-Tribunal Ekklesiastiku jridu jkunu "...tgharrfu sew bid-dritt taghhom ta' azzjoni u ta' difiza b'mod sostanzjalment mhux differenti mill-principji tal-Kostituzzjoni ta' Malta",

"...l-istess ligi ma hi qed tghid xejn aktar milli li ghandu jigi assigurat lill-partijiet quddiem it-Tribunal 'smigh xieraq' b'mod sostanzjalment simili ghal dak li jinghata quddiem il-Qrati ta' Malta. Il-kelma 'sostanzjalment' fl-espressjoni 'b'mod sostanzjalment mhux differenti' (li allura tfisser 'b'mod sostanzjalment simili') hija importanti: il-ligi ma tirrikjedix identita` ta' proceduri. Dak li tirrikjedi huwa li jkun hemm dawk il-mekkanizmi procedurali u ta' organizzazzjoni li fis-sustanza, mhux fid-dettal, jiggarrantixxu smigh xieraq minn tribunal imparzjali u indipendenti, inkluzo dik li fid-duttrina tissejjah 'equality of arms' bejn il-partijiet (cioe` li l-partijiet ikollhom l-istess facilita` ta' access ghad-dokumenti u ghad-deposizzjonijiet u l-istess facilita` li jikkontrollaw lix-xhieda)."

Din il-Qorti hi prekluzo mill-Artikolu 28 tal-Kap. 255 milli "tidhol fil-merti tal-kaz li wasslu ghas-sentenza" li tkun qed tintalab ir-registrazzjoni taghha izda ghandha tillimita ruhha "sabiex taccerta jekk jezistux il-htigijiet ta' dan l-Att

sabiex tkun tista' ssir ir-registrazzjoni mitluba". Kif gie spjegat fil-kawza **Bongailas v. Bongailas** (*supra*), meta wiehed jaqra l-Artikolu 28 flimkien ma' l-Artikolu 24(5)(ii) wiehed jasal ghall-konkluzjoni li din il-Qorti ma nghatatx is-setgha li tissindika jekk it-Tribunal Ekklesiastiku segwiex skrupolozament ir-regoli procedurali tad-Dritt Kanoniku waqt is-smigh u l-ghoti tad-decizjoni dwar l-annullament. Komplet tghid dik is-sentenza:

“Bhala regola din il-Qorti ma tistax tidhol f'din il-materja, izda fl-ipotesi li jigi senjalat lilha li t-Tribunal Ekklesiastiku ma segwiex xi dettam procedurali skond id-Dritt Kanoniku, allura din il-Qorti ghandha s-setgha li tinvestiga hija stess dan l-ilment biex, fl-ewwel lok tara jekk ikunx gustifikat jew le, u fit-tieni lok tivvaluta l-portata u l-konsegwenzi ta' nuqqas ta' osservanza ta' dak id-dettam procedurali. Jigifieri, f'kaz li jirrizulta sodisfacentement li t-Tribunal ma segwiex skrupolozament xi regola procedurali tad-Dritt Kanoniku, din il-Qorti m'ghandhiex awtomatikament tirrifjuta li tirregistra dik id-decizjoni tat-Tribunal Ekklesiastiku. Invece hija ghandha tizen u tivvaluta sewwa x'effett kellu dak in-nuqqas ta' osservanza ta' dak id-dettam procedurali, u din il-Qorti ghandha tirrifjuta r-registrazzjoni biss jekk dak in-nuqqas procedurali jkun jista' jissarraff tabilhaqq f'vjolazzjoni ta' xi dritt protett mill-Kostituzzjoni ta' Malta.”

10. Kwantu ghall-kwistjoni ta' l-inammissibilita` bhala xhieda tat-tlett sacerdoti ghax dawn kienu, allegatament, “konfessuri tal-kontendenti”, apparti li quddiem din il-Qorti – il-Qorti ta' l-Appell – ma ngabet ebda prova li dawn effettivament kienu l-konfessuri tal-kontendenti, u apparti wkoll li ma ngabet ebda prova li dawn iddeponew dwar xi haga “which has become known to them in sacramental confession” bi ksur tal-Kanone 1550(2) jew altrimenti bi vjolazzjoni tal-Kanoni 983(1) jew 984, din il-kwistjoni jidher li giet ezaminata tlett drabiet mit-Tribunali Ekklesiastici. Fis-sentenza tal-ewwel grad – dik tat-30 ta' Novembru 2004 – jinghad fil-paragrafu 55 taghha hekk:

“With regard to [submission] 2b, i.e. with regard to the legitimacy of priests’ evidence, canon 1550(2)(ii) prohibits priests from testifying in respect to that ‘which has become known to them in the sacramental confession’. This means that priests who include confessors are not incapable of being witnesses; they are prohibited from testifying only in matters pertaining to what they came to know in confession. Having read the evidence of the said priests the judges do not see any indication that what they testified was knowledge which they heard from sacramental confession. With regard to the validity of the testimony of Fr Cremona the court reiterates that it is always up to the discretion of the judge to evaluate the evidence and to accept or not to accept the evidence. Fr Cremona’s evidence is not mere hearsay, but the result of his own investigation in his own capacity as a parish priest, and thus the knowledge he gathered carries weight. The priest’s evidence was based on Petitioner’s account to him (*tempore non suspecto*), the priest’s own conclusions when he spoke to Respondent himself, and through enquiries he made with persons who knew Respondent, but were unrelated to Petitioner. Apart from this the undersigned judges did not base their conclusions solely on the evidence of the said priest, but also from other sources, thus confirming the validity of the priest’s testimony, with regard to the search for truth.”

Meta l-intimat Carmel Polidano ppresenta l-*querela nullitatis*, it-Tribunal (tal-ewwel istanza) fid-digriet tieghu (Dok. LSO1) li bih cahad it-talba u ddikjara li “respondent’s claim that the hearing of these witnesses does amount to lack of a fair trial is simply frivolous and vexatious”, qal, *inter alia*, hekk:

“The reason brought forward by Respondent’s Advocate on the alleged nullity of the Judgement because the three priests who testified in this case were bound by the seal of confession and so they

were incapable of giving evidence before this Court does in no way hold water. At no point during the instruction of the case is there any indication that the priests in question were Respondent's or Petitioner's confessors. Respondent does not even refer to them in his testimony whilst Petitioner does only mention Fr Edmond Donkorbaine and Fr Paulino Cremona O.Carm., without ever giving even the least indication that they were confessors; she only stated that Fr Cremona was interviewed by the Civil Court psychiatrists (39/55). Besides, when these three priests appeared before this court to give testimony they did not affirm that they were in any way bound by the seal of the confessional, and this when, according to the policy of this Tribunal, the Instructing Judge has to ask any priest whether he is impeded to testify in terms of Canon 1550. Consequently, when these priests gave evidence there was no reason to doubt their capacity to stand in the witness stand. It was only after the publication of the Acts that Respondent, through his Advocate, did inform the Court that all the priests were his confessors. It is clear for the Judges that this declaration is suspect and cannot be given the weight which Canon 1550(2)(ii) applies to priests who are confessors of one or other of the parties. Besides, an examination of the evidence given by these priests does not lead one to arrive at the conclusion that any one of them was a confessor of either Petitioner and/or Respondent, as understood by this canon."

11. Finalment, it-Tribunal Regjonali tat-Tieni Istanza fis-sentenza tas-16 ta' Dicembru 2005 rega' ezamina l-kwistjoni, u ppronunzja ruhu hekk:

"Here the Judges observe that they find no difficulty regarding the problem raised by Respondent's lawyer re the acceptability of the evidence of three priests, allegedly Carmel's confessors. They agree with the Judges of the First Instance Tribunal that the objection raised was frivolous and vexatious and would like to stress that the Civil court found no

difficulty in accepting their testimony (cf. e.g. 190-191, 203)."

12. Issa, kieku din il-Qorti kellha tidhol biex taghti hi l-interpretazzjoni taghha tal-Kanoni rilevanti u ta' jekk it-tlett sacerdoti kienux ammissibbli o meno, hija tkun qiegħda kjarament tmur kontra dak li jiddisponi l-Artikolu 28 tal-Kap. 255. Il-kwistjoni ta' l-ammissibilita` tagħhom, għalkemm wiehed jista' jikkonsidraha bhala kwistjoni procedurali, giet indirizzata direttament tlett darbiet mit-Tribunali Ekklesiastici, u għalhekk illum tiffirma parti mill-meritu tal-kawza deciza minn dawk it-Tribunali. Jizdied jinghad ukoll, għal kull buon fini, li anke fil-prassi tal-Qrati tagħna, kemm fil-kamp civili kif ukoll f'dak penali, sacerdot jigi ezentat milli jiddeponi biss jekk hu jistqarr li, fir-rigward ta' dak li huwa jkun gie mitlub jiddeponi, huwa vinkolat bis-sigriet tal-qrar. Mill-bqija ma hemm xejn li josta li sacerdot, li jkun konfessur ta' parti jew ohra, jigi prodott bhala xhud favur jew kontra dik il-parti wahda jew ohra. Fid-dawl ta' dan kollu, b'ebda mod ma jista' jinghad li l-intimat Carmel Polidano ma kellux smigh xieraq għal-finijiet u effetti kollha tal-Artikolu 24(5)(ii) tal-Att dwar iz-Zwieg minhabba din il-kwistjoni tax-xhieda.

13. Tibqa' biex tigi kkunsidrata t-tieni lamentela tal-intimat, u cioe` dik dwar l-"equality of arms". F'dan ir-rigward fl-udjenza msemmija tat-3 ta' Ottubru 2006 (quddiem din il-Qorti) gie registrat is-segwentu verbal: "Id-difensuri tal-partijiet jaqblu li fir-rigward ta' l-allegazzjoni ta' nuqqas ta' 'equality of arms', bhala fatt ir-rapport tal-Psikologu Dorothy Scicluna ma nghatax kopja tieghu lil ebda [wahda] mill-partijiet u lanqas lil ebda avukat tal-partijiet, u nghatat kopja lid-Difensur tal-Vinkolu, b'dan pero` li d-difensuri tal-partijiet jaqblu li kemm Dr Carol Zammit Montebello³ kif ukoll Dr Lorraine Schembri Orland⁴ kellhom il-facilita` li jaraw ir-rapport fir-Registru tat-Tribunal Ekklesiastiku u jieħdu n-notamenti li jridu wara u waqt li jkunu hekk qed jarawh." Minn dan, għalhekk, isegwi li biex f'dan il-kaz jinghad li ma kienx hemm smigh xieraq minhabba nuqqas ta' "equality of arms" bejn il-

³ Li qed tidher għall-intimat Carmel Polidano.

⁴ Li qed tidher għar-rikorrenti Doreen Polidano.

partijiet, wiehed irid jara jekk id-Difensur tal-Vinkolu hux “parti” fil-proceduri quddiem it-Tribunal fuq l-istess livell tal-mizzewgin; fi kliem iehor, wiehed irid jara jekk huwa “jippartecipax” fil-process – bhalma, del resto, jippartecipaw anke l-Imhallfin – jew jekk hux parti fis-sens li qed jittutela l-istess interess jew interessi tar-rikorrenti u/jew ta’ l-intimat. Kif gie accennat fis-sentenza ta’ din il-Qorti, diversament komposta, tat-8 ta’ Novembru 2004 fl-ismijiet **Patrick Calleja v L-Avukat Dott. Tonio Azzopardi noe et**⁵, id-Difensur tal-Vinkolu ma jittutelax neccessarjament l-istess interessi ta’ parti jew ohra; anzi huwa (u bhalu wkoll il-Promotur tal Gustizzja) jittutela proprjament l-interess pubbliku in virtu` tal-ufficcju tieghu, mentri l-partijiet u l-avukati taghhom jagixxu direttament ghad-difiza ta’ interess privat. Id-Difensur tal-Vinkolu qieghed, ghalhekk, fuq livell differenti mill-partijiet u mid-difensuri taghhom, u l-fatt li hu jigi trattat differentement mir-rikorrenti u mill-intimat ma jfissirx b’hekk li kien hemm nuqqas ta’ “equality of arms”. Tali ugwaljanza trid tissussisti bejn ir-rikorrenti u l-intimat, u fil-kaz in dizamina ma jirrizultax li dawn it-tnejn gew b’xi mod trattati b’mod inugwali. Ghalhekk anke taht dan l-aspett din il-Qorti ma tirravviza ebda problema taht l-Artikolu 24(5)(ii) tal-Kap. 255.

14. Fic-cirkostanzi, ghalhekk, din il-Qorti ma tarax li l-oggezzjoni ta’ l-intimat Carmel Polidano, kif migjuba fir-risposta tieghu tal-5 ta’ Gunju 2006, hija gustifikata, u konsegwentement hi sodisfatta illi ma jezisti ebda ostakolu ghall-esekuzzjoni tad-decizjonijiet tat-Tribunali Ekklesiastici kif mitlub mir-rikorrenti Doreen Polidano.

15. Ghal dawn ir-ragunijiet, prevja r-rigett tal-oggezzjoni imqajma mill-intimat, tordna lid-Direttur tar-Registru Pubbliku sabiex jirregistra kif imiss id-decizjoni definittiva tat-Tribunal Regionali tat-Tieni Istanza tas-16 ta’ Dicembru 2005 (Prot. No. 05/01) li kkonfermat decizjoni precedenti tat-Tribunal Metropolitan ta’ Malta tat-30 ta’ Novembru 2004 (Prot. N. 00/25) li ddikjarat null iz-zwieg

⁵ Dan kien kaz fejn din il-Qorti irrifjutat li tirregistra decizjoni tat-Tribunal Ekklesiastiku, fuq oggezzjoni sollevata minnha stess *ex officio*, fuq il-bazi li quddiem it-Tribunal Metropolitan ma kienx thares id-dritt ta’ smigh xieraq tal-assenti Fatima Aarab.

Kopja Informali ta' Sentenza

bejn Maria Dolores sive Doreen Polidano (nee Vella) celebrat fil-Knisja Parrokkjali ta' San Guzepp, l-Imsida, fis-27 ta' Lulju 1996, u dana skond ma jipprovdu l-Artikoli 23 u 24 tal-Att dwar iz-Zwieg, Kap. 255. Spejjez, jekk hemm, ta' dawn il-proceduri quddiem din il-Qorti ghandhom jigu sopportati mill-intimat Carmel Polidano.

< Sentenza Finali >

-----TMIEM-----