



**QORTI CIVILI
(SEZZJONI TAL-FAMILJA)**

**ONOR. IMHALLEF
NOEL CUSCHIERI**

Seduta tas-7 ta' Ottubru, 2008

Citazzjoni Numru. 61/2005

Number on list: 18

**A sive A B
vs
C D E**

The Court,

Having seen the writ of summons by virtue of which plaintiff premised:

That on the 5th of June 2001 the parties had signed a contract of personal separation in the records of Notary Elisa Falzon;

That according to clauses [K] and [L] of this deed plaintiff bound himself to pay to defendant the sum of Lm25 weekly as maintenance for their two minor children,

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Warren and Arianne, which obligation was to cease only when Arianne becomes of age; together with half the medical expenses and also those necessary for clothing; plaintiff also agreed to pay to defendant the weekly sum of Lm5 by way of maintenance to her;

That, after being unemployed for same time, he had found employment with Giormina Company Limited; however, since the wages were quite low, he still did not have adequate financial means to fulfil his obligations according to the above deed; in fact plaintiff had been found guilty by the Magistrates' Court for not having honoured his obligations according to the above contract, and has been given a prison sentence;

That in view of his present financial situation, plaintiff submits that a variation of the above maintenance is called for;

On the strength of the above, plaintiff is requesting this Court to vary the maintenance rate agreed to by the parties in the above contract, and establish a new rate according to his present means.

Having seen the note of pleas, by virtue of which defendant is opposing to plaintiff's request, accusing him of trying to evade his contractual obligations towards her and their children; and that she has often witnessed plaintiff working, and also leading a capricious and dissipated existence;

Having seen the sworn declarations, lists of witnesses, and the affidavits presented;

Having seen all the acts of the case;

Having heard evidence on oath;

Having considered;

Action

That by virtue of the present action plaintiff is requesting the variation of two clauses in the contract of personal separation signed between the parties, relating to his obligation to pay to his wife maintenance, for her and their two minor children, on the grounds that his present financial position is such that he cannot continue satisfying this obligation. On the other hand, defendant is claiming that plaintiff is merely trying to avoid his contractual responsibilities in this regard.

The Facts

From the evidence it emerges that in virtue of the above deed signed on the 5th June 2001 plaintiff bound himself to pay maintenance to his wife on a weekly basis. Although their son Warren is now of age, the above maintenance of Lm25 per week is still due according to the deed.

Plaintiff states that, after having been unemployed for some time, he found work with Gormina Company but with low wages; however, subsequently he became redundant. He had also worked at Mercurio Hotel for a year and a half till June 2003, during which time he did not receive any social assistance, and he “used to get money to pay bills and things like that from friends.”¹

Plaintiff admits that at present he is living with a dutch woman, and that a child was born from this relationship. He lives in an apartment with this woman at a rent which initially was of Lm65, “and now it is a higher rent”.²

He states that now he is unemployed, and relies on this dutch girlfriend and her family, his father and friends to meet his expenses; adding also that he still owes a relevant sum of money to his friends.

Considerations of the Court

On a legal note, the Court observes:

¹ Dep. Fol.46 *et seq.*

² Ibid.

[1] That it is a fundamental norm of procedural law that the burden of proof of a particular fact lies on the party alleging that fact – *onus probanda incumbit ei qui dicit non ei qui negat*,

[2] That a contract has the force of law between the parties, and the principle *pacta sunt servanda* applies to what has been agreed therein;

[3] That according to recent case-law, the above principle of *pacta sunt servanda* must give way to the principle *ad impossibilia nemo tenetur*; in other words, to free itself from a contractual obligation a party must prove that it is in the impossibility of fulfilling that particular obligation due to circumstances extraneous to that party.

That regarding the merits of the case, the Court observes that plaintiff has relied solely and exclusively on this evidence, without producing any evidence in support of his allegations. This shortcoming in the evidence of the plaintiff is conspicuous by its absence.

In fact, plaintiff has failed to produce evidence: of his present financial situation, of his wages with the company he had worked with, of his expenses, of his allegations of the debts owed by him; and also of the fact that his termination of employment was not voluntary but was due to circumstances beyond his control. Furthermore, his present social circumstances tend to militate against his submission that he cannot afford to pay the amount of maintenance according to the above contract.

In the light of the above circumstances, the Court is of the opinion that plaintiff has failed to prove satisfactorily his version of the facts.

On the strength of the above, the Court decides this case by rejecting plaintiff's request, with costs.

< Sentenza Finali >

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