



MALTA

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

**ONOR. IMHALLEF
ABIGAIL LOFARO**

Seduta tas-26 ta' Frar, 2015

Citazzjoni Numru. 224/2013

AB

vs.

**Advocate Dr. Martin Fenech and LP Hilda Ellul Mercer as
nominated by decree dated 8 January 2014 as
curators to represent the absentee**

CD

The Court:

Having seen the sworn application filed by plaintiff by virtue of which he declared:

Declaration

1. That the parties got married on the 11th September 2010 at the Marriage Registry, Valletta (Doc. A attached);
2. That the parties have a son, SBwho was born on the 14th November 2010 (Doc. B attached);
3. That the defendnat is guilty of seVICES, threats and serious offences against the plaintiff;
4. That the defendant abandoned the matrimonial home and is absent from Malta;
5. That by virtue of a decree number 1989/13, plaintiff has been authorised to file the present sworn application in order to be legally separated (Doc. C decree);
6. That the plaintiff has been admitted to the benefit of legal assistance (Doc. B - document referring to Legal Aid).

The basis for the request

1. That the parties got married on the 11th September 2010 at the Marriage Registry, Valletta (Doc. A attached);

2. That the parties have a son, SBwho was born on the 14th November 2010 (Doc. B attached);

3. That the defendant is guilty of sevinces, threats and serious offences against the plaintiff;

4. That the defendant abandoned the matrimonial home and is absent from Malta;

5. That by virtue of a decree number 1989/13, plaintiff has been authorised to file the present sworn application in order to be legally separated (Doc. C decree);

6. That the plaintiff has been admitted to the benefit of legal assistance (Doc. B - document referring to Legal Aid).

Thus, this Court has been requested to:

1. Pronounce personal separation between the parties;

2. Award care and custody of the minor to both parties;

3. Awards a reasonable amount as maintenance for the plaintiff;

4. Orders the cessation and division of the community of acquests;

5. Orders the forfeiture of the defendant's rights pertaining to marriage, as stated in the relevant articles of the Civil Code.

Having seen the list of witness produced by the plaintiff;

Having seen the sworn reply filed by the curators who stated that:

1. That they are not aware of the facts and reserve the right to file another reply when they know the facts;

2. That the plaintiff is to declare whether he knows the defendants' whereabouts.

Having seen the list of witnesses produced by the curators;

Having seen the plaintiff's request to have the present case conducted in the English language, which request was acceded to by means of a decree dated the 18th February 2014.

Having seen all the evidence, all the documents which were exhibited and all the acts of the case;

Having seen that the case was put off for today for judgement;

Considers :

That the present case is a separation case filed by plaintiff and through his sworn application he declares that the defendant should be held responsible for the same separation.

The Plaintiff's version of facts

By means of his affidavit¹, plaintiff states that he met defendant in Malta. He states that during their married life, they never lived together since he was living in the Hangar in Hal Far whilst the defendant was living in another location in Hal Far together with the baby. He states that she, together with their son, took up residence in Germany and they became asylum seekers. He states that around two years before he had communicated with her and she informed him that she had no intention of returning to Malta. Plaintiff declares that at present he has no form of communication with the defendant or with his child. The parties share no common property and he ends his sworn declaration by stating that he does not know whether his son and defendant are still in Germany or not.

Evidence Produced

The Court makes reference to the marriage certificate exhibited in the acts which proves that the parties got married on the 11th September 2010². A few months later, precisely on the 14th November 2010, their son Suhab Adam Suleiman Farah³ was born.

¹ Exhibited a fol 50 of the acts

² See their marriage certificate exhibited a fol 4 of the acts

³ See the birth certificate exhibited a fol 5 of the acts

By means of a sworn note⁴, plaintiff holds that the defendant should be held responsible for their separation. He further states that the defendant is absent from Malta and has taken away his child with her and thus, had she to return back to Malta, he would wish to have access rights to his son. As for maintenance he declares that he is currently unemployed and is enjoying subsidiary protection. Neither of the parties is presently paying maintenance. He further states that there are no assets forming part of the community of acquests and there's no communication between the parties.

About the request for personal separation

As regards the first request, this court makes reference to Article 40 of the Civil Code of the Laws of Malta which states the following:

“Either of the spouses may demand separation on the grounds of excesses, cruelty, threats or grievous injury on the part of the other against the plaintiff, or against any of his or her children, or on the ground that the spouses cannot reasonably be expected to live together as the marriage has irretrievably broken down”

and to Article 41 of the Civil Code which states that:

“Either of the spouses may also demand separation if, for two years or more, he or she shall have been deserted by the other, without good grounds”.

It is evident that the defendant has left the islands, together with the minor child and has deserted the plaintiff. This happened more than two

⁴ See a fol 46 of the acts

years before these proceedings were instituted. It must be stated that although plaintiff does mention that the defendant threatened him and is responsible for serious offences in his regard, by means of his affidavit he does not mention anything that can be associated to such behaviour. This is being said due to the fact that the parties never lived together as a married couple. What is evident is that the defendant deserted the plaintiff in hope of a better life in Germany as she sought asylum protection. The question is, can she be held responsible for having taken such a decision? This court strongly feels that in the particular situation that both parties were in, the defendant could have found herself in a position where she felt she had no choice but to seek a better life elsewhere. Both parties were living separately in Hal Far. She assumed responsibility for the baby. Somehow she's presented with the opportunity of going to Germany. One could argue that she still chose to leave her husband behind, but having an opportunity of a better life not only for yourself but also for your child can mean everything. Defendant decided to take that opportunity. Thus, although in the strictest of terms the defendant deserted her husband by leaving together with the child for Germany, this court is convinced that she did so due to the particular situation and not simply because she wanted to desert her husband.

In relation to the request for joint care and custody

The court is aware that the child is currently living with his mother, somewhere unknown. Although it is heartbreaking for the plaintiff not to see his son and to have absolutely no contact with the same child, the law must protect and take care of the child's best interests in the best possible way in the circumstances. This court feels that should contact be established once again or should the plaintiff find out where his son is, then he should be able to take all those necessary decisions together with the defendant in order to make sure that the same defendant does not desert him once again and in doing so, negating him the possibility of seeing his own child.

This court does not know anything about the defendant's character, whereabouts and skills as mother. On the other hand, no evidence shows that the plaintiff is not capable of taking care of his own son, he's simply not in a position to do so at present due to the fact that the defendant does not know where his son is.

In relation to the request for maintenance

This court notes that the plaintiff did not produce any evidence as to his income and what sort of support he's receiving from the Maltese authorities. No evidence was produced as to the income of the defendant. What is clear is that both parties had a minimal income (if any from the Maltese authorities due to their civil status in Malta). At present, no information is available as to the defendant's current state and whether as an asylum seeker (if that is the case) she would be entitled to any benefits in Germany or wherever she might be.

It is true that the spouse deemed responsible for the breakdown of the marriage is to pay maintenance to the other spouse should the latter be in a position where he can no longer sustain himself, however this court is not convinced that the defendant simply deserted the plaintiff for no reason. Having to live separately in Hal Far, the defendant sought refuge in Germany, hoping for a better life. It is true that she left her husband here in Malta but due to the particular circumstances of the case it is most likely that the defendant felt she had no choice but to seek a better life elsewhere. Thus, in these very particular circumstances, the defendant should not be ordered to pay maintenance to the plaintiff as both parties are most likely striving to live and paying maintenance is definitely an impossibility due to the circumstances.

In relation to the order of forfeiture of rights

At this stage, reference is made to Article 48 of the Civil Code of Malta which states the following:

(1) The spouse who shall have given cause to the separation on any of the grounds referred to in articles 38 and 41, shall forfeit -

(a) the rights established in articles 631, 633, 825, 826 and 827 of this Code;

(b) the things which he or she may have acquired from the other spouse by a donation in contemplation of marriage, or during marriage, or under any other gratuitous title;

(c) any right which he or she may have to one moiety of the acquets which may have been made by the industry chiefly of the other spouse after a date to be established by the court as corresponding to the date when the spouse is to be considered as having given sufficient cause to the separation. For the purposes of this paragraph in order to determine whether an acquet has been made by the industry chiefly of one party, regard shall be had to the contributions in any form of both spouses in accordance with article 3 of this Code;

(d) the right to compel, under any circumstances, the other spouse to supply maintenance to him or her in virtue of the obligation arising from marriage.

Reference is also made to the case in the names of **Greengrass Hugh vs. Greengrass Lucia** decided on the 2nd October 2003⁵ where reference was also made to Article 51 of the Civil Code which states that:

"Il-firda li ssir minhabba xi wahda mir-ragunijiet imsemmijin fl-artikolu 40 [u cioe' eċċessi, moħqrija, theddid jew offiži gravi tal-parti l-oħra kontra l-attur, jew kontra xi wieħed jew ieħor mit-tfal tiegħu, jew

⁵Rik Ġur Nru 98/2002

minhabba li l-ħajja flimkien ma tkunx għadha possibbli għax iż-żwieġ ikun tkisser irremedjabilment], ***tista' jkollha l-effetti msemmin fl-artikolu 48, meta l-Qorti jidhrilha li, taht ic-cirkostanzi tal-kaz, ghandhom jghoddu, f'kollox jew f'bicca, id-dispozizzjonijiet ta' dak l-artikolu.*** ***L-effetti kontemplati mill-artikolu fuq citat ghandhom japplikaw biss f'kaz fejn iz-zwieġ ikun tfarrak bi htija preponderanti ta' xi hadd mill-mizzewgin***".

This court is convinced that the marriage broke down due to the particular sad circumstances of the case. It is not convinced that the defendant simply wanted to abandon the plaintiff here in Malta. Due to her civil status, and the fact that she became an asylum seeker in Germany, the court is convinced that the defendant felt that she had no other alternative. Thus, in view of the same and also due to the fact that the parties do not possess anything which forms part of the community of acquests, refuses this request.

DECIDE

Thus, for the reasons stated above, this court decides the case as follows:

[1] Acceeds to the first request and pronounces personal separation between the parties;

[2] Acceeds to the second request and orders that care and custody of the minor child is trusted to both parties;

[3] Rejects the third request;

Kopja Informali ta' Sentenza

[4] Acceeds to the fourth request and declares that the community of acquests existing between the parties is now terminated;

[5] Rejects the fifth request.

In view of the particular circumstances of the case, no bill of costs is to be issued.

< Sentenza Finali >

-----TMIEM-----