



**FIRST HALL, CIVIL COURT  
(Constitutional Jurisdiction)**

**JUDGE**

**HON. JOSEPH R. MICALLEF LL.D.**

**THIS DAY, Tuesday, December 1<sup>st</sup>, 2015**

**Case Number 5 (Kost.)**

**Applic. No. 63/15JRM**

David Anthony **POLLINA**

VS

**L-AVUKAT ĠENERALI**, ir-Regjistratur (Qrati u Tribunali) Għawdex u d-Direttur Ġenerali tal-Qrati

**The Court:**

Having taken cognizance of the Application filed by David Anthony Pollina on the 22nd of August, 2015, by virtue of which and for the reasons therein mentioned, he requested that this Court (a) declare that he has suffered a breach of his fundamental human rights in terms of Articles 36 and 39 of the Constitution of the Republic of Malta

(hereinafter referred to as “the Constitution”) as well as under Articles 3 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as “the Convention”), during the procedures held before the Court of Magistrates (Gozo) in their Superior Civil Jurisdiction – Family Division (hereinafter referred to as the “Gozo Court”) relating to the request to provide maintenance to his estranged wife, Faith, and their common son, Caleb, as well as to the subsequent proceedings instituted against him before the Court of Magistrates (Gozo) as a Court of Criminal Judicature, in execution of the granting of the said maintenance; (b) revoke the decrees pronounced by the Gozo Court on June 6<sup>th</sup>, 2014, and July 28<sup>th</sup>, 2014, in the records of Application Number 40/2014 in the names “*Faith Pollina vs David Anthony Pollina*”; (c) establish proper compensation to be paid to applicant in view of the said breach of his fundamental human rights; (d) condemn respondents, or whoever among them, to pay him such liquidated compensation; and (e) grant him any other remedy or issue any directive or grant any further compensation in terms of article 46 of the Constitution and articles 13 and 41 of the Convention, which this Court may consider expedient in the circumstances. The applicant claimed costs and stated that this action was being filed without prejudice to his contestation of the Gozo Court’s jurisdiction in issuing the contested decrees;

Having taken cognizance of the Reply filed by respondent Director General (Courts) on August 11<sup>th</sup>, 2015, whereby, by way of preliminary plea, he pleaded that he was non-suited and ought to be released with costs against applicant. He reserved the right to file other pleas on the merits if the need thereof arose at a subsequent stage of the proceedings;

Having taken cognizance of the Reply filed by respondent Attorney General on August 13<sup>th</sup>, 2015, whereby, by way of preliminary pleas, he pleaded the joinder of Faith Pollina in the suit in terms of article 961 of Chapter 12 of the Laws of Malta; and that applicant had failed to exhaust ordinary remedies available to him before embarking on these proceedings, by virtue of which he could request and obtain the quashing of the contested decrees, or raise an appeal therefrom or even institute proceedings to the effect that he is not bound to pay maintenance. On the merits, respondent pleaded that applicant’s claims are unfounded in fact and at law and that no violation of his fundamental rights under the provisions of the articles mentioned by him had occurred. He averred that applicant is resorting to this ‘constitutional’ procedure in order to try to re-open an issue which only the Gozo Court

is competent to deal with, having heard evidence and submissions directly by the parties themselves. He also contested applicant's claim that the pending criminal proceedings instituted against him would inevitably lead to conviction and that such conviction would be automatically punished by detention or imprisonment. On the remedies requested by applicant, respondent pleaded that in the unlikely eventuality that the Court finds that applicant's rights or any of them have indeed been violated, a declaration of such violation ought to be sufficient without the need of awarding supplementary financial compensation;

Having taken cognizance of the Reply filed by respondent Registrar (Courts and Tribunals) Gozo during the hearing of August 13<sup>th</sup> 2015, whereby he pleaded that this Court ought to decline to exercise its jurisdiction to hear the case in accordance with the provisions of the *proviso* to article 46(2) of the Constitution and the *proviso* to article 4(2) of Chapter 319 of the Laws of Malta in that applicant has not yet exhausted the other legal remedies available to him, and which he has in fact resorted to on the same day that he instituted this lawsuit and in which, amongst other things, he requested the same remedies he is requesting in the present suit. He pleaded that, therefore, applicant's action is premature and ought to be dismissed with costs against applicant. On the merits, he pleaded that he was in no way responsible for the contested decrees or procedures and applicant's claims cannot be directed against him nor does he hold any power to alter or revoke any decree emitted by a competent court. He therefore submitted applicant's claims to be unfounded;

Having ruled, during the first hearing on August 13<sup>th</sup>, 2015 and following a request to that effect by applicant's learned counsel, that all proceedings of this case be heard in English, and that, before proceeding further into the merits, this Court should rule on the validity of the preliminary plea on whether the applicant has resorted to 'ordinary' remedies before embarking on these proceedings, and whether this Court should thus decline to exercise its jurisdiction to hear the case;

Having heard applicant's evidence in cross-examination on the basis of evidence tendered by him by way of affidavit;

Having authorised the parties to file their submissions on the said preliminary plea by way of written pleadings;

Having seen the Note of Submissions filed by respondents Attorney General and Registrar (Courts and Tribunals) Gozo on September 2<sup>nd</sup>, 2015<sup>1</sup>, relating to their respective preliminary plea;

Having seen the Note of Submissions filed by applicant on October 5<sup>th</sup>, 2015<sup>2</sup>, in reply to that of respondents;

Having heard further submissions by counsel at the hearing of November 3<sup>rd</sup>, 2015;

Having taken cognizance of all the acts of this case;

Having put off the case for to-day's hearing for judgment on the said preliminary plea as to whether this Court should exercise its jurisdiction to hear the case on the merits;

***Having Considered:***

That the applicant claims to have suffered a breach of his fundamental human right to a fair hearing before an independent and impartial court as well as his right not to be subjected to inhuman or degrading treatment during judicial proceedings relating to the issue of whether he ought to provide maintenance to his estranged wife and to one of their sons. Applicant complains that his rights were breached because the Gozo Court, while not having jurisdiction to deal with the dispute, ordered him nevertheless to provide maintenance to his wife and son *pendente lite* and refused to reconsider its decree unless and until he had shown that he abided by its first decree. He claims that this violation consists in the denial to access to a court and that the amount of maintenance he has been ordered to pay is beyond his means. Applicant further submits that, as a result of the effect of such decrees, he has now been subjected to criminal proceedings for the enforcement thereof and has been exposed to the likely consequence that he might be detained for his failure to comply with an order he cannot perform. He is requesting this Court to find that he has suffered a breach of the said fundamental rights and that it quashes and annuls the said decrees. He is claiming compensation for such breach and that the Court grant him any other remedy which it might consider fit and expedient in the circumstances;

---

<sup>1</sup> Pgs. 145 – 9 of the records

<sup>2</sup> Pgs. 153 – 161 of the records

That both respondent Attorney General and respondent Registrar (Courts and Tribunals) Gozo raised, amongst other pleas, a preliminary plea to the effect that this Court should abstain from exercising its “special” constitutional jurisdiction in terms of Article 46(2) of the Constitution and Article 4(2) of Chapter 319 of the Laws of Malta since applicant has not exhausted all the other “ordinary” remedies which were and still are available to him to redress any perceived grievances he may hold against any interim rulings pronounced by the Gozo Court;

This judgment relates to an examination and a decision regarding the said preliminary plea;

As to the facts of the case which are relevant to the issue at this juncture, the records show that on May 21<sup>st</sup> 2014<sup>3</sup>, applicant’s wife of twenty-one years, Faith Pollina, filed an urgent application before the Gozo Court requesting the grant in her favour of the sole care and custody of their son Caleb, the payment of maintenance to her and to the said son as well as the payment of a one-time sum by way of arrears in maintenance. Said application was filed contemporaneously with a letter before the Gozo Court in terms of regulation 4(1) of Legal Notice 397 of 2003 asking that mediation proceedings be put under way with a view to addressing her request to be granted exclusive care and custody of her son and to authorise her to institute separation proceedings against her husband;

On June 6<sup>th</sup>, 2014<sup>4</sup>, the Gozo Court issued a decree (hereinafter referred to as “the Decree”) whereby and for the reasons therein mentioned, it rejected Faith Pollina’s request to be granted sole custody of her son as well as to condemn her husband to pay her maintenance in arrears, but acceded to her other requests for maintenance *pendente lite* to her and to her son Caleb at an amount established at nine hundred euro (€ 900) monthly for both of them;

Applicant filed an application before the said Court on July 10<sup>th</sup>, 2014<sup>5</sup>, to request a reconsideration of the Decree. However, by a decree dated July 28<sup>th</sup>, 2014<sup>6</sup>, the Gozo Court rejected the application for reconsideration of the issue of jurisdiction and, with respect to the other claims, ordered that applicant furnish documentary proof that he had

---

<sup>3</sup> Doc “DAP1” at pp. 78 – 82 of the records

<sup>4</sup> Doc “DP1”, at pp. 10 – 4 of the records

<sup>5</sup> Doc “DP2” at pp. 15 – 7 of the records

<sup>6</sup> Doc “DP3”, at p. 18 of the records

complied with the Decree and that he had paid alimony as ordered, before it went on to consider his other claims;

On the strength of the Decree and since applicant did not pay the maintenance ordered, proceedings were instituted against applicant before the Court of Magistrates (Gozo) as a Court of Criminal Judicature at the behest of Faith Pollina in her own name and of that of her son in January of 2015<sup>7</sup>. Such proceedings were appointed for hearing for the Gozo District sitting of May 12<sup>th</sup>, 2015;

Applicant filed this suit on July 22<sup>nd</sup>, 2015, alleging a breach of his fundamental rights. On that very same day, applicant filed a lawsuit by way of Sworn Application before the Gozo Court<sup>8</sup> requesting a declaration that Faith Pollina's application of May 21<sup>st</sup>, 2014 and the other acts were beyond the Gozo Court's jurisdiction, and requesting the quashing of the Decree as well as the decree of July 28<sup>th</sup>, 2014, which had refused reconsideration until applicant had shown that he had complied with the Decree. The said suit is to date pending before the Gozo Court;

On September 22<sup>nd</sup>, 2015<sup>9</sup>, the Magistrates Court (Gozo) as a Court of Criminal Judicature found applicant guilty as charged, but conditionally discharged him from punishment for a period of three (3) months in terms of article 22 of Chapter 446 of the Laws of Malta, and ordered him to pay the maintenance within a period of one (1) month from that date. It has been brought to the Court's attention that applicant has filed an appeal from the said judgments, and that said appeals are pending;

### ***Having considered:***

That as to the legal considerations relating to the plea under discussion, this Court is very much aware that such a preliminary plea features practically in all cases of this nature brought before it nowadays, but having said that, it does not appear that our Courts have adopted it as an expedient to shy away from exercising their jurisdiction in a proper manner and given the proper circumstances. Certainly, this Court will not treat the applicant's grievances lightly nor will it consider upholding

---

<sup>7</sup> Doc at p. 21 of the records

<sup>8</sup> Rik. Nru. 46/15PC

<sup>9</sup> Cfr. Docs "CC1" to "CC9" at pp. 162 to 180 of the records

the plea unless it is assured that the strict conditions whereby the Court may exercise its discretion not to hear the case truly apply;

That the plea under discussion is based on two related issues. Both are intimately connected. Respondents suggest that the action filed by the applicant was otherwise remediable under the ordinary mode of attacking decrees laid down in the Code of Civil Procedure. Furthermore, applicant himself realised that he had sufficient “ordinary” remedies at his disposal which he actually resorted to and which, in effect, claim the very same remedies which are also being requested in the present suit;

That when considering whether or not to exercise its exclusive jurisdiction, this Court has to be wary not to relinquish it unless and until it is fully convinced that there exist sufficient reasons which dictate that it should do so, considering that the exercise of such a discretion is an exception to the basic rule and duty of any court to hear and decide any question validly brought to its attention. Nevertheless, such discretion has been provided for in the basic law of Malta expressly in order to enhance this special and specific jurisdiction, chiefly to protect it from unnecessary recourse where other remedies are available to the aggrieved party;

That the circumstances which a court has to consider before deciding to exercise its discretion not to hear a case on a “constitutional” or “conventional” issue are now well established in our legal system and this Court is refraining from elaborating further other than to refer to judgments pronounced by the country’s highest tribunals which amply and authoritatively illustrate the point<sup>10</sup>;

That whosoever claims that an ‘alternative ordinary remedy’ is available to the aggrieved party has to show that the remedy referred to is accessible, satisfactory, effective and adequate to address the grievance<sup>11</sup>. However, it does not have to be shown that such a remedy assures or guarantees a favourable outcome, as long as the manner of achieving it can be pursued in a practical, effective and meaningful manner<sup>12</sup>;

That in the present case, respondents point out that it is inconceivable and grossly abusive for applicant to initiate these proceedings on the

---

<sup>10</sup> E.g. Cons. Ct. 16.1.2006 in the case *Olena Tretyak vs Direttur taċ-Ċittadinanza u Expatriate Affairs*

<sup>11</sup> Cons. Ct. 5.4.1991 in the case *Vella vs Kummissarju tal-Pulizija et* (Kollez. Vol: LXXV.i.106)

<sup>12</sup> P.A. Cons 9.3.1996 in the case *Clifton Borġ vs Kummissarju tal-Pulizija* (unpublished)

very same day that he filed a Sworn Application before the Gozo Courts, requesting, *inter alia*, the quashing of the Decree and that of July 28<sup>th</sup>, 2014, which requests are identical to one of the requests of the present law-suit. Respondents furthermore argue that applicant remained inactive for almost a year after the last decree was made before he took up proceedings to impugn the Decree. They then suggest a range of procedural remedies which were and are still open to applicant if he truly wanted to seek redress against the said decrees;

That on his part, applicant argues that the Court ought not to consider declining the exercise of its jurisdiction to continue hearing and deciding this case on the merits. He strongly submits that the **manner** by which the impugned Decree was emanated effectively denied him the right to have access to a Court of law because it imposed upon him a condition he could not comply with as a precondition for its reconsideration. He suggests that this situation has placed him in an impossible plight from which no ordinary remedy can extricate him. He argues that the only remedy which would be attained effectively to redress the violation is only by way of the present proceedings through this Court;

That having considered all the facts and circumstances as regards the availability of other effective remedies, and in spite of the learned submissions filed on applicant's behalf, the Court finds that applicant has indeed not yet exhausted all such remedies. The Court is particularly swayed by the fact that applicant has had recourse to filing a Sworn Application which seeks the very remedy he claims in one of the requests in the present case and which should have been resorted to much earlier. Secondly, common sense seems to suggest that applicant resorted to the present procedures only at the onset of criminal proceedings instituted against him at the start of this year in order to enforce the Decree, and that he aimed to achieve a stay of proceedings before the court of criminal judicature on the basis of this law-suit. Thirdly, the proceedings which applicant has filed in the Gozo Court stand in stark contrast to his complaint that the Decree amounts to a denial of access to justice: not only are such proceedings a proof that applicant has always had recourse to a judicial remedy to impugn the Decree, but that the possibility of the remedy as effective and useful cannot be denied. Fourthly, even with regard to the criminal proceedings instituted against him – and which applicant claims to have cast upon him a humiliating and debasing shadow – the records show that applicant has still available to him judicial remedies of an ordinary and expeditious nature and that the feared punishment of detention which he said was looming upon him was not even meted out, despite



his conviction. Lastly, from the evidence tendered by him<sup>13</sup>, it transpires that applicant's basis for the alleged breach of his fundamental rights in this present law-suit consists in a sort of 'appeal' from the motivations and reasons of the Gozo Court's decrees, which again is the subject-matter of the new lawsuit which applicant has filed concurrently with the present proceedings;

That, in the Court's considered view, all these circumstances show that respondents have shown good reason to convince it that their plea is well founded and should receive due consideration by this Court. Although not all of the remedies which respondents suggest are or were indeed available to applicant, it is enough if one effective remedy is shown to exist for the Court to be in a position of exercising its discretion to relinquish its jurisdiction and decide not to hear the case on the merits. This Court is also actively keeping in mind that the basic allegation of applicant's claim – namely, the issue of a lack of fair hearing and due process – may only fruitfully be investigated within the context of concluded proceedings. As things stand between the parties and at this juncture, this Court will necessarily have its exercise into a proper and comprehensive examination of the alleged violations raised by applicant curtailed by the mere fact that the judicial process before the Gozo Courts is still unravelling. It is established case-law that in order for a proper appraisal to be made of a complaint regarding a breach of Article 39 of the Constitution or Article 6 of the Convention, a Court takes cognizance of the whole process impugned and not of scattered or select episodes forming part thereof<sup>14</sup>, unless the particular episode is such as to constitute in itself a breach of the right to a fair hearing. The same can be said about the right not to be subjected to inhuman or degrading treatment. On the basis of the records of this case, the Court cannot find that such a breach has already occurred to applicant's detriment;

For the above-mentioned reasons, the Court hereby declares and decides:

**To uphold the preliminary plea** raised by respondents Attorney General (second preliminary plea) and Registrar (Courts and Tribunals) Gozo (first preliminary plea) , and declares that it is availing itself of its discretion to decline to exercise its "constitutional" and its "conventional" jurisdiction in terms of article 46(2) of the Constitution and article 4(2) of

---

<sup>13</sup> Cfr. Doc "DP", at pp. 108 – 111 of the records

<sup>14</sup> Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* pp. 202 – 3 . and Cons. Ct. **16.10.2002** in the case **Anthony Żarb et vs Ministru tal-Gustizzja et** (unpublished)

the Convention, on the basis that the action filed by applicant is premature in that he has as yet not exhausted all the ordinary remedies still available to him to redress any of the complaints raised by him in this Application; and

**To dismiss the Application** on the grounds above-mentioned, with costs against applicant, but entirely without prejudice to any remedy which applicant would be entitled to request at the proper time and if the need arises.

**Read and delivered**

**Hon. Joseph R. Micallef LL.D.,  
Judge**

**1st. December, 2015**

**Carmen Scicluna  
Deputy Registrar**

**1st. December, 2015**