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JUDGMENT

At issue: the preliminary question concerning article 1017, paragraph 4 , of the Judicial Code, as this article has been modified by article 129 of the Law of 13 December 2006 laying down various provisions on health, asked by the seized judge from Ghent.

The Constitutional Court,

Composed of the president M. Bossuyt, the judge M. Melchior, acting as president, and the judges R. Henneuse, E. De Groot, L. Lavrysen, E. Deryckeet J. Spreutels, assisted by the clerk P.-Y Dutilleux, chaired by the president Mr. Bossuyt, after deliberation, delivers the following judgment:

* * *

I. Purpose of the preliminary question and procedure

By judgment of 24 February 2009 of B.D. against J.W., which was shipped to the Court Registry on 5 March 2009, the seized judge from Ghent asked the following question:

“Does the article 1017, paragraph 4, of the Judicial Code violate articles 10 and 11 of the Constitution in that – except when the parties succeed on some and fail on other accounts – the judge can only offset the costs between spouses, parents, siblings or relatives to the same degree, and not between the parties between whom exists or existed a family relationship, such as unmarried cohabitants or former unmarried cohabitants for whom exists rights and obligations of family matters?”

The Council of Ministers filed a report.

At the public hearing of 13 October 2009:

- appeared J. Mosselmans *loco* P. Peeters, lawyers of the Brussels Bar, for the Council of Ministers;

- the judges-rapporteurs E. Derycke and R. Henneuse made a report;

- the aforementioned lawyer has been heard;

- the case was deliberated.

The dispositions of the special law of the 6 January 1989 about the procedure and the use of languages were applied.

II. The facts and the earlier procedure

The applicant before the judge *a quo* is opposed to the payment order and the execution of the seizure. He requests the removal of this seizure and the condemnation of the defendant to pay the cost of the seizure and its removal, including the cost of the procedure, taxed at 1,200 euros.

Regarding the applicant's opposition, the judge *a quo* notes that the dispute between the parties is about the scope of the enforcement order on the basis of which the defendant conducted a forced execution. The question of determining from when the applicant is liable for child support contribution to which he has been convicted by a judgment of the juvenile court arises more particularly. The judge *a quo* states that the applicant's opposition is unfounded and notes that this lack of justification results in the applicant's liability for any cost of enforcement.

As for the costs of the proceedings, the question of the possible application of article 1017, paragraph 4, of the Judicial Code arises. Under this provision, the costs can be offset to the extent assessed by the judge, between "spouses, parents, siblings or relatives to the same degree".

The parties are the parents of two children. They lived together without being married for about five years. The dispute between them is an execution incident regarding family rights and obligations. According to the judge *a quo*, the defendant rightly proceeded with a forced execution, but the applicant opposed it within the limits of an ordinarily prudent defense.

The judge *a quo* notes that the article 1017, paragraph 4, of the Judicial Code does not allow the offsetting of the costs when the parties are unmarried former cohabitants. The grounds for the exception to the rule according to which the party that failed is condemned to the costs are drawn, either in the assumption that the mentioned parties in the provision at issue do not proceed to litigation lightly or maliciously, or – in a more compelling way – in the desire to

promote a conciliation between those parties and avoid any ground of animosity, removing the ultimate consequences of the loss of a trial, which would be the award of the costs of the trial.

According to the judge *a quo*, the grounds that once encouraged the legislator to provide for this exception still justify it. However, the question is determining whether, with respect to changed social reality in terms of family relationships, these grounds still justify limiting the categories of relatives and allies that the legislature designated in 1807. In particular, the goal to promote conciliation between the parties and to eliminate any ground of animosity may justify that, in litigation opposing parties between whom exists or existed a family relationship, the judge has the possibility to offset the costs. Indeed, those parties remain bound by rights and obligations of a family nature. The offsetting of costs may reflect the fact that neither party has acted unreasonably in the trial and did not inappropriately called upon the judge to put an end to the dispute, so that neither party shall be in the obligation to cope with a major order for costs.

According to the judge *a quo*, the question arises of determining whether unmarried cohabitants or former unmarried cohabitants constitute categories of people sufficiently comparable, between whom exists a differentiation of treatment opposite to the principle equality and non-discrimination, since such differentiation – applicability or non-applicability of article 1017, paragraph 4, of the Judicial Code – is not reasonably justified.

III. The law

- A -

A.1. According to the Council of Ministers, the judge *a quo* would like to determine whether the principle of equality and non-discrimination is violated in that, in accordance with the provision at issue, a judge can offset the costs of procedure between spouses, parents or siblings but cannot for other type family relationships, such a former unmarried cohabitants.

Although the question is worded very broadly and extended to cohabitants in general, the case to be decided by the judge *a quo* relates solely to former unmarried cohabitants. The Council of Ministers therefore asks the Court to limit its consideration of the question to unmarried former cohabitants.

A.2. The Council of Ministers considers that the question should be answered in the negative

According to the doctrine, the provision at issue was incorporated in the Judicial Code in order to disrupt less the relationship between parents or spouses after a dispute arose between them.

The Council of Ministers argues that the judge may apply the provision at issue only to the extent that it is (still) a matter of marital relationship. In the jurisprudence, it seems to be

accepted that this provision could be applicable in the context of divorce proceedings when – during this procedure –there is still a marital relationship in the strict sense of the term between the spouses. But, if dispute arises between former spouses, the judge may not apply the exception provided by the provision at issue. In this case, it is in principle impossible to avoid a troubled relationship, since the spouses already are divorced. As a result, the legitimacy of the application of this provision by the judge also disappears. According to the Council of Ministers, there is therefore no discussion of any unequal treatment between former spouses and former unmarried cohabitants, as regards the application of the provision.

This is particularly so in a case which, as in this case, is irrelevant to the obligations arising from marriage or cohabitation, but regards affiliation.

A.3. In addition, cohabiting and married people are not categories that are comparable, as according to the Council of Ministers: the legal status of a cohabitant differs from that of a married person, both in regarding the obligations towards the cohabitant and regarding the patrimonial situation (Cases 65/2009 and 185/2002). Also for this reason, the provision at issue cannot be extended to cohabitants and former cohabitants.

A.4. According to the Council of Ministers, the provision at issue is an exception to the principle which stipulates that a party who has failed is condemned to pay severance procedure. The fact that former cohabitants are ineligible to this exception does not prevent the judge *a quo*, with respect to the minimal complexity of the case to decide, to apply article 1022 of the Judicial Code and reduce the amount for the party that lost.

- B -

B.1. The preliminary question regards article 1017, paragraph 4, of the Judicial Code, as this article has been amended by article 129 of the law of 13 December 2006 which contains various provisions on health.

The article states that:

“The costs can be offset to the extent assessed by the judge, or if the parties fail on any account between spouses, parents, siblings or relatives to the same degree.”

B.2. The Court questioned whether this provision is compatible with articles 10 and 11 of the Constitution as it provides that a judge may offset the costs between spouses, parents, siblings or relatives to the same degree but may not offset the costs between unmarried cohabitants or former unmarried cohabitants.

B.3. It is clear from the reasoning of the order for reference that, regarding the possibility for the judge to offset or not the costs, the question requires a comparison between the situation of spouses and the situation of unmarried cohabitants or former unmarried cohabitants.

The question makes no distinction between the aforementioned unmarried cohabitants, whether they are legal cohabitants or actual cohabitants. The Court analyzes both hypothesis.

In addition, the situation of former unmarried cohabitants can only be usefully compared to the situation of former spouses and not the one of spouses. This is because the provision in question does not apply more to former spouses.

Therefore, the Court considers whether the provision in question is compatible or not with the principle of equality and non-discrimination. There is a question regarding whether this provision would create unequal treatment for the legal former cohabitant or the actual former cohabitant. The Court will then examine the difference in treatment between, on the one hand, spouses, and on the other hand, the legal cohabitants and the actual cohabitants.

B.4. According to the Council of Ministers, the provision in question was included in the Judicial Code in order to not overly disturb the relationship between the parents or relatives aforementioned or the spouses, after a dispute arose between them.

Regarding the former unmarried cohabitants

B.5. Regarding the provision in question, the situation of former unmarried cohabitants, whether legal or actual cohabitants, does not differ from the situation of former spouses. Indeed, even in the case of former spouses, the judge could not apply the provision in question.

In the case of former unmarried cohabitants as well as in the case of former spouses, a disturbed relationship cannot, in principle, be avoided, so that in either case, the purpose of the measure mentioned in B.4 cannot yet be attained.

B.6. The question of determining whether the preliminary question relates to former unmarried cohabitants is answered by the negative.

Regarding the unmarried cohabitants

B.7. The legal situations of a married cohabitant, of a cohabitant who made a declaration of legal cohabitation and of a cohabitant who is neither married or legally declared are different, both regarding her/his obligations towards her/his cohabitant and the patrimonial situation.

These differences may, when they are relevant to the purpose of the provision, justify a difference in treatment between these three categories of cohabitants.

B.8. Although the purpose described in B.4 cannot reasonably justify the difference in treatment in question between those categories of cohabitants.

Indeed, the desire to avoid a disturbed relationship between cohabitants as a result of a dispute shall apply regardless of the form the cohabitation category.

B.9. The question of determining whether the preliminary question relates to unmarried cohabitants, regardless of whether they are legal or actual cohabitants, is answered by the affirmative.

For these reasons,

The Court

Rules,

- Because article 1017, paragraph 4, of the Judicial Code, the way it has been modified by article 129 of the law of 13 December 2006 laying down various provisions on health, does not allow the judge the ability to offset the costs between former unmarried cohabitants, it does not violate articles 10 and 11 of the Constitution.

Because the same provision does not allow the judge the ability to offset the costs between unmarried cohabitants, it does violate articles 10 and 11 of the Constitution.

Delivered in Dutch and in French, in accordance with article 65 of the special law of 6 January 1989, to the public hearing of 12 November 2009.

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The clerk, The president,

P.-Y. Dutilleux M. Bossuyt