

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHMT 2009/0106

BETWEEN:

AUGUSTIN MALAYKHAN

Petitioner/Respondent

and

PRESCILIA MALAYKHAN

Respondent/Petitioner

Appearances:

Mr. Evans Calderon for the Petitioner/Respondent

Mrs. Kim C. St. Rose for the Respondent/Petitioner

2010: March 30, 31;
April 1;
August 3.

JUDGMENT

[1] **GEORGES, J [AG.]:** These were hotly contested divorce proceedings in which the Petitioner/husband filed a petition on 23rd June 2009, alleging that his marriage to the Respondent on 25th January 1973, at the Roman Catholic Church at Marchand in Castries had broken down irretrievably on the ground that the Respondent had behaved in such a way that **he found it intolerable to live with her.**

[2] The particulars of behaviour complained of by the Petitioner as set out at paragraph 10 of his petition are that:

- (a) The Respondent refused to do any house chores cooking washing (sic) for the Petitioner.

- (b) The Respondent refused to have marital intercourse with the Petitioner.
- (c) The Respondent had the Petitioner to be arrested and spent a night in jail because of a physical confrontation between them.
- (d) The Respondent requested twice that the Petitioner leaves (sic) their matrimonial home in the U.S. because her son who once broke his wrist in Saint Lucia was coming to the U.S.
- (e) The Respondent broke the Petitioner's ribs from a physical confrontation.
- (f) The Petitioner has lived apart from the Respondent since 2003 though living in the same house and finally lived apart in 2006.

- [3] Although the sole ground under the **Divorce Act 1973** "the Act" on which a marriage may be dissolved is that the said marriage has broken down irretrievably the Court will not pronounce a decree of dissolution unless it is satisfied that the marriage has broken down irretrievably by reason of the facts set out in one or other of Sections 4(1)(a) – (d) of the Act.
- [4] The Petitioner's reason for seeking dissolution of his marriage is ostensibly the Respondent's behaviour which he finds intolerable to live with yet in framing the petition the wording does not conform with the standard wording of Section 4(1)(b) of the Act i.e. that the Respondent has behaved in such a way "that the Petitioner cannot reasonably be expected to live with her." What he in fact pleads instead is that "the Respondent has behaved in such a way that the Petitioner finds it intolerable to live with the Respondent".
- [5] There is in fact no such subsection in Section 4(1) of the Act so that the Petitioner's petition is technically flawed. And while the two things may in effect be tantamount to the same thing no such subsection exists under Section 4(1). Section 4(1)(a) of the Act provides that irretrievable breakdown of a marriage may

be established where "the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent." No where in the Petitioner's particulars of behaviour at paragraph 10 of his petition is there any reference to adulterous behaviour on the part of the Respondent. The Court cannot therefore be expected to validate what is in effect an invalid petition. As I see it the requirements of the Act ought to be strictly complied with.

- [6] In the event that I am wrong I shall now turn to the particulars of the Respondent's behaviour as set out at paragraph 2. Regarding paragraph (a) in which the Petitioner alleges that the Respondent refused to do any house chores etc under cross examination he in effect "back-tracked" when pressed on the point and said that the Respondent in truth only did household chores when she felt like giving the impression that the allegation was exaggerated or perhaps contrived.
- [7] With regard to paragraph 10(b) the Petitioner explained that by his complaint that the Respondent refused to have marital intercourse with him he meant sexual intercourse. In his testimony the Petitioner disclosed that the Respondent and himself had not had sex since 2000. He also said that it was over five years and then he finally revealed that in 1999 they had gone to the USA where they were living as husband and wife but without sex! What is one really to believe?
- [8] In cross examination he denied attempting to persuade the Respondent to have sexual intercourse. However the Respondent testified that they continued to have sexual relations and that he was in fact trying to force her to do so in 2005 when she was ill (having suffered a back injury at work) which resulted in a fracas between them and the Police having to be called. All marital relations the Respondent deposed ceased in 2006, when she asked the Petitioner to leave on account of his behaviour. I believe the Respondent's version in preference to the Respondent's on that issue.
- [9] The evidence shows and the Court accepts that what in fact triggered off the fracas between the parties was the Petitioner's insistence in forcing the Respondent to have sex with him when she was in actual fact incapable of

engaging in the act on account of a back injury. In the ensuing encounter the Petitioner sustained three fractured ribs after which he allegedly assaulted the Respondent with an iron broomstick resulting in the police being called.

- [10] In principle as well as on authority it has been established that as a general rule failure to engage in sexual activity per se is not necessarily a ground for divorce. In **MOUNCER v MOUNCER [1972] 1AER 289** for example it was held that rejection of a normal physical relationship coupled with an absence of affection was not sufficient to constitute living apart where a husband and wife were sharing the same household.

So too in the Court of Appeal in Northern Ireland the Court in **DOORIS v DOORIS [2002] NICA 4** held that a couple who had reached the age and stage in life where each slept apart and attended to their separate toilette but broke bread together in a state of harmonious coexistence – she washed his clothes cooked his meals and generally left him to his own devices. He spent long periods away from the matrimonial home but always returned home sat at the table to eat with her and paid all the household bills.

- [11] The necessary degree of separation had not been established. On the contrary the state of affairs described by the Petitioner amounted to a peaceful accommodation being reached between them which was indicative of some degree of society and mutual regard. Perhaps not the felicitous meeting of minds one might hope to find in a happy marriage but equally not a unilateral or consensual withdrawal from the actual state of matrimony by either or both. Not a great marriage perhaps but a subsisting one. Petition dismissed.

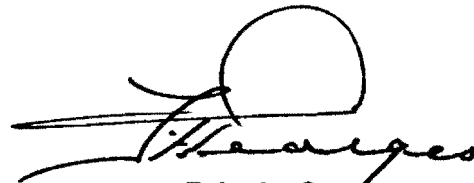
- [12] As regards paragraph 10(c) the facts are that the Respondent had the Petitioner arrested and spend a night in jail because of a physical confrontation between them. Yet ironically although not surprisingly he could not under cross examination recall what had sparked off the confrontation which is set out in paragraph 8. And the reason for his all night detention in jail according to the Respondent was the refusal of his children to bail him. I believe her.

- [13] I move to paragraph 10(e) of the petition which is interrelated with paragraph 10(c). The evidence which the Court accepts is that in the course of the Petitioner forcing his attentions upon the Respondent at a time when she was not physically fit she struck out in retaliation and he suffered three fractured ribs whereupon he assaulted her with an iron broomstick resulting in the police being called.
- [14] In my view the facts set out in paragraphs 10 (c) and (e) cannot per se or individually sustain a petition for dissolution of this marriage having regard to all the circumstances. Paragraph 10 (f) has been disposed of at paragraph 10 of the judgment and requires no further elaboration.
- [15] As regards paragraph 10 (d) of the petitioner's particulars of behaviour the Respondent whilst admitting asking the Petitioner to leave the matrimonial home explained that the reason for so doing was due to the variety of women (suspected prostitutes) who kept coming right to her door demanding to see the Petitioner. The Petitioner did not challenge or refute that assertion by the Respondent. Clearly inasmuch as it is the Petitioner's behaviour which is responsible for that state of affairs the Respondent cannot be held to be culpable in any way whatsoever.
- [16] So that in sum the Petitioner has failed to satisfy the Court of any of the facts set out in section 4(1) of the Act and the Court cannot therefore hold that his marriage has broken down irretrievably. I accordingly dismiss the husband's petition and now consider the wife's answer and cross petition.
- [17] Before embarking on that exercise I note that Counsel for the Petitioner in his written submission states that the husband's grounds (sic) for divorce is that the wife behaved in such a way that he cannot reasonably be expected to live with her. This was not in fact pleaded in his petition but in any event the allegations in support thereof were strongly refuted and were not proved to the satisfaction of the Court and certainly cannot be tantamount to cruelty. The cases cited in support of his proposition namely **Knot v Knot** [1953] 2AER 305, **Walsham v Walsham** [1949] 1AER 774-775 and **Rushton v Rushton** [1969] 2 DLR can readily be

distinguished from the more recent authorities of **Mouncer v Mouncer** [1972] AER 289 and **Dooris v Dooris** [2002] NICA 4 which have been dealt with at paragraph 10.

- [18] As regards the issue of constructive desertion, this has been comprehensively disposed of at paragraph 15 and requires no further elaboration. I therefore move on to the wife's cross petition which is based on section 4(1)(b) of the Act that is to say that the marriage has broken down irretrievably by reason of the fact that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The particulars of behaviour are set out at paragraph 14.
- [19] At subparagraph 1 the wife complains of infidelity by the husband resulting in the birth of three illegitimate children. Mr. Calderon for the husband contends in his written submissions that the marriage did not break down irretrievably by reason of adultery since it was necessary to prove not only that the husband had committed adultery but that the wife found it intolerable to live with him by reason of that fact. Mrs. St. Rose for the wife however countered that one of the particulars of behaviour referred to by the wife was the husband's infidelity and the birth of three illegitimate children during the marriage but adultery per se was not advanced as the fact upon which the court was expected to hold that the marriage had broken down irretrievably. I fully accept that submission by the wife's attorney that it was simply put forward **as one aspect of the husband's behaviour**.
- [20] So too the physical assault of the wife by the husband with an iron, broomstick necessitating police intervention and the arrest of the husband is yet another incident which reflects the behavioural pattern of the spouse's conduct which the wife complains that she cannot reasonably be expected to endure and live with.
- [21] That said I must frankly confess that I have not found sufficient evidence to buttress the serious allegations contained in subparagraphs 4 and 5 of the particulars of behaviour in paragraph 14 of the wife's crosspetition and I would consequently disregard them.

- [22] Not so with regard to the evidence relating to subparagraphs 5, 6 and 7 of the cross petition which I am satisfied conclusively prove that the Petitioner (wife) is entitled to a decree nisi of divorce on the ground that her marriage has broken down irretrievably by reason of the fact that her husband has behaved in such a way that she cannot reasonably be expected to live with him pursuant to section 4(i)(b) of the Act and I so order.
- [23] Court decrees that the said marriage be dissolved as aforesaid unless sufficient cause be shown to the Court within three months of this decree why such decree should not be made absolute.
- [24] And this Court declares that it is satisfied that for the purpose of section 41 of the Act there are no children of the family to whom the said section applies.
- [25] And it is ordered that the Respondent/husband do pay the Petitioner/wife's costs of this contested divorce petition in the sum of \$3,500.00.
- [26] All ancillary matters are adjourned to Chambers with liberty for either party to apply.



Ephraim Georges
High Court Judge [Ag.]