

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: DV. 148/2016

[2018] SCSC 503

J.M.
(nee A)

Petitioner

versus

N.M.

Respondent

Heard: 17th November 2017 and 24th January 2018

Counsel: Anthony Derjacques for Petitioner

John Renaud for Respondent

Delivered: 28th May 2018

RULING

Andre-J

[1] This Judgement arises out of a Divorce Petition of the 24th October 2016 filed by J.M. (“Petitioner”), who is seeking a dissolution of her marriage under section 4(1)(b) of the *Matrimonial Causes Act* (Cap 124) (the “Act”) on the ground that her spouse N.M. (“the

Respondent”), has behaved in a way that the Petitioner cannot reasonably be expected to live with him. The Respondent is contesting the divorce and moving for its dismissal.

- [2] It is not in dispute that the parties are both domiciled in Seychelles and have been lawfully married and nor is it contested that the parties have two adult children.
- [3] For the purpose of this Judgement, the following are relevant factual and procedural background to the pleadings and analysis thereto in light of the legal standards as highlighted and to be applied in this matter.
- [4] In Seychelles there is but one ground for divorce namely, "*irretrievable breakdown of the marriage*", which may be proven in one of four ways listed in section 4 (1) of the Act.

Section 4 (1) provides as follows –

- a. *the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*
- b. *the respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent;*
- c. *the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition; or*
- d. *the petitioner and the respondent have lived apart for a continuous period of at least 1 year preceding the presentation of the petition and the respondent consents to the grant of the divorce.*

- [5] The Supreme Court in ***JM v JM nee D [2007] SCSC 21*** emphasized this, holding that-

“The Court is empowered to enter a decree of divorce on the basis of the irretrievable breakdown of marriage, only when the petitioner has established one of the grounds of divorce, set out in Section 4(1) of the Act.”

- [6] The burden of proof resides with the Petitioner to prove, on a balance of probabilities, that she cannot reasonably be expected to live with the Respondent as a result of his behaviour.

- [7] This was similarly held by Perera J (as he then was) in **JM case**, wherein it was stated –
- “In respect of the ground relied on by the petitioner in the instant case, the burden of proof lies with him to prove the behaviour of the other party and that he cannot reasonably be expected to live with her. Both elements must be established on a balance of probabilities.”*
- [8] The Petitioner during the hearing did not lead any evidence to show how she could not reasonably be expected to live with the Respondent on the basis of his behaviour. *She instead gave evidence that she had been committing adultery for the duration of the marriage, and that she has been living with another man for the past two years. She further testified that she does not love the Respondent and gave evidence that they last had sexual relations three to four years ago.*
- [9] The Court acknowledges that the Respondent, under the circumstances, would have had grounds to petition for a divorce, namely the fact of adultery. However, he has not brought the Petition for the divorce before the Court, nor has he consented to the same.
- [10] It is settled law that parties are bound by their pleadings (see, for example: **(Antoine Leon v Volare (Prop) Ltd [2005] SCCA 3)**). Further, the Court may not formulate a case for a party after listening to the evidence, nor may it grant relief not sought in the pleadings as held in the case of **(Hunt v R [1987] SCAR 160; Vel v Knowles SCA 41/1998, 42/1998, LC 136)**. A Judge who grants relief not sought in pleadings acts *ultra petita* as clearly held in the case of **(Monthy v Esparon [2012] SLR 104)**.
- [11] Accordingly, on the basis of the Petitioner’s failure in proving one of the four elements under section 4 (1) of the Act required for a divorce petition to succeed, particularly the pleaded ground that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with him, this Petition is liable to be dismissed.
- [12] Another relevant issue that arises is the absence of any evidence of attempted reconciliation between the Parties. In accordance with section 5 of the Act, the Court must be satisfied on the evidence presented that reconciliation has been explored and has failed. This was emphasized in the case of **(Barreau v Barreau [1992] SLR 46)**,

wherein it was held that one of the considerations to be borne in mind by the Court is whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife. No evidence has been tendered by the Petitioner to show that attempts at reconciliation have been made. She gave evidence that she does not love the Respondent, and that she wants to be free from the bonds of the marriage. The Respondent, on his part, indicated his willingness to reconcile with the Petitioner. He was called upon his personal answers, and deponed that he did not want to divorce his wife, the Petitioner.

- [13] Therefore, on the basis of the lack of reconciliation efforts, this Petition is liable to be dismissed.
- [14] The Court is cognisant that to dismiss the Petition for divorce may have the consequent effect of trapping the Petitioner in a potentially loveless marriage, given that none of the four facts listed under *section 4 (1) of the Act* may apply to her particular circumstances. However, the Court cannot overstep its powers and encroach on the legislative will of the People of Seychelles.
- [15] England and Wales, in contrast to Seychelles, offer five reasons or facts which may be established to prove an irretrievable breakdown of marriage. In accordance with *section 1 of the Matrimonial Causes Act 1973 (Cap 18)*, these are as follows:
- a. *the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*
 - b. *the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
 - c. *the respondent has deserted the petitioner for a continuous period of at least two years;*
 - d. *the parties to the marriage have lived apart for a continuous period of at least two years and the respondent consents to the divorce; and*

e. the parties to the marriage have lived apart for a continuous period of at least five years.

[16] The latter fact does not require the consent of the respondent for the divorce. However, Seychelles law does not provide for this option, which would otherwise serve to facilitate the process of divorce for those persons who fail to meet the other requirements.

[17] Nevertheless, in this matter in final conclusion, it is the finding of this Court that the Petitioner has failed to prove her case for the reasons outlined above. The Petition thus fails and is accordingly dismissed with costs to the Respondent.

Signed, dated and delivered at Ile du Port on _____ day of _____ 2018.

S. Andre
Judge of the Supreme Court