



CIVIL COURT (FAMILY SECTION)

**Madam Justice
Hon. Abigail Lofaro LL.D., Dip. Stud. Rel.,
Mag. Jur. (Eur. Law)**

Today 7th March, 2018

Application Number: 214/16 AL

A B

Having a permit for residence in Malta numbered MT9528167

vs.

**Advocate Dr. Mark Mifsud Cutajar and Legal Procurator
Peter Sammut** nominated by means of a decree dated the 27th
of January 2017 as deputy curators to represent absentee
CDE,

The Court,

Having seen the **sworn application** by virtue of which plaintiff
premised:

That applicant contracted marriage with CDE on 29 October 2009 at the Marriage Registry, Valletta as indicated in the Marriage Certificate attached and marked Dok IG1.

That the parties first met circa one year prior to contracting marriage when applicant was eighteen years old and defendant was circa nineteen years old. That on the date of marriage, Applicant was twenty years old whilst defendant was twenty-two years old.

That no children were born out of this marriage.

That the parties resided in a rented property after the marriage up until August 2010 and in this period, defendant abandoned the matrimonial home.

That after vacating the matrimonial home, Applicant had no further information about defendant's whereabouts and was later informed that she had set up residence abroad permanently.

That in the course of the years, there was no contact between the parties.

That the marriage broke down irretrievably due to Defendant's abandonment of the matrimonial home in terms of Article 41 of the Chapter 16 of the Laws of Malta.

That the parties did not have and do not have any assets as the matrimonial home consisted of a rented property, parties had no vehicles and they had and have no assets or monies of whatever nature in common.

That the marriage naturally broke down due to defendant's abandonment and since they have been separated factually for

over six years, the parties have separate lives and there is no possibility for reconciliation.

That furthermore, defendant never requested any maintenance and in any case, abandoned the matrimonial home.

That applicant filed a letter for mediation on 6 September 2016.

That by virtue of a decree dated 14 September 2016, a copy of which is being annexed and marked Dok. IG2, Applicant was granted authorization to proceed with a sworn application subject to confirmation of the letter for mediation on oath and the appointment of curators if necessary.

That the Applicant duly confirmed the contents of the Mediation letter under oath in the Registry of Courts and is contextually filing an application for the appointment of curators.

That therefore, Applicant us hereby instituting the current court case for (1) pronouncement of personal separation between the parties on the basis of Article 641 of Chapter 16 of the Laws of Malta and (2) for divorce on the basis of Article 66A et seq of Chapter 16 of the Laws of Malta.

Nowtherefore, Applicant whilst making reference to the above and whilst reserving the right to submit additional evidence in the course of proceedings, requests this Honourable Court to:

1. Declare and pronounce the personal separation 'ad mensa et thoro' between the parties on the basis of Article 41 of the Laws of Malta
2. Authorize Plaintiff to reside separately from defendant
3. Liquidate (recte: Terminate) the Community of Acquests
4. Declare that no maintenance is due by Applicant tin (recte: in) favour of defendant

5. Pronounce divorce between the parties
6. Order the Registrar of Courts to notify within a determinate period, the Director of Public Registry with the relative judgements for due registration at Public Registry.

With costs against defendant.

Having seen the plaintiff's list of witnesses;

Having seen the **sworn reply** of the defendants, whereby they submitted under oath:

That the exponents are not cognisant about the facts giving rise to this case and therefore reserve the right to file a motivated reply in the case that they become cognisant about the facts;

Having seen defendants' list of witnesses;

Having seen the records of the proceedings;

Having seen that by virtue of a decree dated the 17th of October 2017¹, the Court ordered that the proceeding be held in the English language;

Having seen that the case has been put off for judgement to be given in the current sitting;

Having considered:

¹ Fol. 57

CONSIDERATIONS

This is a case of personal separation followed by divorce proceedings between the plaintiff and his absent wife, the defendant, who contracted marriage together in Malta on the 26th of October 2009.²

The Court refers to the sworn application filed by the plaintiff whereby amongst other claims, the applicant requests the Court to pronounce the personal separation as well as the divorce of the parties.

FACTS OF THE CASE

The facts of the case are hereby given in brief³:

- a) The plaintiff, a Russian national, came to Malta in 2007. At that time, he was still young and was still a student although eventually he started to work here;
- b) After a short relationship with CDE, a national of Kazakhstan, the parties married at the Marriage Registry in Valletta, when the plaintiff was twenty (20) years old and the defendant was only twenty-two (22) years old;
- c) Their relationship was based on fun, going out and all activities that young adults engage in. The plaintiff thought that the marriage was an interesting adventure that would add to the fun;

² As evidenced by the marriage certificate exhibited on page 6.

³ These result from the only evidence provided, which is the affidavit of the plaintiff exhibited on page 55.

- d) When they got married, the parties did not have a great income and they used to live in a rented flat, where they had only the basic needs;
- e) No children were borne of this marriage;
- f) In August 2010, just a few months after the marriage, C moved out of the flat. Initially the plaintiff felt hurt. He did not see his wife around much. Later he did not see her at all and he was told that she had left Malta for good. Since then he has not seen her again, nor did he have any contact with her;
- g) No property was bought throughout the marriage, no cars and no immovables. The parties did not hold any joint accounts together. There was nothing to share or divide when she left the flat.
- h) They completely lost contact with each other and went to live their separate ways with no contact for the last six years.

LEGAL PRINCIPLES

From the sworn application, it is evident that the plaintiff relies on desertion as the cause of the breakdown of the marriage between the parties. Desertion is in fact a ground for separation under Maltese law as Article 41 of the Civil Code⁴ lays down:

41. 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.

⁴ Chapter 16 of the Laws of Malta

Both from the wording of the cited article and from case-law, it results that the criteria for a successful action of separation motivated on desertion are two: that the desertion prolongs for two years or more; that there is no just cause for the spouses' abandonment;

In the case in the names of Andrea Avellino vs. Regina Avellino,⁵ one finds a clear definition of these criteria, whereby it was said: *“Illi dwar l-abbandun, jingħad li l-istess, biex jista’ jikkostitwixxi kawżali tas-separazzjoni, irid, apparti ż-żmien, li fil-każ se maj jikkonkorri, illi jkun sar bla ġusta kawża. Huwa fatt li l-apprezzament taċ-ċirkustanzi “di fatto” li l-abbandun mid-dar ikun sar volontarjament (ċjoe bla kawża ġusta), b’mod li jkun jista’ jagħti lok għas-separazzjoni personali għall-ħtija ta’ min jirrikorri għalih, huwa mħolli fil-kriterju tal-maġistrat deċidenti; kif ukoll ġie deċiż illi mhux kwalunkwe allontanament ta’ konjuġi mid-domicilju konjugali jikkostitwixxi l-prova ta’ l-abbandun volontarju: imma jrid ikun jirriżulta minn fattijiet li juri l-intenzjoni żgura, ferma u pożittiva, ta’ min jabbanduna, li ma jergax imur jgħammar mal-parti l-oħra. U biex ikun kundannabbli, l-abbandun irid ikun kapriċċuż, u mhux ġustifikat minn xi motiv raġjonevoli.”*

Reference is also made to the case in the names Josephine Anne Edwards vs. Avukat Dr. Joseph Xuereb noe.⁶ where the court stipulated that: *“Biex jikkostitwixxi motiv ta’ separazzjoni, l-abbandun irid ikun inġust fiż-żmien tiegħu kollu ta’ sentejn...”*

Personal separation caused by desertion, carries along various harsh consequences, that the Court must impose on the

⁵ Decided by the First Hall of the Civil Court on the 16th of December 1949;

⁶ Deċiża mill-Prim’Awla tal-Qorti Ċivili fit-22 ta’ Frar 1961.

defaulting party. These mandatory consequences are laid down in Article 48 which states:

48. (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 Code⁷;

(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.

As, opposed to other grounds of separation, the Court must apply these consequences in cases of desertion and adultery and has no discretion whether to apply them or not.

With regards to the request for the declaration of divorce between the parties, for the Court to uphold such a request, it must be satisfied that:

⁷ Articles 631 u 632 relate to succession rights between spouses, whereas articles 825, 826 and 827 have been abolished by Act XVIII tal-2004.

- a) on the date of commencement of the divorce proceedings, the spouses shall have lived apart for a period of, or periods that amount to, at least four years out of the immediately preceding five years, or at least four years have lapsed from the date of legal separation; and
- b) there is no reasonable prospect of reconciliation between the spouses; and
- c) the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances, as provided in article 57.⁸

APPLICATION OF THESE LEGAL PRINCIPLES TO THE CURRENT CASE

There is no doubt that the cause of the marital breakdown between the parties, was the defendant's desertion of her husband as well as the abandonment of the matrimonial home. Her desertion fits perfectly the legal definition of the ground for separation in that

1. It has prolonged for over two years. The defendant left the matrimonial home in August 2010, never to return again, probably having also in the meantime left the island. She has therefore been absent from the marriage for over seven years and one can positively conclude that she has a resolute intention of never returning to the plaintiff and the marriage;
2. There was no just cause for defendant to abandon her husband. The plaintiff gives evidence that the parties were young in age and that the defendant just walked

⁸ Requisites laid down in Article 66B of the Civil Code.

away on one fine day; His version of the facts is in no way contradicted by the defendant;

In view of this, the Court feels that it is just to conclude that the plaintiff's request for a personal separation motivated by the ground of desertion is just and should be upheld;

As a consequence, the Court is hereby applying against the defendant, all the effects of Article 48 above-cited, including a declaration to the effect that the defendant has forfeited her right to ask for and receive maintenance from her husband the defendant, as well as any rights to her husband's succession.

With regards to the request for a declaration of divorce between the parties, it has been proved to the satisfaction of the Court that the requisites laid down by Article 66B of the Civil Code have, in the present case, been fulfilled since the parties have not lived together for over seven years and furthermore there is no reasonable prospect of reconciliation between the parties;

DECIDES

For all the reasons aforementioned, the Court hereby decides this case as follows:

1. Upholds the first claim and declares and pronounces the separation "ad mensa ed thoro" of the spouses on the grounds of the desertion committed by the defendant as laid down in Article 41 of Chapter 16 of the Laws of Malta;
2. Upholds the second claim and authorises the plaintiff to reside separately from the defendant;

3. Upholds the third claim and hereby terminates the community of acquests existing between the parties;
4. Upholds the fourth claim and hereby declares that the defendant has forfeited her right to request for and receive maintenance from the plaintiff as well as all the other rights laid down in Article 48 of Chapter 16 of the Laws of Malta;
5. Upholds the fifth claim and hereby grants the request for the divorce of the parties;
6. Upholds the sixth claim and hereby orders the Registrar of Courts to notify the divorce of the parties to the Director of Public Registry within one month from the present, so that the same shall be registered in the Public Registry as laid down in Article 66A of Chapter 16 of the Laws of Malta.

With costs against the defendant, however the plaintiff is to provisionally pay the costs and fees due to the Deputy Curators.