SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHMT 2004/0078

BETWEEN:

SONIA HIPPOLYTE
of Beausejour Gros Islet

Applicant

and

CLETUS HIPPOLYTE
of St. George Street Gros Islet

Respondent

Appearances:
Mr. Horace Fraser for Applicant
Mr. Dexter Theodore for Respondent

2011: August 22

JUDGMENT

The application

[1] **GEORGES, J. [AG.]:** On 28th April 2009 the applicant Sonia Hippolyte filed a Notice of Application for Ancillary Relief stemming from divorce proceedings filed by the respondent (Petitioner) Cletus Hippolyte on 20th July 2004. In those proceedings the respondent was granted a decree nisi on 3rd April 2008 by Cottle J which was made absolute on 13th August 2008. In her application for ancillary relief the applicant sought maintenance in the sum of $2,000.00 monthly, costs, and an order that the respondent deliver up to her a half share of the proceeds of all properties sold by him, in particular a property at Canaries, allegedly sold for

$1,000,000.00.

Affidavit in Support of Application

[2] In her supporting affidavit she deposed that:

(i) The respondent had formed a company called "Caribbean Sun Tours.

(ii) By a deed of sale Fleur Odlum sold a parcel of land Block 1256 C Parcel 174 situate in Gros Islet to Caribbean Sun Tours for $60,000.00.

(iii) By deed of sale the respondent purchased Block 1256 C Parcel 45 situate in Gros Islet from Raul Odlum for $46,000.00 upon which, in her words, "our house" was built.

(iv) There are diverse properties in Gros Islet apart from a restaurant which they allegedly operated called "The Banana Split".

(v) On 31st March, 2000 the respondent's son sold him a property for $15,000.00 therefore this was in her view "community property".

(vi) The respondent sold lands at Canaries for $1,000,000.00 which were bought allegedly from "funds obtained from the operations of "the Banana Split".

(vii) They were in business together and proceeds from the business were used to purchase, in her words, "all the properties that we have".

Observations

[3] No proof by way of supporting documents was exhibited by the applicant to enable the court to justly resolve this matter. For although the applicant's supporting affidavit is replete with allegations she altogether neglected to exhibit any documentary proof that could assist the court in reaching a conclusion. For instance, she failed to exhibit the Certificate of Registration or Articles of Incorporation for the Banana Split and Caribbean Sun Tours. Nor did she exhibit the deeds of sale in respect of the alleged purchases from Raul and Fleur Odlum or any documentary evidence concerning the alleged sale of land at Canaries. In my view the applicant did not provide a single iota of proof that she owned and operated businesses with the respondent from which monies were used to purchase the various properties.

Further affidavit in support of the application

[4] On 30th April 2009 the applicant filed a further affidavit in support of her application for ancillary relief in which she made the following unsubstantiated allegations by deposing that:

(i) the respondent and her formed a company CSH Ltd which leased a property called "the Wall".

(ii) She paid utility bills after returning from England in the amount of $3,000.00.

The applicant urged the court to order that the respondent refund the monies that were allegedly paid for utilities and award her half the profits earned from the Wall.

Observations

[5] Once again no cogent proof or evidence of any kind that would have assisted the court in arriving at a decision was provided. The applicant failed to furnish the certificate of registration for CSH Ltd and did not exhibit the receipts in proof of payment of the $3,000.00 which she claimed to have paid for utilities. In addition, although she claimed half share of the profits earned by the Wall no documentary proof of the nature and extent of the business or even an estimate of profits was submitted.

Respondent's affidavit in reply

[6] On 25th September 2009 the respondent filed an affidavit in reply to the applicant's affidavits of 28th April 2009 and 30th April 2009 in which he deposed that:

(i) Although the applicant owns a single share in Caribbean Sun Tours he only gave her the share sometime after forming the company and she invested nothing at any time in it.

(ii) He did indeed purchase property in Gros Islet but this was done from monies which came from property he had purchased to use his words "before I even met the respondent".

(iii) He did purchase Block 1256 C Parcel 45 in Gros Islet but

the purchase was made "before I married the respondent".

(iv) He did purchase land from his son but this was done from proceeds of sale of lands at Reduit which "were purchased in or around 1979 ... before I ever met the respondent".

(v) He did in fact sell land in Canaries but this was land that he had partly inherited and partly bought from income he earned selling beer before he met the respondent. He also deposes that the proceeds of this sale were used to pay community debts, the living expenses of himself and the applicant in England and the medical bills of the applicant.

(vi) The applicant was not in business with him as she was a housewife and when he formed CSH Ltd he only gave her a share as a gift. He also deposed that the company was heavily indebted.

(vii) He denied that the applicant paid $3,000.00 for utilities.

[7] The respondent also deposed that he believed that the applicant's income exceeds his on the basis that he believed she owned a restaurant in Beausejour. He added that he had 3 minor children for whom he was responsible and urged the court to order the applicant to pay him $1,000.00 per month maintenance.

Observations

[8] To the extent that the burden of disproving the allegations made by the applicant falls on the respondent, and to the extent that he was obliged to prove the assertions he made in his affidavit, he failed to provide even a scintilla of documentary proof to assist the court. He exhibited no receipts to show that he had paid her medical bills. He provided no evidence of the companies' debts. He did not exhibit the deed of sale or other related documents for the lands he claimed to have purchased before meeting the applicant nor did he exhibit any copies of the Land Register to show that the lands in Canaries were partly inherited. He claimed to have given her shares in the companies as a gift but did not exhibit a deed of gift or certificate of registration or a copy of a share certificate to assist the court in any way. The respondent could have easily produced the birth certificates of his children to establish that they were indeed minors from which the court may have been able to draw inferences but this was not done.

Applicant's affidavit in reply

[9] On 13th January 2010 the applicant filed an affidavit in reply to the respondent's affidavit of 25th September 2009. That affidavit was in the opinion of the court prolix and contained facts which were scandalous and vulgar. I find it necessary to point out that pleadings, unless the matter is extremely complex and involved, are to be succinct and to the point. Where allegations are bantered about some form of supporting evidence is desirable. Much of the contents of the applicant's affidavit in reply are not of any relevance whilst other parts merely repeat the allegations made in the earlier affidavits. The court has taken great pains to sift out the parts that may be of any value and summarize them as follows:

(i) The applicant deposed that the respondent and herself started running the Banana Split restaurant in Castries in 1981 and part of the proceeds was used to open a second branch in Gros Islet.

(ii) She admitted that the respondent borrowed some money from the Development Bank. She also admitted that the respondent owned a piece of land in Reduit when she met him which was used as collateral for the Banana Split. According to her evidence when the business was on hard times the respondent had to sell the land in Reduit to pay off the bank.

(iii) She deposed that the respondent sold a piece of land in Canaries and used the proceeds to build the Wall but insisted that they managed the business together. She alleges that the land in Canaries was bought between 1984 and 1985 and was sold in 2007. The money used to purchase the land in Canaries came from proceeds of the Banana Split.

(iv) She deposed that she operates the restaurant in Beausejour on behalf of the Gustave's who are the owners.

(v) She alleges that the respondent receives child benefit, pension and housing benefit from England and that he rents the Banana Split and the Wall for $6,000.00 and $30,000 respectively.

As is the recurrent theme throughout the affidavit evidence, not one shred of documentary proof was provided to support the assertions made. The applicant did not furnish a letter of employment from the Gustaves for example to show that she was merely an employee and did not own the Beausejour restaurant. She claimed the Banana Split and the Wall were rented for hefty sums but submitted

no proof of this.

Applicant's further affidavit in reply

[10] On 17th February 2010 the applicant filed a further affidavit in reply with similar deficiencies. It is interesting to note that in paragraph 4 she deposed that the respondent has not provided the court with any documentary evidence in support of his assertions. She therefore urged the court to disregard his evidence. I agree that to the extent that the onus fell on the respondent to support his assertions he did not do so but I go further to point out that the applicant's own affidavit evidence was also completely unsubstantiated. Therefore, to the extent that the onus rested on her to prove her case or substantiate whatever inferences may have arisen she has not done so.

[11] In paragraph 3 of her further affidavit in reply the applicant also deposed that the respondent's affidavit was scandalous and calculated to embarrass her but she is also guilty of the same transgression. I would refer to the learned authors of the **Caribbean Civil Court Practice** (2008), note 25.3 at pages 278 – 279 which states that:

> "The court, both under the rules and **under its inherent jurisdiction** has the power to strike out any scandalous, irrelevant or otherwise oppressive matter (whether contained in an affidavit or in a witness statement) ... any document to be used in conjunction with an affidavit must be exhibited with it" (my emphasis).

In fact if it were not for part 2.2(3) of the **Civil Procedure Rules** which clearly states that the Rules do not apply to family proceedings I would be minded to strike out the application for ancillary relief and the affidavit in reply. I do not believe that CPR 2.2(3) bars the court from striking out prolix and scandalous affidavits under its inherent jurisdiction. More on that later.

[12] It is indeed curious, to say the least, that it was only in this further affidavit in reply that the applicant for the first time deposed that when she met the respondent he encouraged her to leave her job to assist him with running the Banana Split. She also deposed that at all material times she worked tirelessly in the business

without a salary on the understanding that those efforts were for the betterment of the family. Nevertheless she admitted, in her words, that "they lived off the proceeds of the business".

[13] The applicant claimed to be the driving force behind the business as she cooked, directed and supervised staff, created menus, recruited all employees, did the book keeping, shopping, paid the staff, the bills, did the banking, served customers and cleaned. Once more all these allegations could have been corroborated by merely providing the court with an affidavit from a staff member or a frequent customer of the restaurant but nothing of the kind was done.

Submissions

[14] On 23rd February 2010 the parties by consent asked the court to decide the issue of ancillary relief as set out in their respective affidavits. Learned counsel for the parties agreed to file written submissions on or before 31st March 2010. No written submissions were received on the specified date from counsel for the respondent. The court nevertheless will now proceed in deciding the application.

[15] Appended to the written submissions of counsel for the applicant were 9 copies of the Land Register purporting to show that some of the properties were acquired after the applicant and respondent were married and would therefore be community property. I decline to have any regard to them as in my view they are not properly before the court. After filing numerous affidavits in which she made several allegations about the respondent's ownership of land the applicant had ample opportunity to properly exhibit the certificates in proof of her allegations. The certificates cannot now be permitted to be sneaked through at the back of the written submissions of learned counsel.

[16] In his written submissions learned counsel for the applicant asked the court for a property order pursuant to section 45 (b) of the **Divorce Act** 1973 (amended by Revised Laws of St Lucia Cap 4.03 of 2006) in relation to property acquired separately. Section 45 stipulates that the court "may" make orders in relation to

community property and may make orders if it is "satisfied" that a party has made substantial contributions towards the acquisition of separate property. To be satisfied the applicant must identify the separate property to which she lays claim. This was not done and so the court declines to grant any such order. In **Craig Laurie Barnard v Penelope Ann Barnard (nee Bird)** Claim No. SLUHMT 2001/0131 Edwards J put this requirement clearly when she said:

> "...Such an Application would therefore have to clearly identify the separate property that is the subject of the Section 45(b) Application, and state in the supporting affidavit the facts which may prove on a balance of probabilities that the wife had made substantial contributions in the form of either money payments or services or prudent management or otherwise to the improvement or preservation of that specific property. Having read the Application of the Wife and her supporting affidavit, I can find no identification of any specific separate property that is the subject of a Section 45(b) property order application..."

[17] Learned counsel for the applicant also submitted that "article 118" of the **Civil Code** of St. Lucia provides that "the properties acquired by the parties during the course of marriage are deemed to be property belonging to the community". In the view of learned counsel it is "the duty of the respondent to rebut this presumption by clear evidence to the contrary". I am afraid I cannot accept that conclusion. In the first place article 118 of the **Civil Code** says nothing to that effect. The article in fact deals with opposition to marriage. This court will assume no responsibility for guessing what provisions counsel intends to refer to. Articles 1188 – 1191 of the **Civil Code** define legal community. Article 1192(2) defines separate property whilst article 1193 states the following:

> (1) property is deemed to be the joint acquisition of the community unless it is admitted or proved to have belonged to, or to have been in the legal possession of one of the spouses previously to the marriage, or, if acquired after marriage, is admitted or proved to have been acquired in one of the ways set out in article 1192, or to otherwise belong to one of the spouses only.
>
> Provided, however, that where property is acquired by one of the spouses while they are living separate and apart from each other by virtue of a separation deed, such property is presumed to be the separate property of such spouse unless it is admitted or proved to be community property.

(2) Where spouses purchase properties in their joint names such property falls into the community unless it is expressly stated at the time of purchase that they are purchasing with their separate funds.

On careful reading of Articles 1188 – 1191 there is nothing in these provisions that places a duty on the respondent to show that disputed property is not community property. In respect of Article 1193 it is clear that on the plain and ordinary meaning of the words used the framers could not have intended to remove the burden from the applicant of proving that the properties she claims to be community property are in fact so. To my mind the centuries old principle that he who alleges must prove has not been repealed by that provision. In **Constantine Line v Imperial Smelting Corporation** [1942] A.C. 154 at 174 Lord Maugham reminds that proof rests on he who affirms not he who denies. His Lordship puts it this way:

> "The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is Ei qui affirmat non ei qui negat incumbit probation. It is an ancient rule founded on considerations of good sense and should not be departed from without reason".

[18] Undoubtedly parliament from time to time passes provisions into law which shifts the burden of proof from one party to the other. In a real sense this provision is one such but with an important qualification. It is my considered view that the Article places the burden in the first place on the applicant to adduce sufficient evidence in her application for ancillary relief that the property she asks the court to divide is community property so that the presumption that she has a basis for her claim is sufficiently invoked. It is only when this is discharged that the burden then shifts to the respondent to discharge the onus placed on him to prove his assertion in denial that the property is in fact separate property. It must not be forgotten that this presumption is rebuttable and in order that it is properly rebutted the respondent is required to prove with some degree of cogency that he acquired the property before the marriage etc.

[19] The court is empowered under the **Divorce Act** to do a wide range of things. For example section 22 of the Act enumerates the orders the court can make. Section

24 of the Act empowers the court to make transfer orders in respect of property. Section 25 sets out factors which the court may consider when deciding to make an order for transfer of property, financial provisions or any order under section 22. Section 25 is important because it requires that consideration be given to:

> (a) income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the future;
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
> (d) the age of each party to the marriage and the duration of the marriage;
> (e) any physical or mental disability of any party to the marriage;
> (f) Contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family ...

[20] These considerations must be premised on some proof but it is my considered view that in light of all the circumstances the applicant and the respondent have merely engaged in a vulgar war of words. Each party has fired salvo after salvo at each other in their respective affidavits in the hope that one of their missiles will sink the other's vessel. This war of words marked by unsubstantiated allegations did not produce the nuclear weapon that would have assisted the court to decide the application one way or the other. I am therefore loathe to disturb the status quo as the absence of proof on each side has effectively stymied the proceedings. Without more, in my view, the affidavit evidence simply represents allegations and cross-allegations and denials by each party from which the court is regrettably quite unable to arrive at a properly reasoned legal conclusion/decision.

[21] The learned authors of **Phipson on Evidence** 15th Edition paragraph 4-03 at p. 56 illustrates the difficulty with which I am faced in this case when they declared that:

> "While a judge or tribunal of fact should make findings of fact if they can, in the exceptional case in which they are forced to the conclusion that they do not know which side the decision ought to be, the principle of the burden of proof determines which party is to succeed."

In this case where the applicant was charged with the burden of proof she failed to discharge it. This prevented the transfer of the burden to the respondent. Moreover, where the respondent made positive assertions requiring proof he also failed to discharge the burden on him. In **Rhesa Shipping Co. SA v Edmunds (The Popi M)** [1985] 2 ALL ER 712, HL Lord Brandon made some poignant observations which I find applicable to this case. There a vessel sunk and the cause of loss was in doubt. The learned Law Lord opined:

> "...a judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. **There are cases, however, in which owing to the unsatisfactory state of the evidence or otherwise deciding on the burden of proof is the only just course for him to take....**" (my emphasis).

Conclusion

[22] The evidence in this case is wholly unsatisfactory as it amounts to mere allegations, denials and counter allegations without a scintilla of documentary proof or corroboration. Taking all of this into consideration the applicant's application for ancillary relief is wholly deficient. Similarly, the respondents counter application for maintenance also fails. In light of the lack of proof on the part of both the applicant and the respondent whenever the burden of proof rested on them the court is of the view that it is prudent in the circumstances to strike out both applications. I make no order as to costs especially in light of the unsatisfactory state of "the pleadings".

Ephraim Georges
High Court Judge [Ag.]