

Solicitor General
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BETWEEN

SIONE MATEIALONA KAUFUSI

Petitioner

AND

TAIANA MOEAKIOLA

Respondent

BEFORE LORD CHIEF JUSTICE PAULSEN

Heard: 25 October 2016 and 4 November 2016

Decision: 9 November 2016

**Appearances: Mr. S Mo'ale (on 25 October) and Mr 'O
Pouono (on 4 November) for the petitioner
No appearance for respondent**

RULING

- [1] This ruling concerns an undefended application for divorce.
- [2] The parties were married on 15 January 1998 at Nuku'alofa and there are no children of the marriage.
- [3] The petition alleges that the parties separated in March 2014 and relies upon section 3(1)(f) Divorce Act which provides:
- (1) Any husband or wife who is at the time of the institution of the suit domiciled in the Kingdom may present a petition to

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the Supreme Court (hereinafter referred to as the "Court")
praying the Court to dissolve the marriage upon evidence —

- (f) that the respondent and petitioner have been separated for a continuous period of 2 years or more immediately preceding the presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other...

[4] Mr. Kaufusi's evidence was that his wife went to Australia in March 2014 to care for her father. She has not returned. At the time she left the marriage was not over. It was in June 2015, when his wife extended her stay, that Mr. Kaufusi gave thought to the fact that the marriage might be over due to his wife's desire to remain living in Australia.

[5] This petition was filed and brought on with urgency because the respondent had a meeting with Australian Immigration in relation to an application to stay in Australia. I understand her application was unlikely to be considered favourably unless her marriage to Mr. Kaufusi was dissolved.

[6] Having heard from Mr. Kaufusi it appeared plain that grounds for divorce were not made out. As Mr. Mo'ale, who had appeared on the instructions of Mr. Pouono, was taken by surprise by the fact that the petition might not be granted, I adjourned the hearing to 4 November 2016 to allow Mr. Pouono to make submissions.

- [7] When he appeared on 4 November 2016 the thrust of Mr. Pouono's submissions was that all that needs to be proved to obtain a divorce is two years physical separation. I do not agree.
- [8] The Divorce Act is clear that, subject to section 3(2) which provides that no account shall be taken of any one period (not exceeding 3 months) during which the parties resumed cohabitation with a view to reconciliation, to rely on section 3(1)(f) a petitioner must not only satisfy the Court that the parties have been separated for at least two years prior to the petition but also that during that period there has not been a mutual maintenance of, or intention to, maintain or renew normal marital relations (*Tonga v Halapua* [2005] Tonga LR 35, 37).
- [9] In this case I heard no evidence from the respondent. The only evidence before me from Mr. Kaufusi is that he only considered that the marriage was over in June 2015. On that basis no petition for divorce in reliance upon section 3(1)(f) may be filed until June 2017 and this petition must be dismissed.
- [10] There are two further points I wish to make about this. First, it is not the Court's wish to maintain marriages which are no longer viable but it is also its obligation to uphold the law. Counsel must understand that divorces will not be granted unless the proper grounds are made out. Secondly, there have been cases in recent times where a spouse has gone overseas for work and only whilst overseas decides he/she will not return

to his/her spouse in Tonga. It appears petitions are being filed alleging that separation occurred on the date of departure. As this case shows, that is not a view that is likely to find favour with the Court.

Result

[11] The petition is dismissed.



A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over the seal.

O.G. Paulsen

NUKU'ALOFA: 9 November 2016

LORD CHIEF JUSTICE