

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Divorce Jurisdiction)

2023/HPF/D142

BETWEEN:

SHADRECK MUKANJO MUTTI

AND

MUNDIA MBUMWAE MUTTI



PETITIONER

RESPONDENT

*Before the Hon. Mrs. Justice M.M. Bah-Matandala
On the 26th Day of November, 2024*

*For the Petitioner: Ms A. Muyumbana & Mr L.N Chingumbe – Messrs. EMK & Associates
For the Respondent: Mr W. Siyumbano – Messrs. Mutemwa Chambers*

R U L I N G

Legislation Referred:

1. Section 101 of the Matrimonial Causes Act No. 20 of 2007.

Cases Referred:

1. *Shell and BP Zambia Limited v Conidaris and Others* (1975) ZR 174 5.
2. *Caliegnese Corporation v AK 30 Chemie UK Limited* (1976) FSR 273 275
3. *Shamwana v Mwanawasa* (1993-1994) ZR 149
4. *Ivy Simeza Nshindano v Kenneth Nshindano* [2020] ZMCH 470
5. *Mobil Oil Zambia Limited v Msiska* (1993) ZR 86

Other Works Referred:

1. *Patrick Matibini, Zambian Civil Procedure: Commentary and Cases Vol 1, 2017.*

1.0 Introduction

- 1.1 The Applicant herein is the Respondent and the Respondent is the Petitioner in the main matter of a divorce Petition before this Court. The parties will be referred to as they appear in the main matter.

1.2 This a ruling on an application by the Respondent for an interim injunction made pursuant to Section 101 (1) of the Matrimonial Causes Act.

2.0 Background

2.1 The background of the case is that the Petitioner and the Respondent were lawfully married in 2004 at the Lusaka Civic Centre and cohabited as husband and wife until sometime in 2022. There are four children of the family born from them.

2.2 The Petitioner commenced divorce proceedings against the Respondent by way of a Petition dated 15th March, 2023, made pursuant to Section 8 and 9 of the Matrimonial Causes Act citing the irretrievable breaking down of the marriage due to the unreasonable behaviour of the Respondent. The Petitioner also sought custody of the children of the family,

2.3 The Respondent filed her Answer and Cross Petition dated 20th April 2023, asserting that the marriage had irretrievably broken down, but that it was due to the Petitioner's unreasonable behaviour.

2.4 The Petitioner filed his Answer to the Respondent's Answer and Cross Petition on 21st July, 2023.

- 2.5 On the same date, the Respondent filed an ex-parte summons accompanied by an Affidavit in support and Skeleton Arguments with a list of authorities for an application of an interim injunction pursuant to Section 101 (1) of the Matrimonial Causes Act.
- 2.6 The Respondent sought for the Court to restrain the Petitioner, his niece Kamwengo Lyambulula and the farm worker Wesley Mweemba from approaching within 100 meters of the matrimonial home, and in respect of the Petitioner only, from taking the children of the family to and from school, and church, until the final determination of the main matter.
- 2.7 The ex-parte order was granted on 27th July, 2023. The application came up for inter-parte hearing on 12th November, 2024.

3.0 Affidavit in Support of the Application

- 3.1 The Affidavit was sworn by the Respondent. She deposed that the Petitioner had deserted the matrimonial home to an unknown location in December, 2022.
- 3.2 The Respondent averred that despite leaving the matrimonial home, she had allowed the Petitioner to

continue taking the children of the family to and from school and church.

3.3 The Respondent further averred that on 8th April, 2023, the Petitioner confiscated their daughter Deborah's phone, accusing her of practicing prostitution which he said she had learnt from her mother.

3.4 Additionally, the Respondent deposed that on 2nd May, 2023, the Petitioner directed their daughter Deborah to tell the Respondent to stop buying her clothes similar to that worn by prostitutes.

3.5 It was further deposed by the Respondent that on 11th May 2023, she found out that their youngest daughter Hadassah had been directed by the Petitioner to be trading food which she failed to eat for junk food with the Petitioner's niece Kamwengo Lyambalula and the farm worker Welody Mweemba.

3.6 The Respondent averred that the Petitioner had further instructed their other daughter Tabitha to ensure that Hadassah did not eat food prepared at home, but instead eat the food prepared at school.

- 3.7 The Respondent deposed that on 17th May, 2023, the Petitioner exposed their daughter Hadassah, who is asthmatic to cold weather, and subsequently discreetly administered an unknown drug without medical consultation.
- 3.8 Furthermore, the Respondent averred that on 15th June 2023, the Petitioner took their daughters Tabitha and Deborah for prayers to an unknown ritualist where certain rituals were performed with dirty water, after which they were given salt of unknown source to sprinkle at the matrimonial home to prevent witches and wizards from accessing the house.
- 3.9 In addition, the Respondent deposed that between 16th and 17th July 2023, the Petitioner instructed the farm worker to remove irrigation pipes at the matrimonial home, and that he uninstalled a satellite dish from the Respondent's bedroom.
- 3.10 The Respondent swore that the Petitioner's behaviour demonstrated his verbal, emotional and physical abuse on both her and the children of the family. She urged the Court

to grant the interim injunction pending the final determination of the main matter.

4.0 The Respondent's Arguments

4.1 At the hearing, Counsel for the Respondent relied on the Affidavit, Skeleton Arguments and List of Authorities filed on 21st July 2023. It was submitted by Counsel **that Section 101 (1) (a) and (b) of the Matrimonial Causes Act** confers power on this Court to grant an order of interim injunction. The cited provisions state as follows:

“100 (1) Without prejudice to any other powers of the Court, the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for other relief under this Act, grant an injunction or other order, as the case may be-

(a) for the personal protection of a party to the marriage or of any child of the marriage;

(b) restraining a party to the marriage from entering in the matrimonial home or the

premises in which the other party to the marriage resides, or restraining a party to a marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or which the is the location of the premises in which the other party to the marriage resides;”

4.2 Reference was also made to the case of ***Shell and BP Zambia Limited v Conidaris and Others***¹ by Counsel, who contended that for the Court to grant an interim injunction, the applicant must demonstrate a clear right to relief, irreparable damage and injury that cannot be atoned for by damages and a tilt of the balance of convenience in the Plaintiff's favour.

4.3 Counsel argued that there were serious issues to be determined at trial which were based on the Petitioner's unreasonable behaviour. It was argued that the Affidavit in support of this application revealed instances of sheer provocation, emotional abuse and blatant disregard for child health.

4.4 It was further submitted that the Petitioner, his niece Kamwengo Lyambalula and the farm worker Welody Mweemba disrupted peace at the matrimonial house. It was argued that the Petitioner had acted in offensive ways which caused the Respondent to suffer a great deal of distress and mental anguish, which had the potential to degenerate into physical fights, posing a threat of loss of life which cannot be atoned for by monetary award.

5.0 The Petitioner's Affidavit in Opposition

5.1 The Affidavit was sworn by the Petitioner. The Petitioner deposed that he had never threatened or inflicted violence on the Respondent or the children of the family and that the Respondent had not provided any proof to substantiate the allegation.

5.2 The Petitioner averred that he had not deserted the matrimonial home as he visited to see the children, and took them to church and to school, but that he had vacated due to perpetual differences with the Respondent which posed a serious threat to his life.

5.3 The Petitioner averred that he had not told his daughter that she was using her phone to practice prostitution like her

mother. He averred that he was always against their daughter having unlimited access to social media before completing school as it distracted her from school, and that the day he confiscated her phone, she was using it whilst in church where he discovered that she was chatting to different boys.

5.4 It was deposed by the Petitioner that he had not administered any drugs to his daughter as alleged by the Respondent. The Petitioner averred that he had been denied access to the child for a couple of weeks, and that the child was not attending school or church until he took her to the hospital for a medical check-up.

5.5 Additionally, the Petitioner deposed that he did not put the children in harm's way and averred that the person who prayed for the children was a known church elder who used clean salty water and had not given the children any substance as protection from witches.

5.6 Furthermore, the Petitioner averred that the irrigation drippers that were removed were the ones lying idle and that they were stored at the matrimonial house to prevent

damage, while the satellite dish was removed for repair purposes and had been reinstalled.

5.7 The Petitioner deposed that an injunction is an equitable remedy which ought not to be granted in the absence of compelling circumstances, and that Kamwango Lyambulula and Welody Mweemba are innocent third parties who should not be condemned unheard.

6.0 Petitioner's Arguments

6.1 At the hearing, Counsel for the Petitioner placed reliance on the Affidavit in opposition, Skeleton Arguments and List of Authorities dated 11th August 2023. Counsel submitted that interim injunctions are equitable remedies, and that the Court must guard against granting them in the absence of special and compelling circumstances and further submitted that the learned author of **Zambian Civil Procedure: Commentary and Cases on page 759** states as follows:

“imposing an interim injunction is a serious matter and should be restricted to appropriate cases. Interim injunctions are appropriate where there is cogent evidence

that the defendant's alleged wrong doing will cause irreparable damage to the Plaintiff in the period between the issues of the process and trial."

6.2 It was contended that the applicant ought to justify their claim for an interim injunction by proving convincingly that they would suffer substantial prejudice or hardship in a material aspect if an injunction was not granted. To this end, the case of ***Caliegnese Corporation v AK 30 Chemie UK Limited***² was cited, where it was stated that:

"The grant of interlocutory relief has always been considered the grant of relief of a somewhat exceptional character, and it is inappropriate to grant relief of that nature unless it's absolutely vital in order to protect the legitimate interests to the Plaintiff that such relief be granted."

6.3 Furthermore, reference was made to the case of ***Shamwana v Mwanawasa***³ where the following was stated:

"The bottom line is that any judge faced with an ex-parte application for an interim

injunction is duty bound not to gloss over such application. In particular, the judge must be satisfied that the situation revealed justifies an order on an urgent basis pending inter-parte hearing shortly thereafter.

6.4 Learned Counsel argued that the Respondent did not reveal compelling circumstances to grant an order of interim injunction. It was contended that there was no real urgency, irreparable damage or serious mischief suffered to warrant the order. In addition, the Petitioner argued that he who alleges must prove, and that there was no evidence of the Petitioner's verbal, emotional and physical abuse on the Respondent and the children of the family.

6.5 Finally, it was Counsel's submission that an application under Section 101 (1) of the Matrimonial Causes Act does not apply to third parties but applies only to parties to a marriage. It was argued that the ex-parte order that was granted condemned two innocent third parties, namely, Kamwengo Lyambulula and Welody Mweemba who were

evicted from the matrimonial house unheard, and in the case of the latter, it resulted in him losing his job.

7.0 Reply

7.1 In an Affidavit in reply dated 8th September 2023, the Respondent maintained what was previously averred in the Affidavit in support of the application.

8.0 Analysis and Determination

8.1 The application before me was made pursuant to **Section 101 (1) of the Matrimonial Causes Act** which provides thus:

“Without prejudice to any other powers of the Court, the Court may, upon application made by either party to the marriage whether or not an application has been made by either party for any other reliefs under this Act, grant an injunction or other order, as the case may be-

(a)for the personal protection of a party to the marriage or of any child of the marriage;

(b) restraining a party to the marriage from entering or remaining in the matrimonial home or the premises in which the other party to the marriage resides or restraining a party to the marriage from entering or remaining in a specified area, being an area in which the matrimonial home is, or which is the location of the premises in which the other party to the marriage resides;

(c) restraining a party to the marriage from entering the place of work of the other party to the marriage or restraining a party to the marriage from entering the place of work or the place of education of any child of the marriage;

(d) in relation to the property of a party to the marriage; or

(e) relating to the use or occupancy of the matrimonial

home.”

8.2 I have carefully considered the affidavit evidence, skeleton arguments, lists of authorities and oral submissions made by learned Counsel. This Court granted an interim injunction on an ex-parte application on 27th July 2023. The question for determination by this Court is whether or not the Respondent has shown sufficient reasons for the said injunction to be maintained.

8.3 In relation to what the Court should consider when determining interlocutory injunctions, I turn to the case of ***Mobil Oil Zambia Limited v Msiska***⁵ where it was held that:

"A court will not generally grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the Plaintiff from irreparable injury; mere inconvenience is not enough. Irreparable injury means injury which is substantial and can never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired."

8.4 I further turn to Paragraph 765 of the **Halsbury's Laws of England, 3rd Edition, Volume 21** where it is stated that:

“The Plaintiff must also as a rule show that an injunction order until the hearing is necessary to protect him against irreparable injury, mere inconvenience is not enough.”

8.5 From the cited authorities, it is clear that for an interim injunction to be granted, the party seeking the relief ought to show a clear right to relief and that irreparable injury will occur if the relief is not granted. It is also clear that mere inconvenience is not enough for the granting of an interim injunction.

8.6 In the case *in casu*, the irreparable damage that the Respondent is alleging is that there is a possibility of the parties degenerating into physical confrontations that may result in loss of life. However, there is no evidence that has been produced of any prior physical abuse between the parties. The evidence before the Court suggest annoyances or mere inconveniences due to the unfortunate adverse nature and circumstances surrounding the divorce

proceedings, which has resulted into a more fractured relationship between the parties who clearly can barely stand each other.

8.7 I further refer to the case of ***Ivy Simeza Nshindano v Kenneth Nshindano***⁴ where it was stated thus:

“For a Court to grant an injunction, there must be sufficient evidence presented before it at the time of the application that demonstrates that the failure to grant an injunction will cause the applicant to suffer extensive prejudice. To demonstrate this in matrimonial injunctions the applicant for an injunction may have to show that the other party to the marriage has been harassing, assaulting or molesting the applicant and that an injunction is necessary to prevent the offending party from continuing with the offensive behaviour...”

8.8 I reiterate that the circumstances in the case *in casu* do not rise to this standard. I find the evidence before this Court insufficient to maintain the interim injunction.

9.0 Conclusion

9.1 I order that the ex-parte interim injunction is hereby vacated.

9.2 Parties are informed of their right to appeal.

9.3 Costs in the cause.

Dated at Lusaka, this 26th Day of November, 2024.


M.M. Bah-Matandala
HIGH COURT JUDGE.

