

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
FAMILY COURT DIVISION  
HOLDEN AT LUSAKA**

**2023/HPF/D074**

*(Divorce Jurisdiction)*

**BETWEEN:**

**GERALD DINGISWAYO MWANZA**

**AND**

**JUANITA MUSENGE CHIPEPA MWANZA**



**PETITIONER**

**RESPONDENT**

*Before the Honourable Mrs. Justice M.M. Bah-Matandala  
Dated this 28<sup>th</sup> January 2025.*

*For the Petitioner:*

*Mrs. M. Phiri & Mrs. C. Katanegwa & Ms. M. Mushibwe Pro-Bona – Counsel Legal Aid Board.*

*For the Respondent:*

*Mr. E. Sitwaambo & Mrs. B.B. M. Nondo & Ms. M. Mukabonda Messrs. F.B. Nganguzgambo & Associates.*

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# **J U D G M E N T**

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**Legislation and Other Works Referred To:**

- 1. The matrimonial causes act No. 20 of 2007.*
- 2. Rayden and Jackson on Divorce and Family Matters 16<sup>th</sup> Edition, Butterworths.*
- 3. Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' &*
- 4. Magistrates' Courts, 11<sup>th</sup> Edition, London, Butterworths.*

**Cases Referred To:**

- 1. Brighton Soko vs Petronella Sakala Soko, - SCZ-8-189-2015*
- 2. Ash vs Ash (1972) 1. A.E.R. 582*
- 3. Mahande vs Mahande (1976) Z.R. 354 (S.C).*

## **1.0 INTRODUCTION**

1.1 This is a Petition for dissolution of marriage which was filed on 9<sup>th</sup> February 2023, pursuant to the provisions of

**section 8 and 9 (1)(b) of the Matrimonial Causes Act No. 20 of 2007** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

**Sections 8 and 9 (1) (b) of the Matrimonial Causes Act** provides that:

**“8. A petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.**

**9. (1) For purposes of section eight, the Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts**

**(b) that the respondent has behaved in such a way that the petitioner**

*cannot reasonably be expected to  
live with the respondent...”*

1.2 Further, **Section 9(2) of the Matrimonial Causes Act** provides that:

*“On a petition for divorce it shall be the  
duty of the Court to inquire so far as it  
reasonably can, into the facts alleged by the  
petitioner and into any facts alleged by the  
respondent.”* (Court’s emphasis)

## **2.0 BACKGROUND**

2.1 The Petition indicates that the Petitioner is namely **Gerald Dingiswayo Mwanza** who was lawfully married to the Respondent, **Juanita Musenge Chipepa Mwanza**, on the 11<sup>th</sup> December 1999 and the marriage was solemnized at Northmead Assembly of God Church in the City and Province of Lusaka of the Republic of Zambia.

2.2 The Parties last lived together as husband and wife at Kafue Estates, section 6 in the Kafue District in the City and Province of Lusaka of the Republic of Zambia.

- 2.3 The Petitioner is domiciled in Zambia whilst the Respondent is domiciled in South Africa.
- 2.4 The Petitioner is currently self employed and currently resides at Kakuzu Road, Kamwala in the Lusaka District of the Lusaka Province whilst the Respondent is a Teacher in the Employ of Paradigm Education Centre and currently resides at 22 Rivergate Glove Southgate Phoenix, Durban South Africa.
- 2.5 There have been no previous proceedings in any Court in Zambia or elsewhere, with reference to the marriage that are capable of affecting its validity or substance.
- 2.6 There are no proceedings continuing in any country outside Zambia which are in respect of the marriage or are capable of affecting its validity or subsistence.
- 2.7 There are Two (02) children of the family now living to the Petitioner and the Respondent namely;
- i Dingiswayo Issachar Mwanza born on 8<sup>th</sup> May 2001.*
  - ii Jemimah Grace Mwanza born on 23<sup>rd</sup> November 2013.*

2.8 No other child now living has been born to the Respondent during the marriage.

2.9 No agreement has been made between the Petitioner and the Respondent in relation to the maintenance of the children of the family.

2.10 The said marriage has broken down irretrievably.

### **3.0 THE PETITIONER'S CASE**

3.1 The Petitioner alleges that the marriage has broken down irretrievably as the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

3.2 The Petitioner has relied on **Section 8 and 9 (1) (b) of Matrimonial Causes Act**, which provides that irretrievable breakdown maybe proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner, or *vice visa* in the case of cross petition, cannot live with the Respondent.

3.3 **The Petitioner avers the particulars of unreasonable behavior herein are as follows;**

- i) *the Petitioner was domiciled and employed in Canada between 2005 to 2012 while the Respondent remained in Zambia with their son who was at the time their only child.*
- ii) *that the Respondent relocated to South Africa in 2006 and at the time the Petitioner was still working in Canada.*
- iii) *that during the aforesaid period the Petitioner would send the Respondent \$500 every week for upkeep and \$1000 in the last week of the month for rentals and upkeep.*
- iv) *that in 2012 the Petitioner rejoined his family in South Africa and it was then that he discovered that the Respondent had not saved any money from that which he sent weekly at the time he was in Canada.*
- v) *that when the Petitioner inquired about their financial resources the Respondent would become hostile.*

- vi) *that as a result the relationship between the Petitioner and the Respondent deteriorated.*
- vii) *that due to the fact that the Petitioner was no longer in employment, the Respondent grew cold towards the Petitioner because the finances stopped coming.*
- viii) *that during the subsistence of their marriage the Petitioner has on many occasions given the Respondent financial resources and the Respondent has failed to account for them.*
- ix) *that further, due to the Petitioner's state of unemployment the Respondent started asking for financial assistance from friends and family and this caused the Petitioner to suffer humiliation.*
- x) *that when the Petitioner confronted the Respondent, the Respondent justified her actions by stating that the Petitioner was unable to support his family financially.*

- xi) that further to his return from Canada the Petitioner had made numerous efforts to bond with with his son whom he had not seen for years but the Respondent prevented the Petitioner from doing so and as a consequence caused alienation between the Petitioner and his son.
- xii) that the Respondent is very insecure and would usually assume that every female associate of the Petitioner was a sexual partner of the Petitioner.
- xiii) that the Respondent has on many occasions accused the Petitioner of having extra marital affairs. One such incident included the Petitioner's young sister who was residing with them in South Africa.
- xiv) that as a result of the Respondent's allegation, the Petitioner's young sister had to leave the Petitioner and the Respondent's home after the Respondent chased her.

- xv) that since the preceding incident, the Respondent's relationship with the Petitioner's family soured.
- xvi) that somewhere around October 2021 the Respondent started denying the Petitioner conjugal rights and the parties have not enjoyed their conjugal rights to date.
- xvii) that during a conversation on Christmas day in December 2021 the Respondent mentioned to the Petitioner that it would be the last Christmas they would be spending together as a family.
- xviii) that the Petitioner and the Respondent have not had a civil conversation since February, 2022 due to the Respondent's inability to calmly reason with the Petitioner.
- xix) that during a family virtue meeting in November 2022, the Respondent consented to the dissolution of their marriage.

- xx) *that the Petitioner has suffered emotional and mental abuse over the years due to the behaviour of the Respondent.*
- xxi) *that the Petitioner and the Respondent have been counselled several times by the church and the family, but the counselling has yielded no positive results.*
- xxii) *that the Petitioner finds the Respondent's behaviour unreasonable as a result he has lost love, affection and trust for the Respondent and cannot continue being married to the Respondent.*

**3.4 The Petitioner therefore prays that;**

- i *the said marriage be dissolved.*
- ii *the Petitioner be granted custody of Jemimah Grace Mwanza a child of the family and liberal access be granted to the Respondent.*
- iii *Respondent maintains custody of the Dingiswayo Issachar Mwanza a child of*

*the family with liberal access to the  
Petitioner.*

*iv there be an order for maintenance of the  
children of the family.*

*v there be an order for property settlement.*

*vi each party bears their own costs*

*vii any other relief the Court may deem fit*

#### **4.0 ANSWER**

4.1 The Respondent filed an Answer to the Petition on 30<sup>th</sup> May 2023.

4.2 The Respondent admits paragraphs 1 to 9 of the Petition and admits that the marriage has broken down irretrievably although it has been averred that this has not been due to the Respondent but the Petitioner who has behaved in such a way that the Respondent cannot be reasonably expected to live with the Petitioner.

4.3 The Respondent has responded to the particulars of unreasonable behaviour as follows;

*i) The Respondent avers in relation paragraph  
10(i) that indeed the Petitioner was domiciled*

in Canada from 2005 to 2012. Nevertheless in 2005 both the Petitioner and Respondent were supposed to study in Canada although only the Petitioner's visa was issued. The Respondent averred that the Petitioner then went ahead and abandoned her and their child who was 2 years old then without a second thought. This happened shortly after the Petitioner got his pension from the bank.

ii) The Respondent averred that to this day she did not get to know how much the Petitioner received for pension although his family knew his finances and plans, whilst the Respondent was only told things at the last minute.

iii) In relation to paragraph 10(ii) the Respondent said the matrimonial home and vehicle she was using were both sold leaving her to remain destitute. She then had to move from house to house for her friends until she

*decided to move to South Africa in search of a better life for her and the son. There was no money coming from the Petitioner.*

*iv) In relation to paragraph 10(iii) and (iv) the Respondent states that the Petitioner's pay slips indicated his salary was between \$500 and \$1000 hence the Respondent disputes the Petitioner's claim that he was sending his alleged amount of money. The Petitioner is alleged to have been living a good lifestyle whilst the Respondent was battling with her life. The Respondent worked in South Africa to overcome the poverty for herself and the son.*

*v) The Petitioner averred that the sudden return of the Petitioner from Canada was shocking as prior to his return he only spoke to his son or his mother in Zambia so as to prove to the Petitioner that they were truly divorced. The Respondent stated that the Petitioner was*

only sending about 30 dollars and it was even a process to get the said money.

- vi) In relation to paragraph 10(v) and (vi) (vii) the Respondent denies the allegations and states that, the Petitioner did not bring anything when he returned to be with the Respondent in Durban.
- vii) She further states that the Petitioner is an abusive and controlling man. She said that at one time when he was desperate to live in Canada, he had suggested that the Respondent gets into a fake marriage with a random Canadian man.
- viii) The Respondent in relation to paragraph (xiii) averred that the Petitioner and his sister had an inappropriate relationship and that every time she complained about their relationship, the Petitioner would be unkind to her for weeks and would say that the Respondent was crazy and jealous.

- ix) *The Respondent has denied paragraph 10(xiv) and (v) and states that the Petitioner's sister was visiting the parties home due the pain she had in her hand for two weeks. The Respondent avers that she cared for the sister in law despite that she was working as well from 6am to 6pm. During this period the Respondent alleges that the Petitioner would give his sister money for shopping and to relax at malls but would refuse to provide for the family.*
- x) *The Respondent has denied paragraph 10(xvi) but avers that the Petitioner was not helping the Respondent financially despite having a 13<sup>th</sup> cheque and or having a salary which was twice than that of the Respondent. She avers that the Petitioner was a lot of work to handle.*
- xi) *In relation to paragraph 10(xviii) the Respondent avers that the relationship*

*between the parties is not civil and that whenever she has questioned him or tried to correct him about his behaviour he would not speak to her and would insult her and ill-treat her. And further said that it is the Petitioner who would always walk away from the family.*

*xii) The Respondent in in response to paragraph 10(xix) states that the Petitioner's family have not helped reconcile the parties and have not shown up at meetings to help the parties which act the Respondent has found humiliating and disrespectful. The Petitioner had said that he agreed with his family sentiments that the parties should not reconcile but go on separation.*

*xiii) The Respondent avers that it is the Petitioner who has behaved unreasonably such that the Respondent cannot be reasonably be expected to live with the Petitioner.*

4.4 The Respondent in the cross-petition avers that the marriage has broken down irretrievably due to the Petitioner's behaviour and the Respondent cannot reasonably be expected to live with him.

4.5 The Particulars of unreasonable behaviour are repeated as stated in the Answer herein save to add that the Petitioner has admitted in one of the family meetings to have gotten married to another woman whilst in Canada although the Petitioner alleges that the marriage was for purposes of documentations only.

4.6 The Respondent therefore prays

- i) That the marriage be dissolved*
- ii) The Respondent be granted custody of the children of the family and the Petitioner be given reasonable access*
- iii) That there be an order for maintenance of the children.*

## **5.0 HEARING**

5.1 At the hearing of the matter on the 16<sup>th</sup> January 2025 the Petitioner augmented his Petition by testifying on

oath that the marriage has broken down irretrievably on the basis of unreasonable behavior by the Respondent as stated in the Petition.

5.2 The Petitioner testified on oath in his own respect and did not call any witness. Further, he largely recited his averments in his Petition.

5.3 The Petitioner informed the Court that he relied on the contents on the Petition. And he wishes the Court to grant them a divorce.

5.4 The Respondent filed an Answer and Cross Petition on 30<sup>th</sup> May 2023 as already alluded to although she did not appear on the hearing date and the matter proceeded in her absence since there was no reason given for her absence.

## **6.0 SUBMISSIONS**

6.1 There were no submissions from both parties filed at the time of this judgment.

## **7.0 CONSIDERATIONS AND DECISION**

7.1 I have considered the Petitioners' pleadings and the oral testimony by the Petitioner.

- 7.2 Firstly, I take cognizance of the fact that the parties celebrated their civil marriage in the Republic of Zambia as evidenced by the marriage certificate exhibited in the Petition.
- 7.3 I therefore make a finding of the fact that the parties' marriage was celebrated in compliance with the **Marriage Act, Chapter 50 of the Laws of Zambia**. I am satisfied that the parties were properly married in compliance with the laws of the Republic of Zambia.
- 7.4 It is the presence of the marriage certificate which forms the basis of my jurisdiction over the Petition as the same shows that their marriage is not customary but *statutory*.
- 7.5 I have also taken cognizance of the position that the Petitioner is a resident of the Republic of Zambia and the Respondent is resident in the Republic of South Africa and for purposes of **Section 4(3) of the Matrimonial Causes Act**, which bestows jurisdiction on the High Court, to entertain a petition for dissolution of a statutory marriage, based on the residence or

domicile of one or both parties to the marriage. The provision states as follows;

***“The Court shall have jurisdiction in proceedings for divorce or for a decree of nullity of marriage if either party to the marriage...***

***(a) is domiciled in Zambia at the date of the commencement of the proceedings; or***

***(b) is resident in Zambia at the date of the commencement of the proceedings, and has been ordinarily so resident for a period of not less than twelve months immediately preceding that date.***

7.6 Furthermore, it is my finding that the Petition is properly before the Court because it was issued out of Court at least one year post the solemnization of the subject marriage. This is in view of **Section 6 of the Matrimonial Causes Act** concerning the timeframe within which a Petition for the dissolution of a marriage can be presented to the Court. The said provision

prescribes that a Petition for the dissolution of marriage can only be filed into Court after the lapse of one year from the date the marriage was contracted.

7.7 Based on the foregoing findings, it is my position that I have jurisdiction to entertain the present Petition.

7.8 I now turn to determine whether the marriage of the parties has broken down on ground of unreasonable behaviour.

7.9 As highlighted already, the Petitioner has indicated that the marriage has broken down irretrievably, and the Respondent has rebutted the allegations in her Answer to the alleged particulars of unreasonable behaviour.

7.10 I wish to begin by stating that the test to apply on whether the Respondent's behaviour was unreasonable to the Petitioner, and the eminent *author of Raydens Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts*, opined as follows at page 203 paragraph 25:

***“Nevertheless, in considering what is reasonable, the Court (in accordance with its***

*duty to inquire, so far as reasonably can, into the facts alleged) will have regard to the history of the marriage and to individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable; allowance will be made for the sensitive as well the think-skinned;...”*

7.11 The said eminent authors further opined at page 204, paragraph 26 as follows:

*“Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the Respondent.”*

7.12 In the Supreme Court of Zambia Judgment of **Brighton Soko vs Petronella Sakala Soko<sup>1</sup>, their Lordships** held as follows at page J28:

*“In taking the view which we have taken, we have paid careful attention to the reasoning which we have adopted in Mahande namely that when considering the Respondent’s behaviour in the context of a divorce petition founded on ‘unreasonable behaviour’ as enacted in Section 9 (1) of the Matrimonial Causes Act No. 20 of 2007, it is not just the behaviour of respondent which is decisive but, equally crucial and as much decisive, is the way in which such behaviour relates to or interests with the character, behaviour, personality, disposition and other traits and attributes of the particular petitioner involved.”* (Court’s emphasis)

7.13 In the same case, the Supreme Court of Zambia cited the English case of *Ash vs Ash* wherein it was stated in part by Bagnall, J at page 140 as follows:

*“the general question may be expended thus: Can this petitioner with his or her*

*character and personality, with his or her faults and other attributes, good and bad, having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?”*

7.14 The **Ash vs Ash**<sup>2</sup> case was also cited with approval in the Judgment of the Supreme Court of Zambia in **Mahande vs Mahande**<sup>3</sup>, wherein Cullinan, AJS., stated as follows:

*“...The following question then arises, to paraphrase the above words of Bagnall, J, and those of Ormrod, J, in Pheasant vs Pheasant (1972) 1 A.ER. at p. 591 at c to d; bearing in mind the petitioner’s fault and other attributes, good and bad, and having regards to her behaviour during the marriage, bearing in mind the characters and the difficulties of both parties, trying to be fair to both of them and expecting neither heroic virtue or selfless abnegation*

*from either, has the respondent then behaved in such way that the petitioner cannot reasonably be expected to live with him?”*

7.15 I have addressed my mind to **Section 13 of the Matrimonial Causes Act**, which provides that:

*“ where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent, but the parties to the marriage have lived with each other for a period or periods not exceeding six months after the date of the occurrence of the final incident relied on by the petitioner and held by the court to support the petitioner’s allegations, that fact shall be disregarded in determining for the purposes of paragraph (b) (1) of section nine whether the*

***petitioner cannot reasonably be expected to  
live with the respondent.”***

7.16 I am guided by the above authorities that as can be seen from the above, it is clear and it is my considered view, that the behaviour required to be proved, must be of such gravity that the party's powers of endurance are exhausted, to the point where it is clear that they cannot reasonably be expected to live with each other. The standard is an objective one or that of a reasonable man or woman

7.17 I have carefully considered the Petition for dissolution of marriage, as well as the *viva voce* evidence of the Petitioner. I am satisfied that the issue for determination is whether this marriage has broken down irretrievably due to the fact that the Respondent has behaved unreasonably such that the Petitioner cannot be expected to live with the her.

7.18 The Petitioner relied on his Petition and testimony. And an analysis of the aforesaid averments is that the Petitioner is fed up of the marriage for the reason that

the Respondent shows a total lack of affection, love and consideration for him and that she has been denying the Petitioner his conjugal rights. In the alleged circumstances the Petitioner finds the Respondent intolerable to live with.

7.19 Further the Respondent is alleged to have misused the finances that were sent to her whilst the Petitioner was in Canada. The parties have failed to resolve this issue and as such it remains unreconciled.

7.20 Moreover, the Petitioner has testified that the Respondent has been denying the Petitioner his conjugal rights hence the parties have not enjoyed their conjugal rights to date and also the Petitioner alleges that the Respondent is very insecure, as such she is always accusing the Petitioner of having an extra marital affair.

7.21 The record further reveals the rebuttals by the Respondent of some of the allegations against her in the Answer and Cross-Petition she filed. The Respondent has rebutted the particulars alleging unreasonable

behaviour on her part but instead stated that the marriage has broken down irretrievably due to the Petitioner's behaviour.

7.22 The Respondent's particular of unreasonable behaviour are that the Petitioner had abandoned her and the son when he left for Canada. She said he left her a destitute such that she had to move from one house to the other of friends until she had to move to the Republic of South Africa for a search at a good life since the Respondent had sold their matrimonial house and vehicle she was using. The Respondent also said he barely sent her any money to help her and the son thus disputing his allegation of sending money to her whilst in Canada.

7.23 The Respondent has also alleged inappropriate relationship between the Petitioner and his sister whom he is said to spend time with on the phone, in person and also gave money to for shopping but did not do so for the Respondent his wife. And further the Respondent has alleged that the Petitioner even married another woman in Canada whilst still married to. The

Respondent has all in all states that the marriage has broken down irretrievably such that she can longer be expected to live with the Petitioner due to his intolerable behaviour.

7.24 Consequently, on a totality of the evidence before me I find that the Petitioner and Respondent have on a balance of probability established that their marriage has broken down irretrievably due to the unreasonable behaviour stated above by both parties and as such each party states that they cannot reasonably be expected to live with each other.

7.25 I further find that the Petitioner and Respondent are *unharmonious* with each other and they each herein find it intolerable to live with each other.

7.26 Consequently, this marriage has broken down irretrievably. I accordingly grant the Petitioner and the Respondent a *decree nisi* and for *divorce* to be made absolute in 6 weeks from the date hereof.

7.27 I grant joint custody of the children to the Petitioner and the Respondent. The parties shall agree on how they

shall share custody jointly. In default of agreement the issue shall be referred to Mediation.

7.28 I refer property settlement, maintenance of the children to the Honourable Registrar upon application by either party.

7.29 Each party will bear their own costs herein.

**8.0** Leave to appeal is granted.

Dated Lusaka, 28<sup>th</sup> January, 2025.

