

**IN THE HIGH COURT FOR ZAMBIA
FAMILY & CHILDREN'S COURT DIVISION
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Divorce Jurisdiction)

2023/HPF/D257

BETWEEN:

ASLAM BANDA

AND

MIRRIAM BANDA BANDA



PETITIONER

RESPONDENT

***Before the Hon. Mrs. Justice M. M. Bah-Matandala
on this 20th May, 2024.***

For the Petitioner:

Ms. M. Mwaimbabo Messrs - Maria Never Legal Practitioners

For the Respondent:

*Mrs. Precious K. Chibwe Messrs – National Legal Aid Clinic
for Women.*

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. Marriage Act, Chapter 50 of the Laws of Zambia.*
- 2. Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia (MCA).*

CASES REFERRED TO:

- 1. Ash vs. Ash (1972) 1ALL ER 585*
- 2. Livingston -Stallard vs. Livingstone Stallard (1974) 2 ALL ER 766.*
- 3. O'Neil vs. O'Neil (1975) E.R 292.*

1.0 INTRODUCTION

1.1 This is a Petition filed into Court on 16th May 2023 by

Aslam Banda, the Petitioner herein, against ***Mirriam***

Banda Banda, the Respondent herein, for dissolution of marriage.

1.2 The Petitioner alleges that the marriage, which was lawfully solemnized on 8th June 2020, under the provisions of the **Marriage Act, Chapter 50 of the Laws of Zambia**, has broken down irretrievably. The Petition was filed pursuant to **Sections 8 and 9(I) (a) (b) of the Matrimonial Cause Act No. 20 of 2007 (MCA)**.

1.3 The facts alleged as leading to the irretrievable breakdown of the marriage is that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent.

2.0 THE PETITION

2.1 In the Petition, it was averred that the Petitioner and the Respondent were married on 8th June 2020 at the office of the Registrar of Marriages at the Lusaka Civic Centre in the Lusaka Province of the Republic of Zambia. And it was averred that after the celebration of the marriage, the Petitioner and the Respondent lived together as husband and wife at house No. 48 Kasonkomona Road, Woodlands

in the city and province of Lusaka in the Republic of Zambia.

2.2 Petitioner and the Respondent are both domiciled in Zambia.

2.3 The Petitioner is a Business man and resides at 123A Roma Ngwerere Road in Lusaka whilst the Respondent is also a Business lady and currently resides at Chilenje Kalomo Road in the Lusaka District of the Republic of Zambia.

2.4 The marriage has one (1) child namely;

*i Aiden Banda born on the 5th August 2021
and aged 3 years.*

2.5 There are no divorce proceedings in Zambia or elsewhere with reference to the same marriage or between the Petitioner and the Respondent with reference to any property of either or both.

2.6 There are no proceedings continuing in any country outside Zambia which are in respect of the said marriage or which are capable of affecting its validity or subsistence.

- 2.7 The parties have agreed that there shall be no support either party.
- 2.8 The Petitioner has alleged that the marriage has broken down irretrievably by reason of the fact that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent.
- 2.9 In the particulars of the Respondent's alleged adultery, it was stated that the Respondent committed adultery.
- 2.10 The particulars of adultery are as follows

I The Respondent fell pregnant in the year and gave birth to a male child who we named Aiden Banda.

ii That in 2021 the Respondent left the matrimonial home after a disagreement which the Petitioner and the Respondent had been having for some. The Respondent took the child of the family, all household goods apart from the Petitioner's clothes and a few kitchen utensils.

iii *That the Respondent continued to provide for the child of the family even after the Petitioner took the child from the matrimonial home, until the Respondent told the Petitioner that she no longer needed his support.*

iv *That this raised some suspicious in the Petitioner that he feared and he then took he child of the family for DNA test which test came back that there was a Zero% chance of the Petitioner being the father of the child of the family.*

4.0 THE PETITIONER THEREFORE PRAYS THAT;

- i the said marriage be dissolved*
- ii that the Respondent be granted full custody of the child*
- iii that there should be an order for property settlement*
- iv that each party bears their own costs*

v any other relief the court may deem fit

5.0 RESPONDENT 'S CASE

2.11 The Respondent did not file any responses and did not defend the petition.

6.0 HEARING

6.1 At the hearing on 28th November,2023, the Respondent was not present but was represented by her lawyers whom she gave instructions as to not to defend the petition.

6.2 In this regard, the Petitioner gave sworn evidence on his own behalf and didn't call any witness. In his evidence he confirmed all the material aspects of his Petition as outlined above.

6.3 The Petitioner has alluded to the reason for seeking for a divorce to the fact that he has not been living in good terms with the Respondent and he feels that they need to go their separate ways.

6.4 The Petitioner stated that Respondent has committed adultery.

- 6.5 Further the Petitioner averred that at some point the Respondent stopped him from supporting the child of which he started to suspect that the child may not be his and this prompted him to do a DNA test.
- 6.6 The Petitioner further indicated that after the DNA tests results come out it showed zero (0%) probability of paternity, meaning the Petitioner is not the father of the child of the family.
- 6.7 In conclusion, the Petitioner repeated the prayer in his Petition.
- 6.8 There was no cross-examination.
- 6.9 The Respondent did not give any evidence as she did not file any answer to the petition at the hearing. The Petition was uncontested.
- 6.10 No written submissions were filed into Court by either party at the close of the trial hearing.

7.0 CONSIDERATION AND DECISION

- 7.1 I have considered the Petition by the Petitioner, the evidence of the Petitioner and the documents on record.
- 7.2 As already stated above, this Petition is undefended as the Respondent did not defend the petition at the hearing of the Petition and did not file an Answer.
- 7.3 From the contents of the Petition, the Petitioner's evidence and the Certificate of Marriage filed together with the Petition which has been exhibited herein, I am satisfied that the Petitioner and the Respondent were married on 8th June 2020, at the office of the Registrar of Marriages at the Lusaka Civic Centre, in city and province of Lusaka of the Republic of Zambia, under the provisions of the **Marriage Act**.
- 7.4 I am also satisfied that both the Petitioner and the Respondent are domiciled in Zambia.
- 7.5 The question, therefore, is: has the Petitioner proved the fact alleged as leading to the irretrievable breakdown of the marriage, that is, that the Respondent has committed adultery and the Petitioner finds it intolerable to live with the Respondent?

7.6 In answering this question, I wish to begin by reminding myself that under **Section 8 of the Matrimonial Causes Act**, there is only one ground upon which a Statutory Marriage may be dissolved, namely, that *the marriage has broken down irretrievably*. Further, irretrievable breakdown of marriage can only be established by one or more of the facts stipulated under **Section 9 (1) of the Matrimonial Causes Act**. The portion relevant to this case reads as follows:

“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.

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.”

7.7 From the provision quoted above, it is clear that, where adultery is alleged in a divorce Petition, the Petitioner must prove two elements.

7.8 Firstly, that the Respondent has committed adultery during the subsistence of the marriage. Secondly, that, as a result of the adultery committed, the Petitioner finds it intolerable to live with the Respondent.

7.9 In the current case, the Petitioner has anchored his Petition on his evidence that during the course of the marriage, the Respondent has had an adulterous relationship and that he has believed so from the results of the DNA test that indicate that he is not the father of the child. This fact according to him confirms that the Respondent committed adultery.

7.10 Based on the Petitioner's evidence at this point, the question is: Has the Petitioner proved that the Respondent

has committed adultery during the subsistence of the marriage and has the Respondent behaved in such a way that the Petitioner cannot live with her.

7.11 In answering the first question, I have considered the Petitioner's evidence of the DNA test results, which shows that the Petitioner is not the father of the child of the family. Therefore, in terms of **Section 9 (1) (a) of the Matrimonial Causes Act**, I find that the Petitioner has proved that the Respondent committed adultery during the subsistence of the marriage, the Respondent even had a child during their marriage.

7.12 This Court had further made an order for a repeated DNA test and the results have further shown that the child in issue is excluded from being a child of either parties herein. This act I find is an unreasonable behaviour and on the basis of this unreasonable behaviour the Petitioner cannot be expected to live with the Respondent.

7.13 The next question is, has the Petitioner proved that, as a result of the adultery committed by the Respondent and coupled with the unreasonable behaviour of being

untruthful, shown in the particulars and the results for the DNA test, the Petitioner finds it intolerable to live with the Respondent?

7.14 In answering this question, I have referred to **Section 12 (1) of the Matrimonial Causes Act** which provides as follows:

“For the purposes of paragraph (a) of subsection (1) of section nine, a petitioner shall not be entitled to rely on adultery committed by the respondent if, after it became known to the petitioner that the respondent had committed adultery, the parties have lived with each other for a period exceeding, or periods together exceeding, six months.”

7.15 From the provision quoted above, it is clear that, where adultery is alleged against a Respondent and or unreasonable and untruthful behaviour, a Petitioner cannot be granted a *decree dissolving the marriage* if, from the date that the Petitioner became aware of this fact, the

Petitioner has continued to live with the Respondent for a period exceeding six months before the presentation of the Petition for dissolution of the marriage.

7.16 In the current case, I have considered the Petitioner's evidence indicating that he had discovered the fact that the Respondent had committed adultery as established by the results of the DNA test that he was not the father of the child of the family. And that the Respondent upon being confronted over the issue she has since moved out of the matrimonial home. I must add that this evidence was not challenged by the Respondent at the hearing because she didn't defend the Petition.

7.17 I have also carefully studied the record in this matter which shows that this Petition was filed on 16th May 2023, wherein the Petitioner said that the Respondent had committed adultery. This establishes that the facts have confirmed the provision in section 12(1) stated above. Therefore, in terms of **Section 12 (1) of the Matrimonial Causes Act**, I find that the Petitioner has proved on a balance of probability that he finds it intolerable to live

with the Respondent. The Petitioner has testified that Respondent has been continually and repeatedly committing adultery until the filing of the Petition. The relationship is on-going even at the time of the hearing of the said Petition. The evidence was also not discredited in cross examination.

7.18 The test applicable in determining whether a party would find unreasonable to live with the other party was spelled out by Bagnail J. in the case of **Ash vs. Ash** that:

“The phrase “cannot reasonably be expected to live with the respondent” necessarily poses an objective test and “the petitioner” means the particular petitioner in the case under consideration, bearing in mind the petitioner’s faults and other attributes, good and bad, and having regard to her behaviour during the marriage.”

7.19 Further, it was observed in the above case that the Court must consider:

‘The effect of the behaviour on the particular petitioner and ask the question: is it established, not that she is tired of the respondent or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him?’

7.20 Based on the foregoing case law, I ask myself the questions asked by Dunn J in the case of ***Livingstone-Stallard vs. Livingstons Stallard***² and adopted the Court of Appeal in the case of ***O’Neil vs. O’ Neil***³ and which is echoed in the above cited cases that:

‘Would any right-thinking person come to the conclusion that this wife has behaved in such a way that this husband cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?’

7.21 In the case at hand the Respondent has not contested the particulars of her behaviour. I am herein inclined

to believe the evidence of the Petitioner having observed his *demeanor* during trial as he testified on the said particulars of Adultery. The particulars tie in with the evidence an adulterous relationship in most respect. In this regard, the Petitioner had proved this allegation of Adultery, as facts and I find so.

7.22 Consequently, on the basis of the Petitioner's undefended Petition, the totality of the Petitioner's unchallenged evidence, the authorities I have referred to above, and considering all the circumstances of this case, I find that the Petitioner has proved that the marriage between the Petitioner and the Respondent has broken down irretrievably by reason of the fact that the Respondent has committed adultery and lied about the paternity of the child in issue. The Respondent has behaved unreasonably such that the Petitioner finds it intolerable to live with her.

7.23 I accordingly declare that the said marriage be dissolved and grant a *decree nisi* to the Petitioner pursuant to **Section 41 of the Matrimonial Causes Act**. I also order that the *decree nisi* shall become absolute after the

prescribed statutory period of six weeks from the date of this Judgment unless cause is shown why the same cannot be made absolute.

7.24 I shall not make any order as to the custody of the child since the DNA results herein regarding the child show that the child does not belong to either of the parties. The subject of the child is under an investigation by the relevant authorities.

7.25 The parties are at liberty to apply for property settlement and maintenance to the Deputy Director for determination.

8.0 Each party shall bear their own costs.

Delivered at Lusaka, this 20th May, 2024.


M.M. Bah-Matandala
HIGH COURT JUDGE

