

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

2024/HPF/D426

(Divorce Jurisdiction)

BETWEEN:

TAONGA JOY PHIRI

AND

BOYD MWILA MWILA



PETITIONER

RESPONDENT

***Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 22nd November, 2024.***

For the Applicant:

Ms. C. Shimaluba- National Legal Aid Clinic for Women.

For the Respondent:

In Person

J U D G M E N T

Legislation and Other Works Referred To:

1. *The matrimonial causes act no. 20 of 2007.*
2. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths.*
3. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' &*
4. *Magistrates' Courts, 11th 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 11th July, 2024, 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 ***Taonga Joy Phiri*** who was lawfully married to the Respondent, ***Boyd Mwila Mwila***, on the 11th July 2008 at St. Ignatius Church in the City and Province of Lusaka of the Republic of Zambia.

2.2 The Parties immediately lived as husband and wife in Sweden. The Parties last lived as Husband and Wife at plot No. 6947 Meanwood while the Respondent is a retired footballer and currently resides at plot No. 6947 Meanwood Kwamwena in the City and Province of

Lusaka of the Republic of Zambia. Both the Petitioner and Respondent are domiciled in the Republic of Zambia.

2.3 There are two (2) children of the family now living namely;

i Nathaniel Muko Mwila (male) born on the 19th August, 2010 now aged 13 years.

ii Emily Watipa Mwila (female) born on the 7th February, 2014 now aged 10 years.

2.4 There are no children born to the Respondent during the subsistence of the marriage as far as is known to the Petitioner.

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 No agreement has been made between the Petitioner and the Respondent in relation to the maintenance of either party to these proceedings or property sharing.
- 2.8 The Petitioner has further submitted that the said marriage has broken down irretrievably.
- 2.9 The Petitioner has alleged that Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

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 Respondent is physically abusive, and that sometime in March, 2022 the Respondent saw the Petitioner talking to a male colleague from work. Upon seeing them, the Respondent intentionally attempted to run the Petitioner over with his car. Afterwards the Respondent slapped the Petitioner so hard on her face. The Petitioner reported the matter to Meanwood Kwamwena Police station where the Respondent was locked up for the night and released the following day.*
- ii) *the Respondent has tendency of issuing death threats towards the Petitioner. The Petitioner stated that she will show at trial that the Respondent constantly sends messages that hint to the fact that he would kill her. He threatens to hit and kill her even*

*in the presence of the children of the family.
As a result of this unreasonable behaviour
the Petitioner is now in fear of emanate
danger of her life.*

- iii) sometime in May, 2024, the Petitioner left
the matrimonial home as a result of the
Respondent's unreasonable behaviour
which she could not tolerate anymore. In a
quest to know the Petitioner's whereabouts,
the Respondent has been stalking the
Petitioner's family members.*
- iv) the Petitioner will aver at trial that after she
left the matrimonial home in May, 2024, the
Respondent went to her sister's house on the
21st June, 2024 in an attempt to force the
Petitioner back to the matrimonial house.
The Petitioner will show at trial that the
Respondent caused commotion at the
residence of her sister and caused malicious
damage to property at the aforesaid*

residence. He did so by breaking the gate and destroying the panels of the gate.

v) the Respondent is verbally, emotionally and mentally abusive towards the Petitioner. He shames the Petitioner and is fond of using demeaning words towards her.

vi) the Respondent has a tendency of leaving the matrimonial house and coming back at very late hours. He leaves the house and does not communicate to the Petitioner about his whereabouts. The Petitioner avers that this usually causes stress on her as she is usually left wondering as to the whereabouts of the Respondent is.

vii) the Respondent is financially irresponsible. He has developed a gambling habit which has led to him misusing money needed to cater for the needs of the family. The Petitioner will aver at trial that there has been a number of incidences where the

Respondent misused money as a result of his gambling habit.

viii) as a consequence of his gambling habit, the Respondent does not financially provide for the family. His lack of effort in making a contribution towards the maintenance of the family has taken a tow on the Petitioner as she is struggling to solely cater for the needs of the family.

ix) the Respondent has developed a relaxed attitude towards religion and spirituality and refuses to go to Church with the Petitioner. The Petitioner finds this intolerable as she was brought up in a Christian home where she believes in the religion and spirituality.

x) the Parties have undergone professional counselling and have attempted to reconcile but to no avail. There is no hope resuming cohabitation.

3.4 The Petitioner therefore prays that;

- i the said marriage be dissolved.*
- ii the Petitioner be granted custody of the children of the family with reasonable access to the Respondent.*
- iii there be an order for maintenance of the children of the family.*
- iv there be an Order for property settlement.*
- v each party bears their own costs.*

4.0 ANSWER

4.1 The Respondent did not file an Answer to the Petition though he acknowledged the service of the Petition and he indicated that he was not going to defend the Petition.

5.0 HEARING

5.1 At the hearing of the matter on the 11th November 2024 the Petitioner augmented her 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 her own respect and did not call any other witness. Further, she largely recited her averments in her Petition. For avoidance of repetition, I shall only highlight issues he did not aver in the Petition.
- 5.3 The Petitioner informed the Court that Respondent has been in the habit of gambling which has caused the parties to lose money, besides that he would have nights somewhere and his phone will be unreachable. Consequently, it was further submitted that the Respondent has not been supporting the family financially.
- 5.4 In May 2024 the Petitioner had a trip to Copperbelt and asked the Respondent if he can remain with the children and take care of them but the Respondent refused to do that saying that he will not manage. The Petitioner took the kids to her sister and brother's where they had to stay.
- 5.5 When the Petitioner wanted to return, she sent the messages to him that she was returning back, in

response the Respondent asked the Petitioner not to return otherwise he was going to kill her.

5.6 The Threats went on for about a week hence the Petitioner found a flat near her sister's place and moved in with the children. At the end of the same week the Respondent made a follow up at the Petitioner's sister house since he thought the Petitioner and the children were still staying there and started making noise. The Petitioner was only called by her brother who narrated what happened at their house.

5.7 The Petitioner further alluded that it has been emotionally and stressful staying with the Respondent that she cannot continue to live with him.

5.8 There was no evidence from the Respondent since the Respondent did not file an Answer to the Petition despite confirming that he was served with the process. He went on to indicate that he would not intend to defend the Petition.

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 and the Respondent are both resident in the Republic of Zambia 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 regrettably the Respondent has not rebutted the allegations.

7.10 I wish to begin by stating that the test to apply on whether the Respondent's behaviour was unreasonable to the Petitioner, 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 thick-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 Soko¹**, 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**² case was also cited with approval in the Judgment of the Supreme Court of Zambia in ***Mahande vs Mahande***³, 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 him.

7.18 The Petitioner relied on her Petition and testimony. And an analysis of the aforesaid averments is that the Petitioner is feed up with the marriage for the reason that the Respondent has been issuing threats for a continuous period such that she now lives in fear of him and further it is his habit of gambling which has resulted in the family being deprived financially. And this action has also made the Respondent to fail to support the family financially.

7.19 The Respondent did not rebut the Petition since he did not file an Answer.

7.20 Therefore, given the aforesaid, and in consideration of the fact that the basis of decision making in such circumstances is based on an objective test of a reasonable man or woman, I am satisfied that there has

been unreasonable behaviour by the Respondent, as established in the evidence by Petitioner. Thus, the Petitioner feels that it would be wrong to continue with the marriage.

7.21 Further the Petitioner has testified that the Respondent has been verbally abusive towards her and does not respect the Petitioner completely. I find this behaviour by the Respondent to be unreasonable and unacceptable behaviour.

7.22 Consequently, on a totality of the evidence before me I find that the Petitioner has on a balance of probability established that the marriage has broken down irretrievably due to the unreasonable behaviour of the Respondent who has behaved in such a manner that the Petitioner cannot reasonably be expected to live with him.

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

7.24 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.

7.25 I grant custody of the children of the family to the Petitioner with reasonable access to the Respondent.

7.26 I refer child maintenance and property settlement requests to the Honourable Registrar upon application by either party.

7.27 Each party will bear their own costs herein.

8.0 Leave to appeal is granted.

Dated Lusaka, this 22nd November, 2024.


M.M. Bah-Matandala
HIGH COURT JUDGE

