

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

2021/HPF/D174

BETWEEN:

MOONGA CHICHY CHOONGO

AND

IGNATIUS MKANGA TEMBO



PETITIONER

RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE W. S. MWEEMBA AT LUSAKA.

For the Petitioner: Ms. M.C. Choongo (In Person).

For the Respondent: Mr. J.K. Matende – Messrs Legal Aid Board.

J U D G M E N T

LEGISLATION REFERRED TO:

1. *The Matrimonial Causes Act, No. 20 of 2007 of the Laws of Zambia.*

CASES REFFERED TO:

1. *Mahande v Mahande (1976) ZR 287.*
2. *Thurlow V. Thurlow (1975) 2 ALL E.R. 979.*

WORKS REFERRED TO:

1. *Passingham, Law and Practice in Matrimonial Causes (3rd Ed), London: Butterworths (1979).*

Moonga Chichy Choongo (the Petitioner) filed a Petition for Dissolution of Marriage on 9th April, 2021 seeking to dissolve her marriage to **Ignatius Mkanga Tembo** (the Respondent).

The Petition was launched pursuant to **Section 8 and Section 9 (1) (b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia.**

The Petition reveals that the Petitioner was married to the Respondent on 24th August, 2016 at the Office of the Registrar at Civic Center in the City and Province of Lusaka of the Republic of Zambia; that both parties are domiciled in Zambia; that the Petitioner and the Respondent last lived together as wife and husband at Plot No. 16737, Kamwala South, Lusaka aforesaid; that the Petitioner is an Economist by profession and residing at Plot No. 16737, Kamwala South, Lusaka while the Respondent is a self-employed Accountant residing at Plot No. 10622, Lilayi Road, Lusaka.

The Petition further reveals that there is one child of the family now living, namely **Raphael Tembo**, a male, born on 24th October, 2016.

The Petition also reveals that there is one child born to the Petitioner before the marriage, namely **Chibwe Russel Sampa**, a Male, born on the 13th January, 2008.

It goes on to show that there are also two male children born to the Respondent before the marriage, namely;

1. **Leon Mkanga Tembo**, a Male, born on 13th March, 2012.
2. **Tawanda Alex Tembo**, a Male, born on 2nd March, 2010.

The Petition also reveals that there have been previous proceedings in the Subordinate Court instituted by the Respondent under *Cause*

Number 2021/CRMP/306 where he sought for an order for property settlement.

There are no proceedings continuing in any Court or Country outside Zambia which are, in respect of the marriage capable of affecting its validity or subsistence. No agreement or arrangement has been made, or is proposed to be made between the parties for the support of the Petitioner or Respondent.

The Petitioner alleges the irretrievable breakdown of the marriage on the ground that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him. The Petitioner cited the following particulars of the Respondent's unreasonable behaviour as follows. That:

- i. The Respondent is a perpetual womanizer who has engaged in extra-marital affairs with both single and married women during the subsistence of their marriage.
- ii. On or about the year 2019, the Petitioner discovered that the Respondent was engaged in an affair with a married woman whose husband in fact sought the Petitioner's help to salvage their marriage and a meeting was held where the married woman confirmed this fact in her husband's presence.
- iii. The Respondent had a tendency of keeping late nights when he went out drinking sprees and would return home in the early hours of 03.00AM and 05.00AM with women's handbags, wigs and shoes.

- iv. That each time he got back late, he would play loud music, disturb neighbors and wake up the Petitioner to open the gate which disturbed her as she had to wake up early to go for work.
- v. That during one family reconciliation meeting held on 20th February, 2021, the Respondent admitted having committed these transgressions.
- vi. The Respondent had not been supportive of the Petitioner's career development and business activities which maintained the family's daily needs. The Respondent would use his own financial resources to invest in his private ventures and drinking escapades.
- vii. That the Respondent and his mother had purchased a farm and cattle in Mazabuka without her knowledge.
- viii. The Respondent had been insisting on having a share in the Petitioner's business property situated at Plot No. 14770/M in Lilayi which she purchased with her mother who had been her business partner from 2013. Furthermore, that the Petitioner and her mother had been developing the property from 2018 without the Respondent's support.
- ix. The Respondent had only lived on the property in January, 2021 for a short period in isolation from Covid-19 but had now taken advantage to claim the property which had disturbed the business and destabilized their intention to repay subsisting loans and other liabilities.
- x. That the Petitioner recently discovered that the Respondent had vacated the premises but had changed the locks without the

Petitioner's knowledge, thereby restricting her access to the property.

The Petitioner prayed for the following;

- i. *That the marriage be dissolved;*
- ii. *That the Petitioner continue to have custody of the child of the family with reasonable access being granted to the Respondent.*
- iii. *That the Court makes an order that each party keeps their own separate interests in their respective properties the Events Centre in Lilayi and the Farm in Mazabuka without variation of interests therein.*
- iv. *In the alternative to 3 above, a declaration that the said property in Lilayi which the Petitioner co-owns with her business partner, her mother, does not constitute matrimonial property as it was never intended to be such at the time of purchase.*
- v. *Any other reliefs the Court may deem fit.*
- vi. *That each party bears their own costs.*

There was an Answer and Cross - Petition filed by the Respondent dated 29th April, 2021. In his Answer, he admitted that the marriage had broken irretrievably but not for reasons given by the Petitioner. In relation to the particulars of unreasonable behaviour, as alleged by the Petitioner, the Respondent disputes paragraphs (i) to (viii). Further, the Respondent disputes paragraph (ix) and states that on or about February, 2021 he discovered that the Petitioner attempted to fraudulently change the documents relating to the property jointly acquired namely Plot No. 14770/M Lilayi to make it seem as though she acquired it with her mother and that he had since engaged the Petitioner to resolve the issue amicably which had however been futile

as she vehemently resisted and resorted to concoct stories to bar the Respondent from accessing the property.

The Respondent further averred that he vacated the premises after staying there from January, 2021 to 9th April, 2021 when the Petitioner removed his property and changed the locks in his absence. Moreover, that the Respondent gave the Petitioner money to develop the property and he had receipts although the Petitioner had hidden and destroyed them. He went on to state that the fixtures and fittings on the business property were from the Respondent's previous bar business in Chawama.

In his Cross-Petition, the Respondent admitted that the marriage had broke down irretrievably but not for the reasons alleged by the Petitioner but due to the Petitioner's unreasonable behaviour.

The Respondent cited the particulars of the unreasonable behaviour of the Petitioner as follows:

- i. The Petitioner attempted to fraudulently change the documents relating to their jointly acquired property namely, Plot No. 14770/M Lilayi and was masking it as a business property which belonged to her and the mother.
- ii. In April, 2021, the Respondent asked the Petitioner why she had placed her mother's name on the contract of sale and ZESCO account of the jointly owned property and the Petitioner chased him from their matrimonial home and rejected counselling.

- iii. The Petitioner has made it difficult for the Respondent to spend time with their son and from January 2021 till date, he had only spent a maximum of 5 hours with his son.
- iv. The Petitioner had been verbally and emotionally abusive towards the Respondent from September, 2020 when his contract of employment ended.
- v. That the Petitioner left their home from 29th December, 2020 to 3rd January, 2021 with an unnamed gentleman yet she pretended that she had gone for work, which fact she admitted at a family meeting held on 20th February, 2021.
- vi. On or about 9th April, 2021, the Petitioner went to Lilayi where she forcefully opened the Respondent's apartment and removed all his belongings and an envelope containing \$5, 000.00 went missing and he had since reported this to the police. Further, that the Respondent had been unable to travel for business because the Petitioner had his passport and refused to return it.

The Respondent prayed for the following;

- i. *That the Prayer in the Petitioner's Petition be dismissed;*
- ii. *That the marriage be dissolved;*
- iii. *The Respondent and the Petitioner be granted joint custody of the child of the family;*
- iv. *That the Court makes an Order as to property settlement;*
- v. *The Petitioner be condemned to pay costs of and incidental to this suit;*
- vi. *Any other relief the court may deem fit.*

In her Reply to the Answer and Cross-Petition filed by the Petitioner on 1st November, 2021, she maintained that the marriage has broken down but not due to her unreasonable behaviour as alleged by the Respondent. Furthermore, she averred that Plot No. 14770/M Lilayi was solely purchased by the Petitioner and her mother for business purposes without any financial support from the Respondent and which business has been operating for several years. That the said property had been the subject of litigation which was commenced by the Respondent against the Petitioner and her mother in the Subordinate Court under *Cause Number 2021/CRMP/306*. That the Respondent subsequently discontinued the matter unilaterally and voluntarily on 9th April, 2021.

It was further deposed that the Respondent had bought his own farm and livestock in partnership which business he had not disclosed to the Petitioner.

The Petitioner denied having chased the Respondent out of their matrimonial home. She testified that he moved out of their home to go and live in Lilayi when he was in quarantine and he only surrendered his keys to the matrimonial home on or about 22nd May, 2021.

The Petitioner stated that it was not true that the Respondent had only spent 5 hours with their child because he was at liberty to access the child of the family whenever he desired even though he did not support the child in any way. Moreover, that she only denied him access to the child on one occasion when he wanted to travel to Kafue while the child was unwell and was receiving treatment.

Furthermore, the Petitioner stated that the Respondent thought he was being abused whenever she asked him for contributions towards their family upkeep since he repeatedly engaged in extra-marital affairs and kept late nights after his drinking escapades.

The Petitioner denies having admitted to leaving her matrimonial home from 29th December, 2020 to 3rd January, 2021 with an unnamed gentleman. She averred that her line of work required that she travel often. Further, that the matter regarding the \$5, 000.00 was a subject of police investigations and she had never stolen such money.

She finally averred that contrary to his allegations, the Respondent collected his passport together with all his belongings from the matrimonial home on 22nd May, 2021.

At the hearing of the matter on 21st March, 2022, both parties were before Court and the Respondent was represented by Mr Matende.

The Petitioner relied on her Petition for dissolution of marriage and the Reply to the Answer and Cross-Petition. In addition, she testified that the marriage had broken down irretrievably and that the only outstanding issue related to property settlement. It was her evidence in chief, that she last lived with the Respondent in January, 2021 and she had no intention to resume cohabitation with him.

During Cross-Examination, the Petitioner maintained that the marriage had broken down irretrievably and that the Respondent left their matrimonial home in January, 2021 and it was not because she had evicted him. She further testified that she did not deny the Respondent access to his passport. The Petitioner also testified that

the Respondent was running a bar in Chawama but did not know whether it was open until 06.00AM in the morning. Furthermore, she told the Court that Plot No. 14770/M Lilayi was not owned or registered in any business name.

During re-examination, she maintained that the Respondent left the matrimonial house on his own and not because he was evicted by the Petitioner or her mother. Furthermore, that although the bar in Chawama ceased operations around late 2019 and early 2020, the Respondent continued coming home late.

This marked the end of the Petitioner's case.

The Respondent on the other hand, told the Court that he relied on the Answer and Cross-Petition which were filed into Court on 29th April, 2021. Additionally, he testified that he did in fact have an affair outside the marriage and 3 family meetings were held to discuss their marital disputes. He admitted having hooted when he returned home late because he did not have the house keys and that after the bar ceased operations, the latest he had returned home was at 03:00 AM.

This marked the end of the Respondent's case.

The Petitioner also filed some written submissions into Court on 4th April, 2022. The gist of her submissions is that it was clear that there was an admission of the allegations of unreasonable behavior on the part of the Respondent. That this unreasonable behaviour had led to a total breakdown of the marriage between the parties and the Petitioner had lost all affection and attachment to the Respondent and she could no longer live with him.

The Petitioner relied on the case of **MAHANDE V MAHANDE [1]** which brought out the objective test for unreasonable behaviour in a divorce.

She finally submitted that the irrational and undisputed infidelity of the Respondent, lack of reasonable provision and responsibility as a husband and father in a home as well as his late night escapades had drifted the parties apart as such behavior was foreign to her moral values, personal development and wellbeing.

The Petitioner and the Respondent have both petitioned this Court to dissolve their marriage on the ground of unreasonable behaviour.

Section 9 (1) (b) of The Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia on which this petition was premised provides that a marriage can break down irretrievably on the ground of unreasonable behaviour. It provides as follows:

“(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: that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent”

Regarding the applicable test to determine whether or not there has been *unreasonable behaviour* in this matter, I am guided by the definition of the phrase as set out by the learned author Passingham, in his book, ***Law and Practice in Matrimonial Causes*** as follows:

“the Courts have refrained from any attempt at an exhaustive definition of behaviour...Each case raises a question of fact and degree may depend on the personalities of the parties...the phrase “cannot reasonably be expected to live with the Respondent,” poses an objective test...But the words “the Petitioner” and “the Respondent” do not refer to ordinary reasonable spouses who are placed in that position, but to the actual persons concerned in the case.”

I further considered the case of **MAHANDE V MAHANDE [1]**, where Cullinan, AJS extended this argument further with specific reference to the question, whether the Petitioner can or cannot reasonably be expected to live with the Respondent. He stated as follows:

“I have to consider not only the behaviours of the Respondent as alleged...but the character, personality, disposition and the behaviour of the Petitioner. The general question may be expanded thus: Can this Petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?”

In the case of **THURLOW V. THURLOW [2]**, the Court in deciding the question of "unreasonable behaviour" held that: -

"In order to establish that a Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with the Respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the Petitioner to cohabit with the Respondent. It had to be shown that it was the Respondent's behaviour which justified a conclusion by the Court that the Petitioner could not reasonably be expected to endure cohabitation."

Having been guided by the above authorities it is clear that the behaviour required to be proved must be to the point where it is evident that parties cannot reasonably be expected to live with each other.

I have carefully considered all the evidence before me. It is clear, that the issue to be determined is whether this marriage has broken down irretrievably on the ground of unreasonable behaviour. In other words, whether one party has behaved unreasonably such that the other party cannot be expected to live with them.

The Petitioner has testified that she can no longer live with the Respondent due to his perpetual womanizing, and extra marital affairs and his late nights which caused disturbance not only to her but to their neighbours. That the Respondent has not supported her career and business and has instead wasted his finances on private investments and drinking sprees. That the Respondent has been insisting on jointly owning the business property which she already owned with her mother and business partner after he stayed there

briefly during his covid 19 quarantine. That this has disturbed their intentions to finalize its development with a view to repay their subsisting loans. The Petitioner also produced proof of *whatsapp* messages between the Respondent and a female he was having an extra marital affair with and he also admitted having had an affair, and that he had been returning home late.

The Respondent on the other hand has told this Court that the marriage should be dissolved on account of the Petitioner's unreasonable behavior which has been characterized by the Petitioner attempting to fraudulently change the documents relating to their jointly acquired property into her names as well as those of her mother.

That the Petitioner had made it difficult for him to spend time with his son and that she had been verbally and emotionally abusive from September, 2020 when his contract ended. That she had left home with a gentleman after pretending that she had gone for work from 29th December, 2020 to 3rd January, 2021. That on 9th April, 2021 the Petitioner had forcefully removed his belongings from his apartment and he lost \$5,000 and that she was holding onto his passport.

After analyzing the evidence that both parties adduced before me, it is my considered view that the marriage has broken down irretrievably on account of the Respondent's behaviour. The Petitioner produced a *whatsapp* conversation between the Respondent and a female which shows that he had an affair. Moreover, during the Hearing, the Respondent admitted having had an affair and that he returned home late. The Respondent on the other hand did not substantiate his

claims with any evidence and the Petitioner disputed all his claims. I have further noted that the parties herein have lived apart from January, 2021 and neither of them has any intention of resuming cohabitation. The parties have clearly lost their love and affection for each other and cannot be forced to live together in a marriage which is a voluntary union for life.

In the circumstances, I find that the Petitioner has sufficiently proved the contents of her Petition for divorce and is entitled to a *Decree Nisi* particularly that the Respondent is not contesting the divorce.

Therefore, on the evidence of the Petitioner, I am satisfied that the marriage solemnized between **MOONGA CHICHY CHOONGO** and **IGNATIUS MKANGA TEMBO** on 24th August, 2016 at the Office of the Registrar, Civic Centre in the City and Province of Lusaka of the Republic of Zambia has broken down irretrievably in terms of **Section 8 and Section 9(1)(b) of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**. I am further satisfied that granting a Decree Nisi will not cause grave financial or other hardship to the Respondent.

I accordingly Decree that the said marriage be dissolved and a *Decree Nisi* is hereby pronounced dissolving the marriage and I make the following Orders: -

1. The *Decree Nisi* shall become Absolute six (6) weeks from the date hereof unless cause be shown why the same cannot be made Absolute.

2. The Petitioner shall have custody of the child of the family with reasonable access being granted to the Respondent.
3. I refer the issue of property settlement to mediation pursuant to ***Order 30 Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
4. Each party is to bear their own costs of this action.

DELIVERED AT LUSAKA THIS 22ND DAY OF MARCH, 2024.

REPUBLIC OF ZAMBIA
HIGH COURT
22 MAR 2024
25 MAR 2024
W.S. MWEEMBA, J.
W.S. MWEEMBA, J.

**WILLIAM S. MWEEMBA
HIGH COURT JUDGE**