

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

2023/HPF/D400

BETWEEN:

THERESA MUBILA LUNGU

AND

TIZA PETER MWALE



PETITIONER

RESPONDENT

***Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 10th June, 2024.***

For the Petitioner: In Person

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,
3. Butterworths.
4. Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts' & 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).
4. Namuunda Hamalengwe Mutombo vs Livian Haabula Mutombo (2009) ZR Dr. Matibini SC, Mable M. Bbuku vs Arthur Yoyo (SCJ) No. 78/1998 unreported)

1.0 INTRODUCTION

1.1 This is a Petition for dissolution of marriage which was filed on 26th July 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.

1.2 The said **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...”

1.3 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 **Theresa Mubila Lungu**, who was lawfully married to the Respondent, **Tiza Peter Mwale** on 16th October 2010 at Good Shepherd Roman Catholic Church, at Kabwata Parish in the City and Province of Lusaka in the Republic of Zambia.

2.2 The Petitioner and the Respondent lived together as husband and wife at in new Kasama in Lusaka Province of the Republic of Zambia. Petitioner and the Respondent are both domiciled in Zambia.

2.3 There are Three (3) children of the family now living by both the Petitioner and the Respondent namely;

1. *Lisa Mwale (born outside the wedlock by the Petitioner) aged 17 years doing grade 12 at Mukambo Boarding School.*

2. *Jeremiah Mwale aged 13 years who has been autistic from childhood and is at God kind Special School, Lusaka Kabwata.*

3. *Hope Mwale aged 8 years doing grade 3 at KAM Private School.*

2.4 There have been no previous proceedings continuing in any court in Zambia or elsewhere with reference to the said marriage or any property of either or both of them.

2.5 There are no proceedings continuing in any Court in or outside Zambia which are in respect of the said

marriage or which are capable of affecting its validity or subsistence.

2.6 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.

2.7 The said marriage has broken down irretrievably.

2.8 The Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to continue living 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 following particulars;

- i) the Respondent has been violent to the extent of assaulting the Petitioner with anything he comes across such that the Petitioner was once bed ridden for a week as a result of the beatings by the Respondent.*
- ii) the Respondent has not been supporting the Petitioner financially and does not even know where the Petitioner stays and with who since 8th January 2023.*
- iii) the Respondent does not help the Petitioner with education fees as he has left it all to the Petitioner.*
- iv) the Respondent herein does not give the Petitioner due respect and attention as he uses abusive language, calling the*

Petitioner a bitch much to the embarrassment of the Petitioner.

- v) that as a result of the above, the Petitioner and the Respondent do not enjoy their conjugal rights for a period of six months in the matrimonial home as is reasonably expected of a husband and wife due to the Respondent's unreasonable behaviour such that the Petitioner has now completely lost love and affection for the Respondent.*

3.4 The Petitioner therefore prays that;

- i the said marriage be dissolved and a decree nisi be granted.*
- ii the Petitioner takes custody of the children of the family.*
- iii there be order for the property settlement.*
- iv there be no order for the maintenance of the Petitioner.*

v costs be in the cause.

4.0 **ANSWER**

4.1 The Respondent did not file an answer to the Petition because he was defending the Petition.

5.0 **HEARING**

5.1 At the hearing of the matter on the 5th March 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. The Petitioner testified on oath in her own respect and did not call any other witness.

5.2 Further, she largely recited her averments in her Petition.

5.3 The Respondent stated that he was served the Petition and the other documents. He did not file an answer but filed the acknowledgment of service wherein he indicated he was not defending 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 pleadings and the oral testimony by the Petitioner. 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. I therefore make a finding of 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.
- 7.2 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.
- 7.3 I have also taken cognizance of the position that both the Petitioner and the Respondent are domiciled in Zambia as indicated in the Petition and residents 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.

7.4 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.

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

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

7.7 As highlighted already, the Petitioner is in consensus that her marriage has broken down irretrievably, this is for the reason that the Respondent has behaved unreasonably and therefore responsible for the breakdown of the marriage as shown in the particulars of unreasonable behaviour.

7.8 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;...”

7.9 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.”

7.10 In the Supreme Court of Zambia Judgment of **Brighton Soko vs Petronella Sakala Soko**¹, 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)

7.11 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?”

7.12 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?"

7.13 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."

7.14 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

7.15 I have carefully considered the Petition for dissolution of marriage. 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.

7.16 The Petitioner has relied on her Petition and the record shows that the Respondent was present at the hearing but he did not file an answer to the petition for the reason that he had consented to the dissolution of marriage.

7.17 In addition to examining the behaviour of the parties, this Court is also called upon to consider whether cohabitation would resume between the parties since they now stay separately. Section 9(4) provides as follows:

“A decree of dissolution of marriage shall not be made if the court is satisfied that there is a reasonable likelihood of cohabitation being resumed.”

7.18 In the case of ***Namuunda Hamalengwe Mutombo vs Livian Haabula Mutombo (2009) ZR Dr. Matibini, SC⁴***, J as he then was, held inter alia that;

“2. A marriage is said to have irretrievably broken down if it stood no chance because

the parties to the marriage have ceased cohabiting, and one of the parties or both intends not to resume cohabitation.

3. *The duty of the Court is to inquire into the facts alleged to establish irretrievable breakdown of marriage. If there is anything inconsistent with irretrievable breakdown of marriage, then the condition has not been met.*
4. *when it is alleged that the respondent has behaved in such a way that the petitioner cannot be reasonably be expected to live with the respondent, the task of the court is not to look at the quality of the respondent's behaviour, but also the effect of the conduct upon the petitioner."*

7.19 It is my finding that clearly there is no chance shown of the parties resuming cohabitation between them. A critical consideration of the facts of this case shows that the Petitioner has cited the character and temperament

of the Respondent to be in issue. The Respondent is said to have been abusing and assaulting the Petitioner to the extent that she cannot be expected to live with him because the marriage has lost intimacy. The Respondent has not raised any firm denial of this conduct and the Petitioner's evidence was not discredited either.

7.20 Upon careful consideration of the facts of this case and the demeanor of the Petitioner, I find that the marriage is indeed one riddled with problems relating the abusive behaviour of the Respondent which evidence has not been discredited. There is also evidence to say that the Respondent has not shown care to know the whereabouts of the Petitioner since she left the matrimonial home and he does not provide for her and the children financially.

7.21 Consequently, on a totality of the evidence before me I find that the marriage has broken down irretrievably due to the Respondent's acts of violence, which has consequently led the Petitioner to be bed ridden for a

week. Accordingly, there is now no affection in the marriage such that the parties have not been enjoying their conjugal rights for a period 6 months as is reasonably expected of a husband and wife due to the Respondent's unreasonable behaviour. The Petitioner has indicated that she now has completely lost love and affection for the Respondent. Reference thus is had to the case of **Mable M. Bbuku vs Arthur Yoyo (SCJ) No. 78/1998 unreported) Chirwa J ⁵**, as he then was, stated that:

“It is not a question of maintaining the status of “Mrs.”. there must be mutual love. To my mind, both parties must be able to recognize the existence of their marriage for it to be seen to subsist. The state of mind plays a cardinal part in considering whether the marriage exists or not”

7.22 I also find that the Petitioner and Respondent are unharmonious with each other and the Petitioner

herein finds it intolerable to live with the Respondent due to his behaviour and lost love for him.

7.23 Therefore, I find that this marriage has broken down irretrievably and 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.

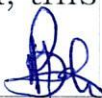
7.24 Upon further inquiry from the parties over custody of the three (3) children namely; ***Lisa Mwale aged 17 years, Jeremiah Mwale aged 13 years and Hope Mwale aged 8 years***, custody is herein granted to the Petitioner with reasonable access by the Respondent as agreed.

7.25 Further I refer the application for property settlement and maintenance to the Deputy Director for determination.

8.0 I order that costs will be in the cause.

9.0 Leave to appeal is granted.

Dated at Lusaka, this 10th June 2024


M.M. Bah-Matandala
JUDGE HIGH COURT

