IN THE HIGH COURT OF ZAMBIA **2009/HP/D.181**
AT THE PRINCIPAL REGISTRY
LUSAKA
(Divorce Jurisdiction)

BETWEEN:

DR. NAMUUNDA HAMALENGWE MUTOMBO
PETITIONER.

V

LIVIAN HAABULA MUTOMBO
RESPONDENT.

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this14th day of December, 2012.

For the petitioner: F. Kalunga of Messrs Elllis and Company.
For the respondent: N. Mpande (Ms) of National Legal Aid Clinic for Women.

JUDGMENT

Cases referred to:

English cases:

1. *Birch v Birch [1908] W.N. 81. C.A.*
2. *Lissack v Lissack [1950] 2 ALL E.R. 233*
3. *Jamieson v Jamieson [1952] A.C. 525*
4. *Katz v Katz [1972] 2ALL E.R. 219.*
5. *Ash v Ash [1972] 1 ALL E.R. 582*
6. *Pheasant v Pheasant [1972] 1 ALL E.R. 587*
7. *Richards v Richards [1972] 3 ALL E.R. 695*
8. *Bradley v Bradley [1973] 3 ALL E.R. 750.*
9. *Livingstone-Stallard v Livingstone-Stallard [1974] 2 ALL E.R. 767*

Zambian cases:

1. *Dewar v Dewar (1971) Z.R. 38.*

2. *Mahande v Mahande (1976) Z.R. 287.*

3. *Mulundika v Mulundika (1991) SJ HC (unreported).*
4. *Yoyo v Yoyo SCZ Judgment Number 78 of 1998 (unreported).*
5. *Malama v Malama Appeal Number 84 of 2000 (unreported)*

Legislation referred to:

1. *Matrimonial Causes Act Number 20 of 2007 ss 8 and 9.*

Works referred to:

1. *Joseph Jackson,Rayden's Law and Practice in Divorce,and Family Matters in all Courts,Volume 1 Text, Twelfth Edition, (London, Butterworths, 1974).*
2. *N Lowe and G Douglas Bromley's Family Law, Tenth Edition, (Oxford University Press, 2007).*
3. *Lilian Mushota, Family Law in Zambia: Cases and Materials, (Lusaka, University of Zambia Press, 2005).*

On 18th November, 2009, the petitioner, Dr Namuunda Hamalengwe Mutombo; filed a petition for dissolution of marriage. The particulars of the petition are that on 4th September, 1996, the petitioner was lawfully married to Lilian Haabula Mutombo. And I will continue to refer to her as the respondent. After the marriage, the petitioner and the respondent cohabited at Court A 10 off Lubumbashi Road, Handsworth, Lusaka. The petitioner is a lecturer at the University of Zambia. While the respondent is a primary school teacher.

The petitioner and the respondent have three children of the family now living as follows:

a) Mwaambwa Mutombo born on 19th August, 1994, attending school at St Canissius secondary school in Monze;
b) Nachibambula Mutombo born on 3rd September, 2002, attending school at Chituwa Memorial school in Lusaka; and
c) Namuluma Mutombo, born on 7th May, 2009.

The petitioner contends that the marriage has broken down irretrievably because the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The petitioner set out the particulars of the behaviour in the following terms: since the celebration of the marriage the respondent has been highly insecure, and accuses the petitioner of having affairs with other women.

The petitioner recalls that around June, 2003, the respondent stormed the petitioner's office which he was sharing with other colleagues, and caused a scene by opening his cabinet and confiscated some photographs which belonged to his office mates. This, the petitioner found to be both embarrassing and demeaning to him.Furthermore, sometime in 2005, when the petitioner's mother visited them, the respondent accused the petitioner of having an affair with her niece whom they were keeping, because he gave her some money for transport. As a matter of fact, this led to a fierce fight in the presence of his visiting mother and brother. When the petitioner's brother attempted to reconcile them over the incident, the respondent insulted the petitioner's brother causing him to vow never to visit them again.

The petitioner also contends that the respondent is very irrational, and tends to withdraw into bad moods and violent fits. To support this allegation, the petitioner cited several instances. First, sometime in August, 2008, the petitioner and the respondent went to Mumbwa to fetch the petitioner's uncle, to enable him attend his father's funeral. In the process, the respondent picked a quarrel with the petitioner for no apparent reason. Second, on or about 12th January, 2009, the petitioner found the respondent smoking some herbs. And had some additional herbs soaked in the bathtub. When confronted about these acts, the respondent reacted violently, and accused the petitioner's relatives of bewitching her. This behavior has made the petitioner very apprehensive, and now fears for his life.

Third, sometime in May, 2009, the respondent went to the University Teaching Hospital (UTH) to deliver their third child without informing the petitioner, and in fact cut off

communication by switching off her mobile phone. Lastly, sometime in July, 2009, the respondent left the matrimonial home for about three days without bidding farewell to anybody.

In light of the foregoing, the petitioner seeks the following orders:

a) that marriage be dissolved;
b) an order for property settlement;
c) an order for custody; and
d) that each party bears the costs of this petition.

On 12th February, 2010, the respondent filed her Answer to the petition. The respondent countered the allegations regarding heralleged behavior as follows: the respondent refutes the allegation that she is highly insecure, and that she has accused the petitioner of having affairs with other women. The respondent also denied the allegation that sometime in June, 2003, she stormed the petitioner's office and caused a scene. The respondent contends that she went to the petitioner's office to search for insurance documents for the family car, to enable her pay the road tax. In the course of the search, the respondent found photographs of the petitioner holding a woman. The respondent maintains that she did not cause any scene which could have either embarrassed, or demeaned the petitioner.

The respondent, however, confirmed that between 2003 and 2004, the petitioner left his mobile phone with the respondent when he went on a work trip. But the respondent denied that she was hostile to female callers. In fact, the respondent recalled that there was only one female person that called, and she is certainwas not the petitioner's employer. The respondent also denies accusing the petitioner of having an affair with his niece. The respondent contends that the fight which occurred in 2005, when the petitioner's mother visited them was due to some questions which the respondent had raised regarding the petitioner attending some conference. The respondent denies the allegation that the petitioner's brother attempted to reconcile them, or herever insulting the petitioner's brother.

The respondent also denies that she is in the habit of withdrawing into bad moods or violent fists,or indeed picking a quarrel with the petitioner when they went to Mumbwa to collect the petitioner's uncle. The respondent recalls that she simply asked the petitioner whether he had noticed that his uncle had not greeted her when they met. The respondent maintained that there was no quarrel that ensued.

The respondent confirmed however that shed used herbs prescribed by a traditional doctor, in a bid to save the pregnancy. But she denies having accused the petitioner's relative of bewitching her. The respondent also denies that she went to UTH to deliver their child without informing the petitioner. In fact, the respondent recalls that the petitioner even visited her when she was hospitalized. Lastly, the respondent denies that she left home for about three days without bidding farewell. The respondent maintains that on 1st August, 2009, she left home and went to the farm. And the petitioner was all along awareabouther whereabouts.

The trial of this petition commenced on 12th July, 2011. In his testimony,the petitioner confirmed the following matters: that the parties were married on 4th September, 1996. And have between them three children referred to above. The petitioner maintained that he would like this Court to dissolve the marriage, because the parties have reached a point where they are not able to enjoy any peace. The petitioner reiterated the incident of 2003, when the respondent searched for documents in his office. The petitioner considered the behaviour or conduct of the respondent unacceptable. The behavior, the petitioner pressed, placed him in a bad light in the eyes of his colleagues.

The petitioner also recalled that two years later a similar incident occurred. The Petitioner was registering returning students at the University of Zambia. (UNZA). As the registration progressed, one of the femalestudents tapped the petitioner's shoulder to draw his attention. The respondent was in the vicinity. When the respondent noticed the gesture, she confronted the student and lambasted her, stating that the petitioner was her husband. Immediately thereafter a fracas erupted, and the petitioner quickly withdrew from the scene, and retreated to his office. The respondent followed the

petitioner to the office. Whilst in the office, the petitioner pleaded with the respondent, and urged her that the office was not the right place to resolve their matrimonial differences. Eventually, the petitioner succeeded in persuading the respondent to return home. But when the petitioner returned home, hedecided to lock himself in the house. Whenthe respondent discovered that the petitioner had locked himself in the house, she began banging the door. The resulting noise attracted the attention of the neighbours. The neighbours interceded, and reconciled them.

The petitioner also recalled, that against his advice, the respondent wrote letters to his father. In the letters, the respondent accused the petitioner's father of being greedy, and unreasonable.The petitioner further recalled that when he was prosecuting his doctoral studies, he returned home to undertake the field work. After his field work, the petitioner agreed with the respondent that instead of buying mealie meal, they should procure some maize from the village and have it milled. Since the respondent was not a competent driver, the petitioner made arrangements with one of his relatives to drive the respondent to the miller.

However, in due course, the petitioner learnt through some SMS messages sent to him, and to his utter dismay, that the respondent had requested a male class mate to drive her around. And also that male classmates frequently visited their home. Lastly, the petitioner testified that at some point, the respondent decided to join a political party. And travelled extensively with persons that the petitioner did not know.

In view of the foregoing, the petitioner maintains that the marriage should be dissolved because the petitioner no longer trusts the respondent; the respondent has ceased to be submissive, and in any event the petitioner contends that he has lost the love he had for the respondent.

The trial of this action resumed on 14th July, 2011. And on resumption trial the respondent testified. The respondent confirmed that she still lives with the petitioner, albeit they sleep in separate bedrooms. Although the parties sleep in separate

bedrooms, the parties still maintain an intimate relationship. As matter of fact, last had sexual intercourse on 24th June, 2011.The respondent denies ever writing insulting letters to his father-in-law, or entertaining men as alleged by the petitioner. The respondent confirmed however that she had requested somebody to drive her to the miller.And that person was in fact known to the petitioner because he introduced him to the petitioner. In this regard, the respondent contends that the same person who drove her to the miller, was a member of the study group, that consulted in their home. And the group consultations continued in their home even after the petitioner returned from his doctoral studies.

The respondent denies ever leaving the children unattended as she electioneered. The respondent recalled that with the approval of the petitioner, she in the company of a Mrs. Sikalomba attended political campaigns. In allowing the respondent to attend the campaigns, the petitioner cautioned her against being roughed up at the political rallies. During the campaigns, the respondent testified that the petitioner closely monitored her movements, and communicated with her regularly. The respondent also testified that in any case she only went out for campaigns over a period of two days in Kalingalinga and Chawama. And the children were during that period left in the custody of her sister.

The respondent also testified that the petitioner's relatives still visit their home.Andwhen they do so, there are no signs of any matrimonial differences. The respondent went on to testify that the communication between herself and the respondent is so healthy that the parties discuss serious issues of mutual interest and concern. These issues generally include the welfare of both the nuclear and extended families.

As regards the allegations relating to use of the herbs the respondent testified as follows:

Q Have you used herbs before.
A I used herbs to prevent a miscarriage.
Q Did you use herbs for all the children.
A. Not for all the children.

Q. Which children did you use herbs.

A. The first we did not use, and the next two died. Hence our resort to herbs.

Q. Where did you get the herbs.

A. From Kafue and my husband knew about it.

Thepreceding evidence went unchallenged.

Furthermore, the respondent testified that whenever the petitioner patronizes her bedroom, they enjoy light moments, including having sexual intercourse. In this regard, the respondent recalled in particular that on 21st June, 2011, the petitioner spent a night with the respondent. And urged the respondent not to disclose to any person the fact that they had sexual intercourse. The respondent wondered why that fact should be maintained as a secret. Thus, the respondent observed that although the petitioner claims that he has lost love for her, he continues to have sexual intercourse with her at least two to three times every month. During those liaisons, the petitioner intimates that he cannot manage without having sexual intercourse with her. And that he would pursue her even after the marriage is dissolved. Theprecedingevidence was not contested.

Towards the end of her testimony, the petitioner testified that she is opposed to the dissolution of the marriage, because the allegations made by the petitioner in support of the dissolution are not true. And the children of the family should not be made to suffer on the basis of false allegations. At the end of the trial, I invited counsel to file written submissions.

On 9th November, 2011, Ms Kalunga filed written submissions on behalf of the petitioner. Ms Kalunga submitted that the petitioner seeks an order for dissolution of marriage on the ground that the marriage has broken down irretrievably. The fact relied on is that the respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with the respondent. In aid of this submission, Ms Kalunga

drew my attention, first, to section 8 of the Matrimonial Causes Act (MCA) which enacts as follows:

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

Second, section 9 of the MCA sets out the facts upon which a petitioner seeking dissolution of marriage may rely on. Section 9 (1) (b) in particular enacts that:

"… the Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court …….that the respondent has behaved in such way that the petitioner cannot reasonably be expected to live with the respondent."

Ms Kalunga submitted that in this case the petitioner narrated several instances of the respondent's behavior. And pleaded that as a result of that behavior, he cannot reasonably be expected to continue living with the respondent. In this respect, Ms Kalunga drew my attention to the case of *Mahande v Mahande [1976] Z.R. 287,* where the Supreme Court laid down guidelines which a trial Court deciding a petition for divorce alleging behavior of the respondent, and consequently that the petitioner cannot be reasonably expected to live with the respondent, should follow:

"The general question may be expanded thus; can this petitioner with his or her faults and other attributes, good or bad, and having regard to his or her behaviour during the marriage reasonably be expected to live with the respondent."

Further, Ms Kalunga drew my attention to the learned author of Bromley on Family Law, 9th Edition, and submitted that the following test is laid down:

"….In establishing whether or not a marriage has broken down irretrievably, the Court not only looks at the alleged behaviour, but also its effect on the petitioner."

Ms Kalunga argued that whenever allegations are made that because of the behavior of the respondent the petitioner cannot be expected to live with the respondent, the Court is called upon to consider two important elements. Namely, the behaviour of the respondent as alleged, and the personality, disposition, and behavior of the petitioner.

Ms Kalunga maintained that the evidence in this case shows that the marriage has broken down irretrievably because both parties have confirmed that they no longer share the matrimonial bed. Further, both parties confirmed that there have been

instances when they have engaged in physical fights. In this regard, Ms Kalunga drew my attention to the case of *Yoyo v Yoyo SCZ judgment number 78 of 1998.* In the *Yoyocase* (supra), Ms Kalunga submitted that the Supreme Court endorsed the High Court's decision to dissolve a marriage and held that in order for a Court to refuse to grant a decree of dissolution of marriage, there must be evidence of mutual love. Ms Kalunga submitted that in this case there is no mutual love between the parties.

Ms Kalunga pointed out that the standard of proof necessary to establish irretrievable breakdown of marriage is the one applied in civil matters. Namely, on a balance of probabilities as was laid down in the *Mahande case* (supra). Ms Kalunga also pointed out that in the *Mahande case*, (supra) the Supreme Court in applying the dicta of Baron J, in*Dewar v Dewar (1971) Z.R. 38,*held that section 2 (1) (b) of the MCA, which is identical to the present section 9 (1) (b) of MCA under which this petitions is brought, the behavior complained of need not be as serious as cruelty. Ms Kalunga submitted that the preceding position of the law was affirmed in the case of *Malama v MalamaAppeal Number 84 of 2000* (unreported). Ms Kalunga observed that in the *Malama* case (supra), it was held that the behavior in question need not pose a danger to the health, or life of the petitioner in order to establish irretrievable breakdown marriage. In this case, the petitioner has shown on a balance of probabilities that the respondent is of a violent, jealous, and superstitious nature. And as such, the petitioner can no longer be reasonably expected to live with the respondent.

Ms Kalunga further drew my attention to section 13 of the MCA, which enacts that:
"Where in any proceedings for divorce the petitioner alleges that the respondent had 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… that fact shall be disregarded in determining … whether the petitioner cannot reasonably be expected to live with the respondent."

Ms Kalunga argued that the preceding provision is couched in similar terms as the English MCA of 1973. And in interpreting this provision, Ms Kalunga submitted that the English Courts have allowed a divorce, even in cases where the parties shared the matrimonial bed as was the case in *Bradley v Bradley [1973] 3 ALL E.R. 750*. Thus, Ms Kalunga argued that the fact that the petitioner is in this case living in the same house

with the respondent or indeed sharing a bed, is irrelevant for the purposes of determining whether or not the petitioner can be expected to live with the respondent. Ms Kalunga argued further that the parties are living together simply because they live in an institutional house, and the petitioner is not comfortable to leave the respondent alone with the children. Overall, Ms Kalunga pressed that the petitioner has proved that the marriage has broken down irretrievably because the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her.

On 31st August, 2011, Ms Mpande in turn filed submissions on behalf of the respondent. Ms Mpande submitted that in terms of the MCA of 2007, there is only one ground for divorce that the petitioner must establish; that is that the marriage has broken down irretrievably. Ms Mpande was however quick to add that the Court cannot grant a divorce unless the petitioner also proves one of the five facts set out in section 9 of the MCA. Ms Mpande argued that in this case, the marriage between the parties has not broken down irretrievably. She went on to submit that one of best test to be applied in deciding whether or not a marriage had broken down irretrievably was laid in *Livingstone-Stallard v Livingstone-Stallard [1974] ALL E.R. 767* as follows:

"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 [her], taking into account the whole of the circumstances, and the characters and personalities of the parties."

Ms Mpande argued that in this case, the petitioner has catalogued a long list of trivial complaints, including incidents that stretch over many years, and some of which are in any event normal isolated marital challenges, as being the basis for claiming that the marriage had broken down irretrievably.Ms Mpande drew my attention to the case of *Katz and Katz [1972] 3 ALL E.R. 219,* and argued that while the Court will apply a subjective test in considering what is reasonable, it is the respondent's behavior that has to be considered. The behavior in question should be something more than a mere state of affairs or a state of mind.

Ms Mpande also drew my attention to the learned author of Rayden's Law and Practice in Divorce, and Family Mattersin all Courts,Volume 1 Text, Twelfth Edition (London,

Butterworths, 1974) where it is stated that, in all these cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to warrant the conclusion that from a reasonable person's point of view, the conduct is such that the petitioner cannot be expected to endure.Ms Mpande submitted that in this case the respondent believes that the petitioner loves her, because they still have meals together;he continues to support her financially; and they still enjoy a sexual relationship.

Therefore citing *Mulundika v Mulundika (1991)* S.J. (HC), (unreported),Ms Mpande argued that the question is not whether the respondent has behaved unreasonably, but rather whether having regard to the behavior, it is reasonable to expect the petitioner to go on living with the respondent. Further, Ms Mpande pointed out that in the *Mulundika case*, (supra), the High Court held that if the parties lived together in the same household for a period in excess of six months since the last incident of the behavior which the petitioner relied on, was proof that the petitioner is capable of enduring the respondent's conduct.

Furthermore, Ms Mpande drew my attention to the case of *Birch v Birch [1908] W.N. 81 CA* where it was held that:

"Allowance will be made for the sensitive as well as the thick-skinned- conduct must be judged up to a point by the capacity of the complaining petitioner to endure his or her spouse's conduct; the Court would consider to what extent the respondent knew or ought reasonably to have known of that capacity."

Lastly, Ms Mpande submitted that all the incidents which the petitioner in his case has cited, were not initiated by the respondent. They were simply reactions to isolated misfortunes that befell the marriage. Ms Mpande argued that these incidents have since ceased. And the parties continue to live as a family. Overall, Ms Mpande argued that the marriage has not broken irretrievably.

I am indebted to counsel for their spirited submissions and arguments.Divorce law has always been one of the most contentious subjects in family law. Marriage and its place in modern society are seen as significant political and cultural issues, with the health of

society somehow bound up with the extent to which marriages appear to be stable or failing.Making divorce too easy has been seen by some as a means of undermining traditional family life and hence the stability of society. Whilst others have sought to liberalise divorce precisely in order to assist the emancipation of women from the traditional role of house wife (see N Lowe and G Douglas, Bromley's Family Law. Tenth Edition, (Oxford, Oxford University Press, 2007, at page 262).Thus by the MCA, there is only one ground for divorce: that the marriage has irretrievably broken down. To this end, section 8 of the MCA is in the following terms:*"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."*

Sir B McKenna, in "Breakdown of Marriage," Modern Law Review, Volume 30, Number 2, 1967, described "irretrievable breakdown of marriage," as a marriage which stood no chance because the parties to the marriage have ceased cohabiting and one of the parties or both intends not to resume cohabitation. Lilian Mushota, also observes in her Family Law in Zambia: Cases and Materials, (Lusaka, University of Zambia Press, 2005) at page 157, that the duty of the Court is to inquire into the facts alleged to establish irretrievable breakdown of marriage. If there is anythinginconsistent with irretrievable breakdown of marriage, then the condition has not been met. Irretrievable breakdown,however, may be established only by proving one or more of the five facts set out in section 9 of the MCA, and which is expressed in these words:

"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 a such a way that the petitioner cannot reasonably be expected to live with the respondent;
(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or

(e) that the parties to the marriage have lived part for a continuous period of at least five years immediately preceding the presentation of the petition.

If none of the preceding 'facts' are established, the Court may not pronounce a decree *nisi* even though the Court is satisfied that the marriage is at an end (See section 9 (3) of the MCA and *Richards v Richards [1972] 3 ALL E.R. 695).* Although in terms of section 9 (3) of the MCA, it is the duty of the Court to inquire so far as it reasonably can, into the facts alleged by both parties, in practical terms, the burden is on the petitioner, solely to establish one of the facts, and it is for the respondent in a defended suit to show, if he wishes, that the marriage has not irretrievably broken down(see N V Lowe and G Doughlas, Bromley's Family Law, (supra) at page 266). Lastly, section 9(4) of the MCA provides that 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.

BEHAVIOR: MEANING AND EXTENT

In this case, the petitioner has relied on section 9(1) (b). To recapitulate, it is in these words:*"that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent."* The learned authors of Bromley's Family Law, (supra), observe at page 267 that the preceding provision is frequently, but erroneously, abbreviated to "unreasonable behavior," thereby suggesting that all one has to look at, is the quality of the respondent's behavior. In fact, what is important is the effect of the conduct upon the petitioner.The question whether the respondent's behavior has been such that the petitioner can no longer be expectedto live with him,is essentially one of fact. And it is for the Court, and not the petitioner to answer it. The test is thus objective. But this is not the same as asking whether a hypothetical reasonable spouse in the petitioner's position would continue to live with respondent (see Ash v Ash [1972], 1 ALL E.R. 582).

Joseph Jackson, in Rayden's Law and Practice in Divorce and Family Matters in All Courts, Twelfth Edition, Volume 1 Text (London, Butterworths, (1974), states in paragraph 25, at page 216, that in considering what is reasonable, the Court in

accordance with its duty to inquire, so for as it reasonably can into the facts alleged, will have regard to the history of the marriage, and to take the 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 made for the sensitive, as well as for the thick-skinned.

BEHAVIOUR; CUMMULATIVE EFFECT

The learned author of Rayden's Law and Practice in Divorce and Family Matters in All Courts (supra) states in paragraph 26, at page 217, that: any conduct active or passive constitutes behavior. The behavior is not confined to behavior to the respondent: the behavior may have reference to the marriage although it is to other members of the family or to outsiders. Any and all behavior may be taken into account: the Court will have regard to the whole history of the matrimonial relationship. But behavior is something more than a mere state of mind: behavior in this context is action or conduct by the one which affects the other; it maybe an act or omission. Or course of conduct. But it must have some reference to the marriage.

The learned author of Rayden's Law and Practice in Divorce and Family Matters in All Courts (supra) goes on to state in paragraph 26, at page 217, that regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts 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 when taken together are such that the petitioner cannot reasonably be expected to live with the respondent(see *Jamieson v Jamieson[1952] A.C. 525 at 528, per Lord Reid).*

ENGLISH CASES

In order to fully appreciate the principles adumbrated above, I will initially consider some English cases. Later, I will advert to a few Zambian cases. The first English case I will

consider, is the case of *Katz v Katz [1972] 3 ALL E.R. 219*. This was a petition by the wife for a decree of divorce under section 2(1) (b) of the Divorce Reform Act 1969, on the ground that the marriage had irretrievably broken down based on the fact that the husband had behaved in such a way that the wife could not reasonably be expected to live with him. This is how Sir George Baker P, expounded the notion of behavior and the function of a judge in deciding whether the behavior warrants dissolution of marriage at page 223:

"*A word about the law. Section 2(1) of the Divorce Reform Act 1969 under which this petition is brought requires first that the husband has behaved. Behaviour is something more than a mere state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse, or a feeling that the wife is not reciprocating his love, or not being as demonstrative as he thinks she should be. Behaviour in this context is action or conduct by the one which affects the other, such conduct may take either acts or omission or may be a course of conduct and, in my view, it must have some reference to the marriage. Then the question is what the standard of behavior is. The standard is that he must behave in such a way that the petitioner cannot reasonably be expected to live with the respondent." That is the test. It is for the judge, not the petitioner alone, to decide whether the behavior is sufficiently grave to fulfill that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down, to that extent I agree with what Bagnall, J,said in Ash v Ash [1972] 1 ALL E.R. 582. The Court must consider the effect of the behavior on this particular plaintiff and ask the question: is it established, not that she is tired of the plaintiff or, colloquially fed up with him, but, that she cannot reasonably be expected to live with him? In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behavior. It is behavior that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him."*

In *Katz v Katz* (supra) Sir George Baker P went on to quote and adopt the test developed by Ormrod, J, in *Pheasant v Pheasant [1972] 1 ALL E.R. 587,* at page 591, as follows:

"All these consideration point to only one conclusion, namely, that the test to be applied under sub-paragraph (b) is closely similar to, but not necessarily identical with, that which was formerly used in relation to constructive desertion. I would not wish to see carried over into the new law all the technicalities which accumulated round the idea of constructive desertion but rather to use the broader approach indicated by Pearce J in Lissack v Lissack [1950] 2 ALL E.R. 233, and consider whether it is reasonable to expect the petitioner to put up with the behavior of this respondent bearing in mind the characters and difficulties of each of them, trying to be fair to both of them, and expecting neither the heroic virtue nor selfless abnegation from either. It would be

consistent with the spirit of the new legislation if this problem were now to be approached more from the point of view of breach of obligation, than in terms of the now out moded idea of the matrimonial offence."

The second English case I will consider is *Livingstone-Stallard v Livingstone-Stallard [1974] 2 ALL E.R. 767*. In this suit the wife sought a dissolution of her marriage on the ground of irretrievable break down under section 1 (2) (b) of the Matrimonial Causes Act 1973. The husband by his answer denied that the marriage had irretrievably broken down, and also denied that he had behaved in the manner alleged by the wife in her petition.The case for the wife, was that her husband was as she put it, a critical and non-loving man who treated her from the first, not as a wife but as a rather stupid child. She said that even on their honeymoon, her husband was abusive to her. Further, the wife complained that from the time that they started married life together, he criticized her behavior, her friends, her way of life, her cooking, and even criticized her dancing. The husband agreed that he did critize her, but he said that he was quite satisfied in so doing because she was what he called a constructive person.

In the course of the judgment, Dunn, J, accepted at page 770, the submission of counsel for the wife that in a case of which depends on a course of conduct and on the character of the other spouse, rather than on series of dramatic incidents, perhaps of violence, the effect of conduct may be nonetheless serious in the long run even though it is not practical to specify particular incidents as having impinged on the memory of the wife as incidents in their own right.Dunn, J, observed further at page 770, that although he was quite satisfied that the marriage had broken down, he could not dissolve the marriage unless he was satisfied that the husband had behaved in such a way that the wife could not reasonably be expected to live with him. Dunn, J, was quick to add that; that question is a question of fact and one approach to it, is to assume the case was being tried by a judge and jury. And first to consider what the proper direction to the jury would be, and then to put oneself in the position of a properly directed jury in deciding the question of fact.

Dunn, J, noted that counsel for the husband had referred him to the cases all of which were decided at first instance of*Ash v Ash [1972] 1 ALL E.R. 582; and Katz v Katz [1982] 3 ALL E.R. 219*, and submitted that incompatibility of temperament is not enough to entitle a petitioner to relief. Counsel for the husband argued that the behavior must be of sufficient gravity so that the Court can say that it would under the old law have granted a decree of divorce on the ground of desertion.Counsel for the husband also submitted that the best approach is to apply the test which was applied in the constructive desertion cases, bearing in mind that the parties are married and that the conduct must be sufficiently grave to justify dissolutionof marriage. Counsel for the husband pressed that there was need to weigh the gravity of the conduct against the marriage bond or as he put it, against the desirability of maintaining the sanctity of marriage.

Dunn, J, also observed that he had in the past followed the reasoning of Ormrod, J, in *Pheasant v Pheasant* (supra), but onreflection he did not consider it was helpful to import notions of constructive desertion into the construction of the statute. Nor did he think it helpful to analyse the degree of gravity of conduct which is required to entitle a petitioner to relief under section 1(2) (b) of the 1973 Act.

Dunn, J, pointed out that the Act, as Lord Denning M. R., emphasized in another context, is a reforming statute, and the language of the subsection is very simple and quite easy for a layman to understand. In this regard, Dunn, J, reverted to his analogy of a direction to a jury and asked himself this question: would any right thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances, and the characters and personalities of the parties.This was the basis on which Dunn, J, approached the evidence. And applying the test which he had formulated, he came to the conclusion that any right thinking person would come to the conclusion that this man had behaved in such a way that this woman could not reasonably be expected to live with him. A decree *nisi* was accordingly granted.

In this case it has been argued that the fact that the petitioner is living with the respondent, does not of itself establish that the petitioner should reasonably be expected to live with the respondent. In support of this proposition, counsel for the petitioner drew my attention to the case of *Bradley v Bradley [1973] 3 ALL E.R. 750*. The facts of the case were as follows: The parties were married in 1964, and lived in a four bedroomed council house of which they were joint tenants. They were nine children of the family, seven of whom lived with the husband and wife. In 1969, and again in 1970, the wife went to the magistrates court and obtained orders of separation on the ground of persistent cruelty by the husband, Despite those orders, the husband returned to the matrimonial home. In 1972, the wife filed a petition for divorce under section 2(1) (b) of the Divorce Reform Act 1969, alleging that the husband's behavior had been such that she could not reasonably be expected to live with him, and particularising many instances of violence against her. At an early stage of the hearing, it emerged that the parties were living together in the same house, and had done so more or less continuously since the separation orders were made. The trial judge held that by reason of that fact he could not grant a decree *nisi* under section 1(2) and dismissed the petition.

The wife appealed. She also filed a further affidavit explaining the position in the house; she said that she had no alternative but to be in a bedroom with the husband, to cook his meals, etc for she was too frightened to do anything else; she had asked to be rehoused by the council, but the council informed her that as long as the parties were married they could not give her another house.

Lord Denning in delivering his judgment observed at page 752 as follows:

"Those facts give rise to the point of law. It is this: the wife is in fact living with the husband. How can she say that she "cannot reasonably be expected to live with her husband." When she is in fact living with him? I think she can say so. The section does not go on to provide that she must have"left him" and be "living apart" from him. I think she satisfies that requirement, even though she is in the same house with him—and in fact living with him—If it be the case that she has no alternative open to her—nowhere else to go. It is not reasonable to expect her to live there but albeit unreasonable she has no option but to be there."

Lord Scarman, L. J. concurred and said rather poignantly at page 753*: "I agree that the wife's case is that her marriage has broken down irretrievably and she set out to establish irretrievable breakdown of her marriage by seeking to prove that her husband had behaved in a such a way that she cannot reasonably be expected to live with him. In my judgment she is entitled to have her case investigated on its merits and the mere fact that she is living with him, and was living with him when the case came to Court, does not by itself establish that she should reasonably be expected to live with him."*

Lord Scarman continued:

"There are many, many reasons why a woman will go on living with a beast of a husband. Sometimes she may live with him because she fears the consequences of leaving. Sometimes it maybe physical duress, but very often a woman will willingly make the sacrifice of living with a beast of a husband because she believes it to be in the true interest of her children. Is such a woman to be denied the opportunity (which, of course,is what happened here) of calling evidence to show that, although she is living with him, yet the family situation is such and his behavior is such that she cannot reasonably be expected to do so. It seems to me, as Megaw, J, has said, that there is no logical difficulty in the way of the wife and the 1969 Act plainly envisages that she should have the opportunity of placing her case before the Court."

ZAMBIAN CASES

I turn now to consider some Zambian cases. The first case I will consider is the case of *Dewar v Dewar [1971] Z.R. 38.* The facts of the case were that the petitioner who had been married to the respondent for about eleven years applied for dissolution of her marriage, custody of two minor children of the marriage and maintenance for herself and the children on the ground that the marriage had irretrievably broken down, and that the respondent had behaved in such a way that she could not reasonably be expected to live with him. In the course of the judgment, Baron J, observed at page 40,that the wife complained of her husband's conduct and attitude towards her; she made allegations of sexual pervasion and abnormality. And she further complained that her husband humiliates and abuses her. The husband in turn complained that his wife was preoccupied with sex, is promiscuous, and behaves provocatively in male company. Baron, J, went on to observe that the petitioner prayed for dissolution of the marriage in terms of section 1 and 2(1)(b) of the Divorce Reform Act, 1969, the effect of these two provisions he noted read together with section 2(3) is that there are two separate

requirements: first the irretrievable breakdown of the marriage. And second, the existence of one or more of the facts (a) to (e) in section 2(1).

Baron, J, went on to observe at page 40 that:

Thus, even if as a matter of common sense and reality the Court is satisfied that a marriage has broken down irretrievably, it is not permissible so to hold as a matter of law unless one or more of the five requirements is present, the onus in this latter regard being on the petitioner: equally, even if one of these five requirements is present, the Court is not permitted to grant a decree nisi if it is not satisfied that the marriage has not broken irretrievably, the onus there being on the respondent (see section 2(3).)

The second Zambian case I will consider is *Mahande v Mahande [1976] Z.R. 288*. The facts of the case were that before the marriage, the petitioner had an illegitimate child of which the respondent was not the father. She did not disclose the existence of the child to the respondent who learned of it about two years after the marriage.The respondent accepted the child into the matrimonial home, and continued to accept and maintain it until the petitioner left the matrimonial home. The petitioner petitioned for divorce on the ground that the marriage had irretrievably broken down, and that the respondent behaved in such manner that the petitioner could not reasonably be expected to live with him.

In the judgment delivered by Cullinan, A,JS he referred to and adopted the dicta of Ormrod, J, in *Pheasant v Pheasant [1971] 1 ALL E.R. 587* at page 589 as follows:

Having established by section 1, that the only ground on which a marriage may be dissolved is that the marriage has broken down irretrievably, the Act goes on to provide in section 2(1) of the 1969 Act that the Court "shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts:" Thereafter, the well-known five facts are defined. The question of irretrievable breakdown has not therefore been left at large for the Court to determine, no doubt because it was realized that, except in the clearest cases, this is not a justiciable issue. Without guidelines, the Court has no means of judging what one person, let alone two, may decide to do in the future in relation to their marriage. If there is any doubt about it, section (1) is designed to provide the guidelines, and this it does by defining the five essential facts or situations from which alone the Court may infer that the breakdown is irretrievable."

In the Mahande case (supra), the trial judge observed as follows:

I wish to state at the outset that when dealing with a petition for divorce, I must not hold the marriage to have broken down irretrievably unless I am satisfied that the allegations in the petition are established. It is the duty of this Court so far as it reasonably can, to inquire into the facts alleged by the petitioner and into any facts alleged by the respondent and if the Court is satisfied on the evidence of any fact or facts alleged, then unless it is satisfied on the evidence that the marriage has not broken down irretrievably it must grant a decree nisi of divorce."

Commenting on the dicta of the trial judge above, the Supreme Court noted as follows at page 293:

"That direction is based on subsections (3) and (4) of section 1 is incomplete. The Court must be satisfied on the evidence not just of any fact or facts alleged in the petition, but of any such fact as is mentioned in subsection (2). Obviously a petition could not be filed in the Court without at least one of the essential "facts" being pleaded. Nonetheless a feature of the judgment is that in dismissing the petition, the learned trial judge nowhere stated that he was not satisfied of the essential fact alleged, nor if so satisfied he was also satisfied that the marriage had not broken down irretrievably. It seems to me that the particular wording of section 1(1) and (4) places a duty on the trial judge to make such definitive findings."

The Supreme Court went on to observe at page 293 that the essential "fact" pleaded in the *Mahande* case(supra) fell under section (1)(2)(b). The Supreme Court noted that the wording of that "fact" has been the subject of some learned authority. The Supreme Court singled out the observations of Bignall, J, in Ash v Ash [1972] 1 ALL E.R 582 at page 585, f to c, as follows:

"The phrase cannot reasonably be expected to live with the respondent necessarily poses an objective test, in contradistinction to the phrase," the petitioner finds it intolerable to live with the respondent," in paragraph (a) of the subsection. So much is common ground. The question on which I heard considerable argument was: what is the meaning of the words the petitioner in paragraph (b)? Two possible constructions were canvassed, one which counsel for the wife, for whose assistance I am indebted, first submitted was that "the petitioner" means the ordinary, reasonable spouse, looked at as a petitioner. The alternative which counsel for the wife adopted after he had resiled from his submission was that "the petitioner"means the particular petitioner in the case under consideration. Faced with a choice between those two meanings, I have no hesitation in adopting the latter; that is the sense in which the words "the petitioner" are used, so it seems to me, throughout the section and that is the sense which apart from that, I think the words naturally bear.

In order therefore to answer the question whether the petitioner can or cannot reasonably be expected to live with the respondent in my judgment, I have to consider not only the behavior of the respondent as alleged and established in evidence, but the character, personality disposition, and behavior 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 behavior during the marriage, reasonably be expected to live with this respondent?It follows that if a respondent is seeking to resist a petition on the first ground on which the husband in this case relies (i.e. notwithstanding his admitted or proved behaviour,) it was not such that the petitioner could not reasonably be expected to live with him, he must in his answer plead and in his evidence establish the characteristics, faults, attributes, personality, and behaviour on the part of the petitioner on which he relies. Then if I may give a few examples, it seems to me that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; a taciturn and morose spouse can reasonably be expected to live with a taciturn and morose partner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the opposite sex; and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other. The conclusion seems to me consonant with that have been said to be the objects of the 1969 legislation, which are not in my view simply to make divorce easier, but to quote from one source:

"…(i) To buttress, rather than to undermine the stability of marriage; and (ii) when, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation."

Notwithstanding, Baron, J, observed at page 294 that with the greatest respect to the learned judge-Bignall, J, he could not say altogether that he agreed that two violent persons could be reasonably be expected to live together. But he however agreed with the underlying principle.

Ultimately, the Supreme Court held that the petitioner had adduced sufficient evidence of the respondent's behaviour, particularly in the cumulative effect to prove her case.Namely,that the respondent had behaved in such a way that she could not reasonably be expected to live with him, and that the marriage had irretrievably broken down.

The third Zambian case I will consider is the caseof *Yoyo v Yoyo SCZ Judgment Number 78 of 1998.* This was an appeal against the High Court's decision to grant decree *nisi*to the respondent. The respondent had earlier presented a divorce petition in the High Court. The petition was based on behaviour of the appellant. The essential facts were that the respondentwas in London for three years for medical treatment, with the knowledge, financial, and material support of the petitioner. During that period, the petitioner was alleged to have committed adultery with a third party. In answer to the petition for dissolution of marriage, the respondent resisted the petition, and counsel for the wife argued that the petitioner intended to divorce the respondent, not because he did not love her, but because he wanted to pave way to marry the third party. In delivering the judgment, the trial judge observed as follows:

"While I accept that the respondent has proved adultery against the petitioner, I cannot say that it is the cause of the problems between the parties. Closely following the history of the marriage, the problems started long before the third party came on the scene…"

The trial judge was therefore satisfied that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent.

On appeal, in a judgment delivered by Chirwa, JS. the Supreme Court rejected the argument by counsel for the wife that she was prepared to tolerate the husband's adultery. The Supreme Court noted that accepting the argument by counsel for the wife, would amount to endorsing the trial judge's finding that what remained of the marriage was a legal shell. And further the Supreme Court held that it was not just a question of maintaining the status of "Mrs"; there must be mutual love.The Supreme Court went on to observe that the behaviour of the wife was not only unreasonable, but was also frightening. The Supreme Court was quick to point out that whilst the Courts should always assist married parties to reconcile, they should not create fertile ground for homicide. In the end, the Supreme Court concluded that the petitioner could not reasonably be expected to live with the respondent.

The last Zambian case I will consider is the case of *Malama v Malama Appeal Number 84 of 2000 (unreported)*. This was an appeal against the High Court judgment, in favour of the petitioner. The parties wedded on 27th June, 1987. It was common ground before the trial Court that sometime in 1991, there was no matrimonial harmony between the parties, because the husband (appellant) believed that his wife (respondent) applied love potions to her body, and introduced some in his food. Because of this suspicion, the husband searched the home, and recovered what were alleged to be love potions and some concoction which utterly distressed him. After the discovery, the couple sought assistance of church counselors. After the counseling, the parties resolved to give the marriage a chance.

However, on 16th September, 1996, after being tipped by the maid, the husband discovered a fresh consignment of the love potions. He found the potions offensive. In response to the petition for the dissolution of the marriage in the High Court, the wife admitted before the trial judge that the love potions were discovered in the matrimonial home. But she however denied introducing them in her husband'sfood. She maintained that the love potions were only applied to her body in order to cement their marriage. The trial judge dismissed the petition by the husband, on the ground that he had not established proof beyond reasonable doubt; using a higher standard of proof equivalent to the criminal standard of proof, thatbecause of the conduct,orbehaviour by the wife, the marriage had irretrievably broken down.

On appeal, the Supreme Court held that, first, the standard of establishing facts in divorce matters is the same as in other civil matters. Second, there was no evidence to support the trial Court's conclusion that applying love potions is a prevalent practice of Zambian women, and as such the trial Court misdirected itself in using that as a reason for refusing to dissolve the marriage. The Supreme Court granted the decree *nisi*.

SUMMARY OF THE LAW

The law may therefore be summarised as follows: there is only one ground for divorce; that the marriage has broken down irretrievably. Irretrievable breakdown, however may

be only established by proving one or more of the five facts set out in section 9 of the MCA. It is therefore the duty of the Court to inquire so far as it reasonably can, into the facts alleged by both parties.In practical terms, the burden is on the petitioner to establish one of the facts. And it is for the respondent in a defended suit to show, if he wishes, that the marriage has not irretrievably broken down. If there is anything inconsistent with irretrievable breakdown, of marriage, then the condition is not satisfied. In a word, a marriage is said to have irretrievably broken down, if it stands no chance of the parties resuming the cohabitation.

When it is alleged that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, the task of the Court is not only to look at the quality of the respondent's behaviour, but also the effect of the conduct upon the petitioner. Therefore, in considering what is reasonable, the Court in accordance with its duty to inquire, so far as it reasonably can into the facts alleged, will have regard to the history of the marriage, and to take the 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 as for the thick-skinned. Although the test is said to be objective, it is not the same as asking whether a hypothetical reasonable spouse, in the petitioner's position would continue to live with the respondent.

In the context of section 9(1)(a) of the MCA, behaviour means any conduct, whether active or passive. The behaviour is not confined to behaviour to the respondent: the behaviour may have reference to the marriage although it is to other members of the family or to outsiders. Any and all behaviour may be taken into account. The Court will in particular have regard to the whole history of the matrimonial relationship. It is however important to note that behaviour is something more than a mere state of mind: behaviour in this context is action or conduct by the one which affects the other. It may be an act or omission. Or course of conduct. Whatever the case, the behaviour must have some reference to the marriage.

It is also instructive to note that regard will be hardto the cumulative effect of behaviour, while conduct may consist of a number of acts 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 when taken together, are such that the petitioner cannot reasonably be expected to live with the respondent.

I have stated above that behaviour is action or conduct by the one which affects the other. But the question is; what is the standard of behaviour? The Court has to consider whether it is reasonable to expect the petitioner to put up with the behaviour of the respondent, bearing in mind the characters and difficulties of each of them and in the process trying to be fair to both of them.

It is for the judge, not the petitioner alone, to decide whether the marriage has irretrievably broken down. This is a question of fact. And one approach to it, is to assume the case was being tried by a judge and a jury. And first to consider what the proper direction would be, and then put oneself in the position of a properly directed jury in deciding the question of fact. In that case, a judge ought to ask himself this question: wouldany right thinking person come to the conclusion that this party has behaved in such a way that the other party cannot reasonably be expected to live with him; taking into account the whole of the circumstances, and the characters and personalities of the parties?

Lastly, I must also point out that the fact that one spouse is living with the other spouse at the time of the hearing, does not of itself establish that the first spouse should reasonably be expected to live with that other spouse. There may be good reasons. Such as a lack of anywhere else to go, which prevent the petitioner from leaving the matrimonial home. And such spouse is in any case entitled to have her case investigated on its merits; while living with the other party and attending to the hearing of the suit. In any event, section 9(1)(b) of the MCA does not provide that a petitioner should have left the respondent, or that the parties must be living apart when the petition is filed.

APLLICATION OF THE LAW TO THE FACTS

I will now pass to apply the law to the facts of this case. The major contention of the petitioner in this matter is that the marriage has irretrievably broken down because the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with her. In support of this contention, the petitioner has relied on the following pieces of evidence. First, thatthe parties no longer share the same matrimonial bed. Second, that there have been instances when the parties have engaged in physical fights. Lastly, that the respondent is of a jealous, and superstitious nature.

The respondent has contested the petition. In so doing, the respondent has argued that there is only one ground that the petitioner must establish: that is, the marriage has irretrievably broken down. And the respondent contends that the Court cannot allow the petition, unless the petitioner has proved one of the facts set out in section 9 of the MCA; in this particular case section 9(1)(b).In ascertaining whether or not the marriage has irretrievably broken down, the respondentmaintained that the following test should be employed: 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 her; taking into account the whole of the circumstances, and characters and personalities of the parties? In resisting the dissolution of the marriage, the respondent has relied on the following pieces of evidence. First, that the parties still enjoy some family life. This includes eating meals together. Second, the petitioner continues to support the respondent financially. And lastly, the parties still continue to enjoy a sexual relationship.

Before I pronounce whether or not the marriage has irretrievably broken down, I would like to interpolate that a petition for the dissolution of marriage premised on behaviour must amount to more than a bare or mere complaint that, for instance, the parties now consider themselves incompatible; they no longer have anything in common; or that one of them is bored.While the behaviour complained of need not be as serious as cruelty, a

petitioner must nonetheless advance sufficiently serious reasons to say that from a reasonable person's standpoint, after consideration and allowance of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that the petitioner ought not to be called to endure it.

I also accept the submission by counsel for the husband, that the fact that the petitioner is in this case still living in the same house with the respondent, is not a bar for the petitioner to bring a petition that he cannotreasonably be expected to live with the respondent.

All said and done, the following question then arises, to paraphrase the words of Bagnall, J, in *Ash v Ash* (supra);Ormrod, J, in *Pheasant and Pheasant,* (supra); and Cullinan, A, JS in *Mahande v Mahande* (supra);that bearing in mind the petitioners faults and other attributes, good and bad and having regard to his behaviour during the marriage, bearing in mind the characters and 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 a way that the petitioner cannot be reasonably be expected to live with her? I think not.I think not, because in my opinion, the petitioner has barely catalogued a long list of largely trivial complaints and most which are in any event normal and isolated challengesthat most married couples encounter. What is more, the conduct and life style of the parties, especially during the period when this suit was pending hearing, is utterly inconsistent with a marriage that has irretrievably broken down. For instance, the parties still continue to enjoy family life; the petitioner is still supporting the respondent financially, and above all, the parties still continue to enjoy a sexual relationship. In light of this evidence, I reject the submission by counsel for the husband that there is no mutual love between the parties as laid down in the *Yoyo* case (supra).

In any case, the *Yoyo* case (supra) is distinguishable from this case because the behaviour of the respondent in that case was so frightening that it led the Supreme Court to observe that while the Courts should always help to reconcile warring parties,

in the process they should not create fertile ground for homicide.The *Malama* case (supra) is also distinguishable from this case because while the Supreme Court accepted the argument by counsel for the husband that there was no evidence to support the trial Court's conclusion that applying love potion to cement marriages is a prevalent practice in Zambia, in this case, the respondent was with the knowledge of the petitioner, applying the herbs, in a bid to save a pregnancy.

Granted the matrimonial history of the parties, and the challenges that they have encountered in their marriage, I am unable to say that the respondent has behaved in such a way that the petitioner cannot be reasonably expected to live with her. I therefore dismiss the petition. And costs will of course follow the event.

Leave to appeal is also granted.

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Dr. P Matibini, SC.
HIGH COURT JUDGE