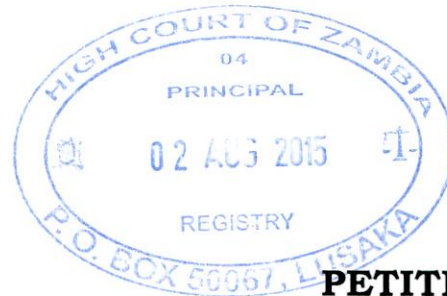


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2014/HP/0193**



**BETWEEN:**

**MR. KENNETH BANDA**

**PETITIONER**

**AND**

**SHEZIPI MAIMISA BANDA**

**RESPONDENT**

**CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Petitioner : Mr. D. M. Chakoleka of Messrs Mulenga  
Mundanshi, Kasonde Legal Practitioners*

*For the Respondent : Mr. M. Kanga of Messrs Makebi Zulu  
Advocates*

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**J U D G M E N T**

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**LEGISLATION REFERED TO:**

- (i) *Matrimonial cases Act, No 20 of 2007 of the Laws of Zambia.*
- (ii) *The marriage Act, chapter 50 of the Laws of Zambia*

(iii) *Matrimonial Causes Rules of England, 1973*

(iv) *Section XXXV (1) of the High Court Rules chapter 27 of the laws of Zambia.*

The genesis of this case is that the Petitioner Kenneth Banda on 29<sup>th</sup> August, 2014 launched a petition for divorce against the Respondent, **SHEZIPI MAIMISA BANDA.**

The petition was for dissolution of marriage on the ground that the marriage had irretrievably broken down in accordance with section 8 of the Matrimonial Causes Act<sup>1</sup>, on account of the situational fact of unreasonable behaviour that the respondent has behaved so unreasonably that the Petitioner cannot be reasonably be alleged expected to stay with him. He alleged adultery. The petition was supported by affidavit. The petition was anchored on section 9 (1) of the Matrimonial causes Act<sup>1</sup>.

On 26<sup>th</sup> October, 2014 the Respondent filed in an answer and cross petition. She admitted that the marriage had indeed broken down irretrievably, but not on account of her unreasonable behaviour but on account of the unreasonable behaviour and adultery of the Petitioner. The Answer and cross petition was supported by an affidavit.

On 4<sup>th</sup> November, 2014 the Respondent filed summons for security for costs pursuant to Order 40 Rule 7 and 8 of the High Court Rules, chapter 27 of the laws of Zambia. The application was supported by an affidavit. The Respondent sought orders to

- (i) *Order for petitioner to pay into Court security for costs.*
- (ii) *Order for stay of proceedings until security for costs are paid.*

On 30<sup>th</sup> January, 2015 Counsel for the Petitioner, Mr. Chakoleka made 2 applications. The first one to strike out summons for payment of security for costs on the ground that neither the Respondent nor her Advocates had appeared to prosecute the application for security for costs. The second application was to withdraw or abandon the Petitioner's Petition.

Both applications were granted. In respect of the first application to strike out the Respondent's application for payment of security, the same was struck out for an appearance of the Respondent the mover of the application pursuant to order XXXV(1) of the High Court Rules<sup>3</sup> with costs to the Respondent which costs were to be taxed in default of agreement.

The respondent was granted leave to apply for restoration of the struck out application within 14days in default the application would stand dismissed.

In respect of the second application by the **Petitioner** to abandon the Petition so that the cross petition would proceed and the Court determine the same on the basis of affidavit's evidence filled therein by the parties.

The application to withdraw the petition was upheld and the petition was accordingly dismissed with costs to the Respondent which costs were to be taxed in default of agreement.

It was also observed that, there is no provision under the Matrimonial Causes Act<sup>1</sup> and the Matrimonial Causes Rules<sup>(iii)</sup> which provides for determination of a divorce Petition or cross petition on affidavit evidence without the parties being called to the stand and give evidence.

The exception to the general rule will be in a situation where a petition or cross petition is not contested or defended or where a party elects to keep away from proceedings. In such a situation the party present will be advised to proceed to present his or her case.

The matter came up for hearing on 28<sup>th</sup> July, 2015. The record reveals that the orders given on 30<sup>th</sup> January 2015 were not drawn up by the Advocates for the petitioner who had made the application to strike out the Respondent's application for payment of security for costs and the application to withdraw or abandon the petition.

I should point out that, it is the duty of a party or litigant or his or her Advocates who have made an application upon which a pronouncement has been made to draw up orders upon attendance in chambers or open Court as the case might be, and cause to be served on the opponent's such orders.

This was not the case in this matter. This conduct is disapproved. On the return date Counsel for the Respondent Mr. Kanga informed the Court that the Respondent was abandoning the situational fact that asserts adultery on the part of the Petitioner in her cross appeal. Instead the Respondent would rely solely on the situational

fact for a continuous period of at least 5 years proceedings the presentation of the petition and cross petition.

There was no objection from the Counsel for the petitioner Mr. Chakoleka. There being no objection, the application was sustained and the situational fact of unreasonable behaviour premised on adultery was abandoned and expunged from the **petition** and record.

The petitioners Advocates being present and having abandoned the petition on 30<sup>th</sup> January, 2015, I allowed the Respondent to proceed with the cross petition which in any event was not being resisted there being no answer to the cross petition.

PW1 was **SHEZIPE MAIMISA BANDA** (The Respondent)

She testified on oath. She is 39 years old and resides at 202, Kabulonga Kudu Road, Lusaka. She is a Human Resource Director at **DYNALAB** International (Zambia) Limited. It was her testimony that she was on 19<sup>th</sup> February, 1999 lawfully married to the Petitioner at the Lusaka Civil Centre as evidenced by exhibit "RP1" being a marriage certificate under the provisions of the marriage Act<sup>2</sup>.

At that time she was a student, whilst the Petitioner was working for the Post News Papers Zambia Limited. After marriage, the parties cohabited at plot 1811, Libala South and subsequently at 44, Constantia **Kloof Roodepoort Gauten** in the Republic of South Africa.

Both parties are domiciled in Zambia. There are 2 children of the family namely.

- (i) *Fatima Banda (female) born on 21<sup>st</sup> September, 1995 and*
- (ii) *Kenneth Banda (Junior) born on 21<sup>st</sup> March, 1999.*

There are no proceedings in Zambia or elsewhere in the world in any Court that might affect the validity of the marriage or matrimonial property or property settlement in this matter in the event of dissolution of this marriage. No arrangement has been made for the children.

It was her testimony that the marriage has broken down irretrievably on account of the fact that the parties have lived apart for at least 5 years preceding the presentation of the petition and cross petition.

The parties stopped staying together or started living apart on or about February 2008. She therefore prayed for the dissolution of marriage on that account. It was her further testimony that there has been no agreement on her maintenance and that of the children of the family. She revealed that Faustina Banda was born before the parties were married but she was adopted by the petitioner.

There has been no agreement on the custody of the children. She would however like, nay love to have the custody of the children with the petitioner being granted reasonable liberty liberal access to the children.

There has also not been any agreement on property settlement. She finally prayed that she be awarded the costs of Petition/Cross Petition.

The witness was not cross examined. That being the position the Respondent closed her case. Learned Counsel for the parties both addressed the Court only on the issue of costs. Learned Counsel for the Petitioner submitted that the Petitioner had abandoned his petition and the same was dismissed and the Petitioner condemned to pay costs.

He pointed out that, equally the Respondent's application for payment for security of costs was struck out with costs and the Respondent condemned to pay the costs. He therefore urged the Court to let each party to bear its own costs. Learned Counsel for the Respondent submitted that costs are in the realm or Jurisdiction of the Court.

Having heard the Respondent and there being no challenge to her evidence, I am satisfied that the marriage which was celebrated on 19<sup>th</sup> February 1999 between the parties under the Act<sup>2</sup> has irretrievably broken down on account of the facts that the parties have lived apart for a continuous period of 5 years preceding the presentation of the Petition/Cross Petition in accordance with section 9 (i) e of the Matrimonial Causes Act<sup>1</sup>.

The marriage is therefore dissolved and a decree nisi granted, pursuant to section 41 of the Matrimonial Causes Act<sup>1</sup>. The decree

nisi is to be made absolute after 6 weeks, unless cause is shown why the decree should not be made absolute.

I grant the custody of the children **FAUSTINA BANDA** (Female) and **KENNETH BANDA** (male) to the Respondent. The Petitioner is granted access during reasonable hours of the day upon prior notification by the Petitioner. I will refer the issue of maintenance and property settlement to the Learned Deputy Registrar upon application by either party within 90 days from the date of hereof in default of agreement by the parties.

The Petitioner having abandoned his Petition and not having contested the divorce, it is a fundamental principle of awarding costs that a successful litigant should not be deprived of his or her own costs unless it can be demonstrated that it would be injudicious to award such costs.

I find no such grounds to justify the denial to successful litigant of her costs. I therefore hold and rule that the costs are for the Respondent which costs are to be taxed in default of agreement.

Before I leave this matter I have to refer to an affidavit filed on 20<sup>th</sup> October, 2014 by the Respondent SHEZIPI **MAIMISA BANDA** in support of Answer and Cross-Petition, of particular concern and interest in paragraph 10 of the said affidavit which reads as follows.

*“That the Petitioner now cohabits with another woman, namely **SHARON CHISENGA CHIBUYE** who he purportedly married at St Ignatius Parish in Lusaka on 22<sup>nd</sup> August 2014 while he was*



*still legally married to me. Now shown and produced are photos of the Respondent and purported wife taken on their wedding day collectively marked "SMB<sup>2</sup>"*

Indeed a perusal of the 4 very graphic photographs shows a man and a woman in a wedding attire a demonstrative kiss is captured and the bride holding a wedding bouquet of flowers graced by brides maids in purple and brides men properly dressed in black suits white shirts and topped with black bowties appropriate to the occasion.

In my view if the assertion by the Respondent are in fact true that the Petitioner had celebrated a marriage during the subsistence of a valid marriage, then the incidence reveals a commission of the offence of bigamy, contrary to section 166 of the Penal Code. The relevant section reads

*"Any person who having a husband, or wife living, goes through a ceremony of marriage which is void by reason of its taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years.*

*Provided that this section shall not extend to any person whose marriage with such husband and wife has been declared void by a Court of competent Jurisdiction or to any person who contracts a marriage during the life of a former husband or wife at the time of the subsequent marriage, shall have been continuously absent from such a person for the space of 7*

*years, and shall not have been heard of by such person as being alive within that time”.*

The allegations of bigamy having been brought to the attention of the Court, the Court cannot gloss over this serious allegation. I accordingly refer this matter to the relevant investigating authorities or state Agencies of the Zambia Police Service and the Director of Public Prosecution to look into this matter and come up with their findings and take such course of action as they may deem fit and appropriate within their lawful mandate of investigating alleged crime and prosecuting where necessary.

The parties are informed of their rights of appeal to the Supreme Court within 30 days from the date hereof.

**Dated this *24* day of *August*, 2015**



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**Mwila Chitabo, SC  
Judge**