IN THE HIGH COURT FOR ZAMBIA **2016/HPF/D114**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Divorce Jurisdiction)

BETWEEN:

MUTALE MUSWEU **PETITIONER**

AND

IAN MUSWEU **RESPONDENT**

BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON 29TH DAY OF SEPTEMBER, 2017 IN CHAMBERS.

For the Petitioner: *Mrs. D. Findlay - D. Findlay & Associates*

For the Respondent: *Ms. I. Nambule - Sharpe & Howard Legal Practitioners*

RULING

CASES REFERRED TO:

1. *W (RJ) vs. W (RJ) (1971) 3 ALL ER 303;*
2. *M (D.) vs. M (S.) and G (D.A) intervening (1969) 2 ALL ER 243;*
3. *Bellamano vs. Ligure Lombarda Limited (1976) ZR 328; and*
4. *Josia Tembo & Another vs. Peter Mukuka Chitambala (2009) ZR 362 at 338.*

LEGISLATION AND OTHER WORK REFERRED TO:

1. *The Rules of the Supreme Court (White Book) 1999 Edition;*
2. *The Matrimonial Causes Act No. 20 of 2007;*
3. *The Matrimonial Proceedings and Property Act 1970;*

4. *Practice Direction (PD 14) of 197;*
5. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia; and*
6. *The High Court Act, Chapter 27 of the Laws of Zambia.*

This is a Ruling on three preliminary issues raised by the Petitioner in a Notice of Motion filed pursuant to ***Order 14A*** and ***Order 33 Rule 7*** of ***The Rules of the Supreme Court***[1] and ***Section 5 (1) (c)*** and ***Section 75*** of ***The Matrimonial Causes Act***[2]. The generis of this matter, in so far as it relates to these preliminary issues, are that the matter came up for hearing of an application on the part of the Petitioner for an Order for maintenance of the children of the family pursuant to ***Sections 54 (1) (d) (e)*** and ***56*** of ***The Matrimonial Causes Act***[2] before the District Registrar. Before hearing could commence, it was brought to the attention of the Honourable District Registrar that the Respondent had filed a notice for trial of an issue as to whether a child, whom I shall refer to as LM, is a child of the family in an application for ancillary relief, which application was pending hearing and determination. The District Registrar was of the considered view that the issue raised before him related to paternity, which ought to be heard and resolved first before maintenance and accordingly stayed the hearing of the application for maintenance. The record was subsequently re-allocated to this Court on 2nd May, 2017 for the hearing of the Respondent Application for determination of paternity.

At the scheduled hearing of the Respondent's application of trial of issue as to whether child LM, is a child of the family on 19th

September 2017, preliminary issues were raised by the Petitioner. The Petitioner formulated the preliminary issues as follows: -

1. *Whether the Respondent's Application is properly before the Court in light of the fact that the aforesaid application is defective as it does not state the provision of the law pursuant to which the said application is being made on; neither pursuant to which provision of the law the Court is being moved to make the Order sought by the Petitioner;*
2. *Whether the Respondent can move the Court to determine by way of trial whether the child is child of the family by virtue of the provisions of* ***Section 5 (1) (c)*** *of* ***The Matrimonial Causes Act Number 20 of 2007*** *of the Laws of Zambia, which provides for children that shall be deemed to be a child of the family; and*
3. *Whether the Respondent can move the Court to determine the issue of whether or not the child is a child of the family by virtue of* ***Section 75*** *of* ***The Matrimonial Causes Act Number 20 of 2007*** *of the Laws of Zambia, which provides that the Court shall regard the interest of the children as paramount consideration, when in fact the sole purpose of the Respondent's application is to avoid maintenance of the child of the family and therefore not in the best interest of the child, as provided by law.*

In support of the Notice of Motion to raise preliminary issues, the Petitioner filed herein an Affidavit in Support deposed by the Petitioner, Mutale Musweu, where she averred, *inter alia*, as follows:-

1. *That she is aware that the Respondent has made an application for trial of issue to determine whether LM is a child of the family on application for ancillary relief, by virtue of the fact that the Respondent does not wish to be financially obligated towards maintenance of the said LM;*

2. *That she verily believes as advised by her Advocates that in any event the fact that LM was born within the marriage, has always been considered a child of the family, a member of the household of both the Petitioner and the Respondent and accepted by both as such, deems her to be a child of the family by law;*
3. *That she verily believes that the sole reason that the Respondent is seeking to have LM declared illegitimate is so as to avoid being financially responsible for her upkeep and education, which she verily believes is entirely for his benefit and not intended to benefit or consider what is in LM's best interest;*
4. *That she disputes the validity of the DNA test exhibited by the Respondent in his Affidavit in Support of the application, which blood test was undertaken at the instance of the Respondent and was entirely overseen and financed by the Respondent, the results of which were already opened prior to her notification, therefore not to her satisfaction or acceptance;*
5. *That she does not wish to subject LM to further blood tests as she was extremely traumatised by the first blood tests as she was told the purpose of the blood test, therefore she does not consider this to be in her best interest and as she is of age of understanding, she is likely to be once again seriously traumatised by any further blood tests that may be ordered by the Court in any event;*
6. *That in the circumstances, as it is the Respondent's sole reason to avoid maintenance by seeking this application and declaration that LM is not his child, she is inclined to absolve the Respondent of any financial responsibility towards LM and take full responsibility for the child, so as not to subject her to any more emotional trauma if it is the Respondent's wish not to consider LM as his child, as love cannot be forced upon another.*

The Respondent in opposing the Notice of Motion to raise preliminary issues, filed herein an Affidavit in Opposition dated 28th August 2017, deposed by Ian Musweu, the Respondent herein, in which he averred, *inter alia*, as follows: -

1. *That the allegation that he does not wish to be obligated towards the maintenance of LM is incorrect because, until he discovered, through the deoxyribonucleic acid (DNA) test results, he attended to the said child's financial needs from the date that they discovered that the Petitioner was pregnant with the child to the day that she left the matrimonial home;*
2. *That the educational financial responsibility of taking care of the said child was borne by the Respondent as can be verified from the Lusaka International Community School records and therefore to claim that his current application for determination of the question of whether or not the child is a child of the family is a scheme by the Petitioner to elude the real issue for determination by this Honourable Court which question hinges on the deceit which the Petitioner has subjected the Respondent and the child;*
3. *That since the facts before the Court prove that the said child is not biologically his, he has the right to establish the facts and in the same vein the child has a right to know her biological father against whom the child can assert her rights and who should then take full responsibility of raising his own child;*
4. *That the acceptance of the said child as a child of the family was before he found out that she is not his biological child, which evidenced the Petitioner's deceit of, despite knowing that she had committed adultery and conceived by another man, she made him believe that he was taking care of his biological child when in fact not, to this extent, the Petitioner should not be allowed to benefit from the fruits of her own adultery;*
5. *That he is not seeking to have the child declared illegitimate but rather seeking a declaration that the child is not a child of the family and that,*

particularly, he is not the biological father of the child. That whilst the child was indeed conceived and delivered during the subsistence of their marriage, the evidence before this Honourable Court proves that he is not the biological father of the said child, which fact proves the deceit and adultery of the Petitioner who should not be allowed to benefit from it;

6. *That the contention that he is seeking to have the child declared as not being a child of the family on application for ancillary relief is not serving any interest of his but to the contrary the interest of the child who notwithstanding these proceedings deserves to be honestly informed of her biological father as opposed to how the Petitioner wishes to proceed by refusing and or avoiding to account truthfully to the child about her true paternity. That by insisting on giving obligations over to the child, he strongly believes that the Petitioner is not serving the child's interest but perhaps those of the biological father whose identity is still only known to the Petitioner;*
7. *That whilst the DNA test was conducted at his request, which was triggered by his suspicion of the Petitioner's adultery, the same was conducted in a transparent manner and with the consent of both parties;*
8. *That when the DNA test results were ready, the Petitioner refused on many occasions to go with him to collect them until he threatened legal action and when they got there the test results were sealed and they were informed of their rights to ask the medical officers questions. That there were no questions raised by the Petitioner notwithstanding the invitation to do so;*
9. *That the Petitioner's deceitful behaviour is again exposed when she asserts that she cannot allow the child to undergo blood tests, which according to her traumatised the child whilst on the other hand, she contests the very results. That the assertion of trauma on the part of the child is unproven speculation on the part of the Petitioner and that notwithstanding, it is expected that the drawing of blood from any person, more particularly a child will cause discomfort.*

The Petitioner responded to the Affidavit in Opposition by filing herein an Affidavit in Reply dated 13th September 2017, deposed by the Petitioner, in which she avers, *inter alia*, as follows: -

1. *That the assertions made by the Respondent that he continued being financially obligated towards the child until the date that she left the matrimonial home are incorrect and misleading to the Court;*
2. *That she verily believes that the Respondent unilaterally authored an email to Lusaka International Community School (LICS) on 17th February, 2016 advising the school that the said child will not continue attending the school but will be moving to another school BIPS;*
3. *That she believes that the sole reason the Respondent authored and unilaterally decided to move only one child namely LM, is by reason of the fact that BIPS is much cheaper in terms of school fees than LICS and in fact the Respondent subsequently declined to pay any of LM's registration fees or any school fees in the new school even before the DNA test were carried out;*
4. *That she verily believes that the Respondent had always been financially motivated and the sole reason for disputing paternity and embarking on DNA tests has always been with intent to cease financial obligations particularly school fees for one of the children;*
5. *That she verily believes that further proof of the fact that the Respondent's sole motivation for disputing paternity is to be absolved of financial obligation for LM is the Respondent's application to Stay the Maintenance Application until the paternity issue is disposed of by this Court as he does not wish to be in the meantime encumbered financially for a child that he does not consider to be his pending determination of this issue by the Court;*
6. *That the Respondent is distorting the information relating to the emotional trauma experienced by LM at the time of the DNA tests, as the Respondent*

is well aware that LM was made aware by the Nurse as to why the blood tests were being taken and so LM was deeply traumatised;

7. *That LM has been so traumatised by the events that she had to take her for counselling and therefore she still maintains that the Respondent's application is not in LM's best interests but solely intended to give the Respondent reasons to cease being financially obligated towards her.*

Both parties filed herein skeleton arguments. The Petitioner's skeleton arguments were filed herein on 14th September, 2017. On the first preliminary issue raised, the Petitioner submits that it is trite law that it is a requirement that the provisions of the law upon which reliance is sought to move the Court must be stated in the Summons and/or Notice of application, under which the relief is sought. The Petitioner contends that despite the fact that some authorities in decided case law state that such omission is not always fatal, however this particular omission is fatal in this case, because there is no provision of the law that can be found upon which this Honourable Court can be moved to grant the relief sought by the Respondent in firstly declaring the child of the family illegitimate and seeking to compelling the Petitioner in disclosing an alleged third party's identity as the father. In support of this argument, I was referred to ***Section 5 (1) (c)*** of ***The Matrimonial Cause Act***[2], which states as follows: -

"Certain Children deemed to be children of family

(1) For the purposes of this application of this Act in relation to a marriage-

(c) a child of either the husband or wife, including a child born outside wedlock to either one of them and a child adopted by either of them, if at the relevant time the child was ordinarily a member of the household of the husband and wife and accepted by both as a member of the family;

shall be deemed to be a child of the family, and a child of the husband and wife.

Provided that a child born before the marriage, whether legitimated by the marriage or not, who has been adopted by another person or other person shall be deemed not to be child of the marriage."

It is contended by the Petitioner, that according to the above cited provision, whether or not the Respondent is the natural father of the child or not is irrelevant, as the provisions adequately specify what child will be deemed as a child of the family. She further contends that this provision evidently intended that a child of the family would include a child born outside wedlock to either one of them, provided that at the relevant time the child was ordinarily a member of the household and accepted by both of them as a member of the household. Her argument is that whether or not the Respondent was a natural father to LM, this child was treated as a member of the household and accepted as such by both the Respondent and Petitioner, therefore embarking on a trial of an issue of whether or not the child is a child of the family is futile, as the law is clear. In augmenting the issue raised, the Petitioner submitted that the reason for the absence of the indorsement of the

provision of the law sought to be relied upon by the Respondent in his application is because there is no such provision of the law upon which this Court can be moved to determine the issue of whether or not a child of the family considered by both as a member of the household can be by way of trial be declared otherwise.

The Petitioner contends that there are provisions of the law that adequately provide for circumstances wherein the Respondent may avoid liability to maintain child LM and thus drew the attention of this Court to the case of ***W (RJ) vs. W (RJ)***[1], wherein a similar application was considered. In the said case, the Court held that: -

> ***"...Thus by reason of that section the husband of a wife who during wedlock gives birth to a child whom both treat as their own, on discovering that he is not the father may avoid liability to maintain the child. The result is achieved without the husband having to take the undesired course of bastardising the child who may have lived for some years as a member of the family..."***

The Petitioner submits that the section of the law that the Court sought to rely upon in the aforesaid case is ***Section 5 (3)*** of ***The Matrimonial Proceedings and Property Act 1970***[3], which is similar to ***Section 56 (5)*** of ***The Matrimonial Causes Act***[2]. ***Section 56 (5)***[2] provides that: -

> ***"Powers of court in maintenance proceedings***
>
> ***(5) The Court shall in deciding whether to exercise its power under paragraphs (d), (e) or (f) of subsection (1) of section fifty-***

four and subsections (2) or (4) of section fifty-four against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, have regard, among the circumstances of the case-

(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; and

(c) to the ability of any other person to maintain the child."

On the foregoing provision, the Petitioner submits that recourse has been provided to the Respondent so as to avoid liability for the maintenance of the child, sought to be declared illegitimate, without embarking on an application for trial of issue as to whether a child is a child of the family. The Petitioner contends that it would not be in the best interest of the child to embark on a trial of an issue which could result in declaring the child illegitimate, particularly as the child has considered herself a child of the family and thus urged the Court to consider the interest of the child. I was referred to the case of ***M (D.) vs. M (S.) and G (D.A)***[2], where Lord Denning M.R. stated that: -

"...In this situation, I cannot help thinking that the sole reason why the husband wants a blood test is to prove that the wife was

guilty of adultery over ten years ago. Now in most cases it is best to know the truth; and I think the Court should help in ascertainment of it, by ordering blood test, if it is of any benefit to the infant. But I do not think that the infant should be made a pawn in a contest between a husband and wife - not at any rate, in the case of an infant of ten who can understand what is happening. ...so far from being in his interest, the blood tests may be harmful to him..."

The Petitioner submits that the provisions of the law make it abundantly clear that the interest of the child must be paramount, gives specific guidance as to what child will be considered as a child of the family and makes provision for instances wherein the Respondent can avoid financial obligations for the child. Accordingly, she contends that it is both futile and academic to seek determination of this issue of paternity, in light of the provisions of the law that they have relied upon, which provide that the child would be considered a child of family in accordance with ***Section 5 (1) (c)*** of ***The Matrimonial Causes Act***[2], irrespective of the blood test.

The Petitioner further argues that determining the issue for the purpose of ancillary relief, is also irrelevant as the provisions of ***Section 56 (5)*** of ***The Matrimonial Causes Act***[2], adequately provide for such instances, without having to embark on a trial of the issue. On the foregoing, the Petitioner contends that there is no need to extend determination of issues that would waste the Court's

valuable time and add unnecessary costs to parties by embarking on a trial of this issue.

The Respondent filed herein skeleton arguments and list of authorities in opposition to the Notice of Motion to raise preliminary issues. In response to the first preliminary issue raised that the application is not properly before Court in light of the fact that the aforesaid application does not state the provision of the law pursuant to which the application is being made, the Respondent referred the Court to the case of ***Bellamano vs. Ligure Lombarda Limited***[3], where the Supreme Court held that failure to make reference to a rule of law is not fatal. I was also referred to the case of ***Josia Tembo & Another vs. Peter Mukuka Chitambala***[4], where my elder brother Justice Mutuna N. K. pronounced himself on this issue by stating at ***page 338*** as follows: -

> ***"The authorities cited above indicate clearly that, it is necessary to indicate the Order pursuant to which an application is made on the process. Further, that a list of authorities to be relied upon should be filed clearly specifying the passage or pages to which reference will be made at the hearing. The authorities however, do not prescribe a penalty for default, and neither has the applicants' counsel stated what action she wishes me to take as a result of the default by counsel for the respondent. I find that, the default is not fatal and does not in any way prejudice the applicants in the conduct of their defence to the preliminary issues. Having so found, I will entertain the preliminary issues."***

On the basis of the above authorities, the Respondent contends that their non-reference to the rule upon which their application for trial of issues as to whether a child is a child of the family on application for ancillary relief, is not fatal but a curable defect.

On the second preliminary issue raised by the Petitioner, on whether the Respondent can move the Court to determine by way of trial whether the child is a child of the family by virtue of the provisions of ***Sections 5 (1) (c)*** of ***The Matrimonial Causes Act***[2], the Respondent contends that this particular section envisages non-biological children who are either adopted or expressly with consent of the party who is the biological parent of such a child accepting to treat such a child as a child of the family. The Respondent submits that the said section does not envisage a situation such as the one *in casu*, where one of the parties to the marriage was, for the duration of the subsistence of the marriage led to believe that he was the biological father of a child. In this regard, the Respondent argues that when evidence arises to the effect that a party is not a biological parent of a child, such a party is within his rights to have a trial of issue as to whether a child is a child of the family.

On the third issue raised on whether the Respondent can move the Court to determine the issue of whether or not the child is a child of the family by virtue of ***Section 75*** of ***The Matrimonial Causes Act***[2], the Respondent submits that he is seeking a declaratory order that he is not the putative father of LM and thus argues that the

declaratory order will serve the best interest of the child in that the Petitioner will now be allowed an opportunity to inform the child who its biological father is as opposed to the child finding out at a later stage in life. He thus contends that the argument by the Petitioner that the Respondent is trying to avoid maintenance of the child is baseless and unfounded as there is nothing in this particular section that precludes the Respondent from moving this Honourable Court for a determination of whether a child is a child of the family.

In conclusion, the Respondent urged the Court to hear and determine its application as the non-indication of the rule pursuant to which his application was brought is not fatal or to order an amendment of the application. The Respondent further prayed that the second and third issues raised by the Petitioner be dismissed for lack of merit with costs as they do not evidence a preclusion of the Respondent from seeking a declaration that he is not the putative father of a child in the face of evidence that he is not.

At the hearing of the matter, Learned Counsel for the Petitioner Mrs. Findlay relied entirely on the Notice to Raise Preliminary issues, Affidavit in Support dated 22nd June 2017, Affidavit in Reply dated 13th September 2017 and the Skeleton Arguments dated 14th September, 2017 filed in support of the application.

In response, Learned Counsel for the Respondent Ms. Nambule opposed the application to raise preliminary issues and placed reliance on the Affidavit in Opposition dated 28th August 2017,

deposed by the Respondent, Skeleton Arguments and List of Authorities of even date. Ms. Nambule prayed that the preliminary issues be dismissed and that the costs be for the Respondent.

In reply, Ms. Findlay orally submitted that the skeleton arguments filed by the Respondent in opposition to the notice of motion raised, particularly page 3, does not dispute the fact that the Respondent's application as to whether the child is the child of the family does not contain the provisions of the law that the Court is being moved to grant the relief sought. She maintains her argument that the provision of the law has been omitted because there is no such provision and thus the Respondent's application, which is pending before this Court, must be dismissed.

I have carefully considered the pleadings related to the issues at hand and arguments by Counsel for both parties. The Court has been moved to consider three preliminary issues that have been raised by the Petitioner, which I have reproduced at page R3 of this Ruling. It is the Petitioner's prayer that this Court should uphold the preliminary issues raised and in so doing dismiss the Respondent's application for trial of issues as to whether child LM is a child of the family.

The preliminaries as a whole are anchored on ***Orders 14A*** as read with ***Order 33 Rule 7*** of ***The Rules of the Supreme Court***[2], which state as follows: -

> ***"Order 14A (1) Disposal of Case on Point of Law***

1. - Determination of questions of law or construction

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.

(4) The jurisdiction of the Court under this Order may be exercised by a master.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.

"***Order 33 rule 7 Dismissal of action, etc., after decision of preliminary issue***

If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."

By the said orders, this Court is firstly clothed with jurisdiction to entertain an application by way of a preliminary issue raised at any stage of the proceedings in a matter. Secondly, if the determination of the issue is such that the Court finds that the action as a whole will have been disposed of by such determination, may dismiss the matter. In view of the foregoing, these preliminaries are, therefore, properly before this court and I do have jurisdiction to entertain them.

I now turn to determine the issues raised. The first issue raised is whether the Respondent's Application is properly before the Court, in light of the fact that the aforesaid application is defective, as it does not state the provision of the law pursuant to which the said application is being made on; neither pursuant to which provision of the law the Court is being moved to make the Order sought by the Petitioner. I have perused the case of ***Bellamano vs. Ligure***

Lombarda Limited[3], that I was referred to. The said case states as follows: -

> ***"It is always necessary, on the making of applications, for the summons or notice of application to contain a reference to the order or rule number or other authority under which the relief is sought."***

I also refer to ***Practice Direction (PD 14)***[4], which states as follows:-

> ***"List of Authorities to be Referred to***
>
> ***In High Court Proceedings, either in Court or in Chambers, practitioners should, in all cases, furnish the Judge, Deputy Registrar or District Registrar who will hear the proceedings, with lists of the authorities to which they propose to refer.***
>
> ***Such lists should clearly specify any passage or passages to which reference will be made at the hearing.***
>
> ***Such lists must be delivered to the Judge's Marshal, or the Secretary to the Deputy Registrar or District Registrar, not later than two clear days before the date set down for the hearing of the proceeding.***
>
> ***Practitioners are reminded that failure to lodge lists within the time specified may possibly serve to protract proceedings."***

From the above authorities, it is clear that it is necessary for practitioners to furnish the Court with the authority pursuant to which an application is made. However, there is no penalty prescribed for default. It is my considered view that default thereof is not fatal and will not in any way prejudice the Petitioner in the

conduct of her defence to the application for trial of issue of whether child LM is a child of the family. In view of my finding above, I find no merit in the first preliminary issue raised by the Petitioner and accordingly dismiss it.

I now turn to determine the preliminary issues raised in respect of the second and third issues, which I have considered together as they are interrelated. These are whether the Respondent can move the Court to determine by way of trial whether the child is child of the family by virtue of the provisions of ***Section 5 (1) (c)*** *of* ***The Matrimonial Causes Act***[2], which provides for children that shall be deemed to be a child of the family; and whether the Respondent can move the Court to determine the issue of whether or not the child is a child of the family by virtue of ***Section 75*** *of* ***The Matrimonial Causes Act***[2] of the Laws of Zambia, which provides that the Court shall regard the interest of the children as paramount consideration, when in fact the sole purpose of the Respondent's application is to avoid maintenance of the child of the family and therefore not in the best interest of the child, as provided by law. I must, however, note that no relevant case law has been referred to, in aid of the arguments on these two preliminary issues. There appears to me to be a complete paucity of relevant case law in this regard.

This is a very unusual case, in the sense that it is alleged that the Respondent for a long time, had no knowledge of the truth, that the child foistered on him by the Petitioner, was not biologically his and

now having acquired the knowledge that the child is not biologically his, he wishes the child to be declared as not being a child of the family, to avoid his obligations to maintain the said child. The Petitioner contends that since child LM falls within the ambit of ***Section 5 (1) (c)*** *of* ***The Matrimonial Causes Act***[2], this Court should not be moved to entertain the Respondent's application for trial of an issue of whether a child is a child of the family. In determining whether to allow or not the preliminary issues raised by the Petitioner, the question that I ask myself is that, in the circumstances of this case, does ***Sections 5 (1) (c)*** *and* **75** of ***The Matrimonial Causes Act***[2] preclude the Respondent from bringing the application that is before this Court, as contended by the Petitioner, in the face of the uncontroverted DNA evidence put before the Court? In responding to this question, I am guided by ***Article 94 (1)*** of ***The Constitution of Zambia***[5], which states as follows: -

> ***"There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law."*** *(emphasis mine)*

From the above authority, it is clear that the High Court of Zambia has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction

and power as may be conferred on it by the Constitution or any other law.

I also refer to ***Section 13*** of ***The High Court Act***[6], which states as follows: -

> ***"Law and equity to be concurrently administered***
>
> ***In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."*** *(emphasis mine)*

I further refer to ***Order III Rule 2*** of ***The High Court Rules***[6], which states as follows: -

> ***"What orders to be made***
>
> ***Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been***

expressly asked by the person entitled to the benefit of the order or not."

There is an ancillary issue between the parties which is pending determination before the District Registrar and the Respondent has seen it fit for an issue that may impact on the said ancillary application, to be determined before this Court. From the authorities cited above, it is clear that the Court has jurisdiction to determine all issues that arise in any cause and make orders that are necessary for doing justice. Thus the Respondent is perfectly within his rights to make an interlocutory application, in the manner that he has done, before this Court.

I also refer to ***Section 56 (5)*** of ***The Matrimonial Causes Act***[2], which states as follows: -

"Powers of court in maintenance proceedings

(5) The Court shall in deciding whether to exercise its power under paragraphs (d), (e) or (f) of subsection (1) of section fifty-four and subsections (2) or (4) of section fifty-four against a party to a marriage in favour of a child of the family who is not the child of that party and, if so, in what manner, have regard, among the circumstances of the case-

(a) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility;

(b) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own; and

(c) to the ability of any other person to maintain the child."

It is obvious that when determining the ancillary application, the Court is guided, *inter alia*, by the above provision and justice will only be achieved where the Court is satisfied on who the child of the family is. It is the duty of the Court to ensure that it is satisfied as respects every child of the family, that proper arrangements have been made for the child's care and upbringing. The Court cannot determine whether child LM is a child of the family, that is, a child of both parties to the marriage, unless the paternity is settled. In the face of the DNA evidence before the Court, it is compelling that this issue is properly and conclusively looked into, to determine the controversy between the parties and avoid the possibility of multiplicity of actions related to this issue of paternity. The only way that this could be settled, in my considered view, is by trial of the issue as to whether the child is a child of the family or not.

The jurisdiction of a High Court Judge is unlimited. Accordingly, this Court can make any order that is in the best interest of the child. The object of the Court always is to find out the truth as the truth is what aids in attaining justice. This Court therefore finds that the application before Court cannot be rendered incompetent merely by operation of ***Sections 5 (1) (c)*** and **Section 75** of ***The Matrimonial Causes Act***[2]. It is desirable that this Court

determines the Respondent's application at trial of the issue as to whether LM is a child of the family, which application is currently pending before this Court, in order to make a proper decision on the arrangements that the Court can order for the benefit and in the interest of child LM. In doing so, the Court will in essence be assisting itself in arriving at a fair and just award in the ancillary application. I am of the view that there will be no prejudice occasioned to the Petitioner or child LM by proceeding in this manner. For the foregoing reasons, I find that this is a proper case in which to exercise my inherent jurisdiction in the interest of justice under ***Order 3 Rule 2*** of ***the High Court Rules***[6] not to dismiss the Respondent's application for trial of issue as to whether LM is a child of the family.

By way of conclusion, I hold that all the three preliminary issues raised by the Petitioner are misconceived and lack merit. Accordingly, I dismiss them with costs to the Respondent, to be taxed in default of agreement. I further direct that the matter come up for trial of issue as to whether the said child is a child of the family on 16th day of October, 2017 at 14:30 hours. Leave to Appeal is granted.

Delivered at Lusaka this 29th day of September, 2017.

P. K. YANGAILO
HIGH COURT JUDGE