

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Family Jurisdiction)

2017/HP/D0080

BETWEEN:

FINE SIMATA SIMENDA CHIYALA

AND

NAKAWA CHIYALA**PETITIONER****RESPONDENT**

**BEFORE HON MRS JUSTICE S.KAUNDA NEWA THIS 24th DAY OF JULY,
2017**

For the Petitioner : In person

For the Respondent : No appearance

J U D G M E N T

CASES REFERRED TO:

1. *Anne Susan Dewar V Peter Alexander Dewar 1971 ZR 38*

LEGISLATION REFERRED TO:

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

This is a judgment on a petition for the dissolution of marriage, filed on 20th March, 2017, pursuant to Sections 8 and 9 (1) (b) of the Matrimonial Causes Act No 20 of 2007. The petition states that the Petitioner and Respondent were lawfully married on 21st June, 2006, at the office of the Registrar of Marriages at the Lusaka Civic Centre.

That both the Petitioner and Respondent are domiciled in Zambia, and the Petitioner is employed by the Ministry of education as a Protocol

Officer, while the Respondent is also employed by the Ministry of Education, and is a Registry Officer.

Paragraph 4 of the petition states that the parties lived at house number 31038 Chalala Township in Lusaka after the marriage was solemnized. It is stated that there are two children of the family now living namely Moombe Choolwe, aged eight years, and who is in grade two at Holy Cross Convent School, and Cholwe Chiyala aged six years, and is in pre-school at Holy Cross Convent School. The Petitioner further states in the petition that there are two children who were born to her before the marriage was celebrated namely, Precious Simenda aged eighteen years, and is in grade 12, and Gerald Simenda aged fourteen years who is in grade 9.

Paragraphs 7 and 8 of the petition state that there are no proceedings in any court in Zambia or elsewhere with respect to the marriage that are capable of affecting its validity or substance. In paragraph 9 of the petition, the Petitioner states that the marriage has broken down irretrievably as the Respondent has behaved in such a way that she cannot reasonably be expected to live with him.

The particulars of the unreasonable behavior are stated as;

- I. *Infidelity on the Respondent's part, as he is fond of going out with different women, who inconveniently call the Petitioner at any time, and that one of them sent naked pictures of herself to the Respondent's phone.*
- II. *The Respondent is very violent whenever the Petitioner tries to find out, who he is talking to, as he talks to other women while in the matrimonial home.*
- III. *That the relatives of the Respondent threaten the Petitioner that if anything happens to him, she will be responsible, and they accuse*

the Petitioner of having sent criminals who broke the Respondent's leg.

IV. The Respondent does not help to maintain the children whom he found the Petitioner already had before the marriage, stating that the two children have their father, who is an accountant.

The Petitioner prays that the marriage be dissolved, and she be granted custody of Moonde and Cholwe Chiyala.

In her testimony the Petitioner repeated the contents of the petition, adding that she had filed a copy of the marriage certificate, and she produced it, and it was marked 'P1'. She further testified that the child of the family Moombe is a boy, and that he was born on 31st October, 2006, and is in grade 5 at Holy Cross Convent, and that Cholwe is also a boy, and that he was born on 15th January, 2009, and is in grade 3 at Holy Cross Convent.

It was also her testimony that there is a child born to the Respondent with a woman who is resident in South Africa, during the subsistence of the marriage. However the husband to that woman states that the child is his. With regard to the children she had before the marriage, the Petitioner testified that Precious Simenda was born on 3rd September, 1997, and she has completed her grade twelve, and that Gerald Simenda was born on 3rd September, 2000, and is in grade 11 at David Kaunda Technical School.

On why she contends that the marriage has broken down irretrievably, the Petitioner testified that from the date of the marriage in 2006, the parties had not lived well as husband and wife. This she stated was on account of the fact that the Respondent would beat her and the children when he was drunk, and would use abusive language. That his girlfriend who sends him photographs calls when the Petitioner is sleeping, and

when she asks her why, she tells the Petitioner that she has failed to control her husband.

She also told the court that the first time the Respondent had left his phone with her, the woman Georgina had phoned, and told the Petitioner not to answer a phone that was not hers, and insulted her, and called her all sorts of names. That there is another woman called Winnie who told her that she was surprised that she was answering the Respondent's phone, as she thought that the two were on separation. The Petitioner stated that there is also another woman called Chimuka who also phones the Respondent, and that all these women are married.

Further in her evidence, the Petitioner testified that the Respondent gave his phone to their son to be using in 2017, after there had been a family meeting over the child in South Africa that the Respondent states is his, and her father in law had told her to accept the child. That the Petitioner found naked photographs of the woman after her son told her the phone had bad pictures. She stated that the Respondent when told about the photos was unmoved, and told her that Georgina had sent them to him in 2015.

It was also her testimony that she had contacted the sister to Mr Hazemba, the husband to Georgina who connected her to him, and he told her that the Respondent also sends naked pictures of himself to Georgina. On other instances constituting unreasonable behavior on the Respondent's part, it was stated that sometimes he does not return home, saying he was at a party, and is violent when drunk. That in November, 2016 some unknown people about fourteen in number, attacked the Respondent when he drove into the yard. However the Respondent alleged that she sent the people to attack him, and his relatives threatened her.

She also told the court that one time the Respondent was locked in the toilet when he was with his girlfriend Winnie, and he again alleged that the Petitioner had organized his being locked up. The Petitioner prayed the marriage be dissolved, stating that she would like to have custody of the children, as the Respondent cannot look after them, as he is a drunkard.

I have considered the evidence. The petition was filed pursuant to Sections 8 and 9 (1) (b) of the Matrimonial Causes Act, No 20 Of 2007. The said sections provide that;

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

9. (1) For purposes of section eight, the Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts.

(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 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 apart for continuous period of at least five years immediately preceding the presentation of the petition”.

The Petitioner relies on Section 9 (1) (b) which deals with unreasonable behavior. In the case of ***ANNE SUSAN DEWAR V PETER ALEXANDER DEWAR 1971 ZR 38*** it was held that the test required to prove unreasonable behavior is an objective test that takes into account the characters and personalities of the parties concerned.

Therefore the question in this matter is the behavior alleged by the Petitioner on the Respondent's part unreasonable, taking into account the characters and personalities of both parties? The first allegation is infidelity on the Respondent's part with a number of women among them Georgina, Winnie and Chimuka. The Petitioner recounted that those women phoned the Respondent when he left the phone with her, and told her that she has failed to control her husband. One of the women Georgina even sent naked pictures of herself to the Respondent on his phone.

A marriage contracted under the Act, such as this one before court, is a union of two people to the exclusion of all others. Therefore it was not expected that the Respondent would carry on relationships with other women with impunity, as he had vowed to be with only the Petitioner.

The Respondent did not file an answer or complete the acknowledgment of service form, despite being served. He therefore did not deny the allegations levelled against him. Whilst the acts of the women calling him may not be unreasonable behavior on his part, to keep the naked photographs of one of the women and give the phone to their son, knowing very well that it contained such photographs, is not only irresponsible, but shows indifference as to who accesses those photographs. Further to allow women with whom he has relationships to

call him at any time is not only unreasonable as entails lack of care for the other person's feelings, but is also traumatic to the Petitioner.

I therefore find that the Respondent carries on sexual relationships with other women, and keeps naked photographs of one of the women.

The evidence of violence on his part, and his drunkenness was also not defended, and I find that he is a drunkard and violent. With regard to the allegations of the Respondent's relatives threatening the Petitioner that she will be responsible for anything that will happen to the Respondent, this is not behavior on his part, and cannot be attributed to him, although him alleging that she sent people to attack him and to lock him up in the toilet with his girlfriend Winnie is, as it was unsubstantiated. It would also be unreasonable for the Respondent to tell his relatives that the Petitioner sent people to attack, in the absence of proof to that effect, or to indeed to encourage them to threaten her.

On the failure by the Respondent to maintain the children that the Petitioner had before the marriage, no evidence was led by the Petitioner to show that the Respondent had accepted these children as children of the family, and had in fact maintained them, and subsequently stopped. This is because Section 5 of the Matrimonial Causes Act No 20 of 2007 deems certain children as children of the family. It states inter alia that;

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

(c) a child of either he 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”.

This allegation will fail. The behavior of the Respondent maintaining sexual relationships with other women, which has not been denied, is unreasonable and it affects the Petitioner's emotional well-being as it is torture to speak to those women, who from the evidence taunt her. The Petitioner cannot therefore be reasonably be expected to live with the Respondent who cares less about his marriage, and what he does. On that basis I find that the marriage has broken down irretrievably, and I accordingly grant a decree nisi to dissolve the said marriage, which shall become absolute after a period of six weeks.

The parties are at liberty to agree on the custody of the children, and in default thereof, either party may apply to me at chambers, for an order for the same. Issues of property settlement and maintenance are referred to the learned Deputy Registrar for determination. Each party shall bear their own costs.

DATED THE 24th DAY OF JULY, 2017



S. KAUNDA NEWA
HIGH COURT JUDGE