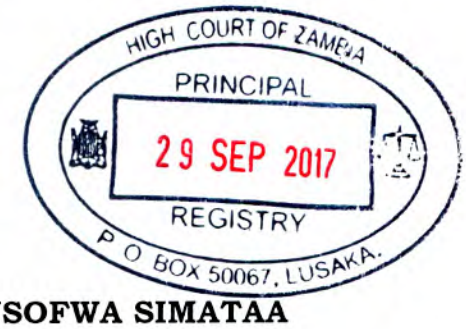
IN THE HIGH COURT OF ZAMBIA **2017/HP/D0057**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Family Jurisdiction)



BETWEEN:

SIMATAA SIMATAA **PETITIONER**

AND

NAMTENDA JANET NSOFWA SIMATAA **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 29th DAY OF SEPTEMBER, 2017

For the Petitioner : Ms Chisha Mwambazi, Central Chambers

For the Respondent : Mr L. Mudenda, Kalokoni and Company

J U D G M E N T

CASES REFERRED TO:

1. ***Hopes V Hopes 1948 2 ALL ER 920***
2. ***Rushton V Rushton 1968 2 D.L.R 25***
3. ***B V B 1977 ZR 159***

LEGISLATION REFERRED TO:

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

This amended petition for the dissolution of marriage was filed on 28th July, 2017, pursuant to Section 8 and 9 (e) of the Matrimonial Causes Act, No 20 of 2007.

The petition states that the Petitioner and the Respondent were lawfully married on 7th November, 1992 at the Lusaka Civic Centre. That the parties who are both domiciled in Zambia last lived as husband and wife

at number 37 Chelston Green in Lusaka. The petition further states that there are four children of the family now living, and that there is a child named Patricia Musonda Kachana Simataa aged thirty nine years who was born to the Petitioner before the marriage.

That there are no proceedings in any court in Zambia or elsewhere with regard to the marriage, and which are capable of affecting its validity or substance. The petition also states that no arrangements have been made for the maintenance of the children of the family. It is contended that the marriage has broken down irretrievably as the parties have lived apart for a continuous period of five years. The Petitioner prays that the marriage be dissolved, and that there be no order for property settlement or maintenance of the Petitioner.

The Respondent in the answer and cross petition admits that the marriage has broken down irretrievably on the basis of the five year separation, and prays that the said marriage be dissolved. She asks that there be an order for property settlement and that she be granted custody of the children of the family.

At the hearing both parties testified. The Petitioner in his testimony repeated the contents of the petition, and produced the marriage certificate as evidence that the marriage was solemnized. He also stated that the child of the family Mary Rose is aged twenty three years, while Simataa is aged twenty one years, and that the third child Mary Jane is aged sixteen years, while the last child Linyama is aged six years. The Petitioner told the court that Patricia who was born to him before the marriage is thirty nine years.

His evidence as regards the breakdown of the marriage was that they have lived apart for more than five years, and that they have not shared a bed or bedroom during that period, or lived as man and wife.

The Respondent in her testimony told the court that she consents to the dissolution of the marriage and stands by that position. She told the court that they separated in 2011 after the last child was born, when the Petitioner moved out of the bedroom and started living in his own bedroom.

I have considered the evidence. The petition was brought pursuant to Section 8 and 9 (e) 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.***
>
> ***(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".***

Going by the above provisions, the Petitioner in order to prove the breakdown of the marriage, must establish that the parties have lived apart for a continuous period of five years immediately preceding the presentation of the petition. He stated that the parties have not shared a bed or bedroom or lived as man and wife for the last five years. The

evidence given by the Respondent was that the parties separated in 2011 after the last child was born. The exact date of the separation was not stated to the court, and neither was the date when the last child was born. However from 2011 to July 2017 when the amended was filed, is a period of more than five years.

The evidence as given by both parties is that the Petitioner moved out of the bedroom that he used to share with the Respondent, and began sleeping in his own bedroom. They do however share a house as can be deciphered from the evidence. In the case of ***HOPES V HOPES 1948 2 ALL ER 920*** Denning LJ in considering what constituted desertion stated that;

> ***"One of the essential elements of desertion is the fact of separation. Can that exist while the parties are living under the same roof? My answer is "Yes." The husband who shuts himself up in one or two rooms of his house and ceases to have anything to do with his wife is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on the stairs or in the passageway, but so they might if they each had separate flats in one building."***

This dictum by Denning LJ was considered in the case of ***B V B 1977 ZR 159*** when the court observed that ***"while the petition in Hopes was based on desertion, the decision therein involving a review of the authorities, is nonetheless relevant. The parties in that case slept in separate bedrooms, intercourse ceased and they frequently quarrelled: the wife did not wash or iron the husband's clothes; the wife cooked for the husband who had his meals with her and the***

rest of the family; when not in his bedroom he shared the rest of the house with his wife and daughters. On those facts the Court of Appeal held that the parties were not living separately and apart".

The court went on to note that the dictum by Denning LJ was approved in the divorce division. In the case of ***RUSHTON V RUSHTON 1968 2 D.L.R 25*** McIntyre J stated that;

> ***"I am of the opinion that in the case at bar the parties have been living separate and apart for three years within the meaning of s. 4 (1) (e) (i) of our Divorce Act. The words 'separate and apart' ... mean, in my view, that there must be a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial consortium as well as physical separation. The two conditions must be met. I hold that they are met here. The mere fact that the parties are under one roof does not mean that they are not living separate and apart within the meaning of the Act. There can be, and I hold that here there has been, a physical separation within the one suite of rooms. To hold otherwise would be to deprive the petitioner here of any remedy under the new Divorce Act simply because she is precluded, or was for a period of time precluded, by economic circumstances from acquiring a different suite in which to live."***

From the above cases, it can be seen that parties to a marriage may be deemed to be living apart even if they reside in the same household as long as they show that there is a withdrawal from the matrimonial obligation with the intent of destroying the matrimonial consortium, as well as physical separation. In this case it has been seen that the

Petitioner left the matrimonial bedroom to sleep in one of the other bedrooms in the house, and he told the court that since then, the parties have not lived as husband and wife. The Respondent testified that the Petitioner has been living in his own bedroom since the birth of the last child.

Apart from the parties sleeping in separate bedrooms, no evidence was led to show whether the Respondent does any household chores for the Petitioner or that the parties do associate as husband and wife in other ways. What the Respondent told the court was that she was consenting to the marriage being dissolved as she does not have a change of heart. While there was not enough evidence to show that the parties in this matter separated with the intention to destroy the matrimonial consortium, as what has only been established is that they do not sleep together, it is clear that the two do not intend to resume the matrimonial relationship. Seeing that they separated in 2011, the five year period of separation immediately preceding the presentation of the petition has been established.

The consent of the Respondent to the dissolution of the marriage is not a requirement where five years separation is relied on as a fact to prove the breakdown of the marriage. It is only a requirement where two years separation is relied on as a fact, as provided in Section 9 (d) of the Act. The only ground of opposition to the dissolution of a marriage based on five years separation is grave or other hardship, as provided in Section 18 (1) of the Act. It states that;

> ***"18. (1) The respondent to a petition for divorce in which the petitioner alleges five years separation may oppose the grant of a decree on the ground that the dissolution of the marriage***

will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage".

No such allegation has been made in this matter, and as it has been established that the parties have been on separation for a period of five years immediately preceding the presentation of the petition, I find that the Petitioner has proved his case, and I accordingly grant a decree nisi for the dissolution of 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 of the family, and in default thereof either party may make the application to me at chambers. Issues of property settlement and maintenance are referred to the Learned Registrar for determination. Each party shall bear their own costs.

DATED THE 29th DAY OF SEPTEMBER, 2017

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE