

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

2017/HPF/D141

BETWEEN:

DANIEL PAUL MAPULANGA

AND

MARTHA NGULUBE MAPULANGA



PETITIONER

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 13th DAY OF
FEBRUARY, 2018**

For the Petitioner : Ms K.M. Nyimbili, Legal Aid Board

For the Respondent : Ms Catherine Jere, National Legal Aid Clinic for Women

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*

The petition for the dissolution of marriage was filed on 6th June, 2017, pursuant to Section 9 (1) (b) of the Matrimonial Causes Act No 20 of 2007. The petition states that the Petitioner, Daniel Paul Mapulanga was lawfully married to the Respondent, Martha Ngulube Mapulanga on 10th June, 2013 at the Lusaka Civic Centre. That the parties who are both domiciled in Zambia last lived as husband and wife at the Zambia National Service Camp in Chongwe.

It is stated that the Petitioner is a serviceman employed by the Zambia National Service, and resides at the Zambia National Service Camp in Chongwe, while the Respondent is a General Worker working at the Ministry of Chief and Traditional Affairs in Lufwanyama. That there are two children of the family now living, namely Daniel Mapulanga who was born on 9th October, 2008 and is in grade 4 at Pepmum Primary School in Chongwe, and Eunice Mapulanga born on 8th October, and is in grade 1 at Pepmum Primary School in Chongwe.

The petition further states that no other child now living has been born to the Respondent during the subsistence of the marriage, and that there have been no proceedings with respect to the marriage or the property of either of the parties. That there are no proceedings continuing in any court outside Zambia that are capable of affecting its validity or substance, and that no arrangement has been made for the support of the parties.

The Petitioner contends that the marriage has broken down irretrievably as the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. The particulars of the unreasonable behavior are named as;

1. *The Respondent's behavior changing when she was offered a job as a cleaner at the Ministry of Chiefs and Traditional Affairs in Lufwanyama sometime in March, 2013 and the Petitioner receiving reports from a concerned person in Lufwanyama about the Respondent's bad behavior.*
2. *That on one occasion the Petitioner called the Respondent and when she answered, she was in a drunken state from a noisy place, confirming the reports about her behavior. That the Respondent's mother was informed of her behavior and she promised to speak with her and ask her to stop drinking beer.*
3. *The Respondent reducing on her visits back home as she would come for just a day and go back to Lufwanyama, and would only come home after three to six months.*

4. *The Respondent becoming unruly and pompous every time the Petitioner inquired about her bad behavior, and one time told the Petitioner to stop running her life, and go his own way, and mind his own business. The Respondent's bad behavior continued for three years, and the Petitioner endured it as the Respondent's parents wanted to maintain the marriage, and the Petitioner would forgive the Respondent.*
5. *The Respondent was involved in an affair and the Petitioner was informed by Lumbwe, a nephew to the Respondent's house mate, Mr Lumbaya was having an affair with her, and the nephew was chased from the home as he was accused of interfering in the matter. That the Petitioner when confronted admitted the affair and asked for forgiveness, and promised to end the affair. However in December 2016, the Petitioner noticed that Mr Lumbaya was still sending messages to the Respondent on her phone, and she stated that Mr Lumbaya kept sending her messages despite the affair being over.*
6. *That in December, 2016 the Respondent came home from Lufwanyama and confronted the Petitioner with a knife and threatened to kill him, and in the process of disarming the Respondent of the knife, the Petitioner was injured on his fingers and bled. That as the Petitioner tried to get away the Respondent stoned him at the back of his head and he fell, and the Respondent hit him on his leg with a Mosi bottle. He could however not report the matter to the police as the ZNS Administration advised against it, due to the nature of his job.*
7. *That the Respondent has had other extra marital affairs in Lufwanyama and the Petitioner has confronted some of the Respondent's lovers who have confirmed the affairs. That because the Petitioner does not trust the Respondent, he has not exercised his conjugal rights with the Respondent since December, 2016, which has drawn them apart, as they no longer live as a loving and married couple.*

8. *That the Respondent threatened to end the Petitioner's life, and he therefore cannot reasonably be expected to live with her.*
9. *The Respondent in March, 2017 took the Petitioner's ATM card without his permission, including the spare keys to the house that they rent out in Chelstone, which behavior the Petitioner finds unreasonable.*

The Petitioner prays that the marriage be dissolved, and that he be granted custody of the children, with reasonable access to the Respondent. Further that there be an order for property settlement and maintenance, and that each party bears their own costs.

The Respondent filed an answer on 27th October, 2017, in which she denies that the marriage has broken down irretrievably, stating that there are prospects of restoring the marriage if the couple is counseled. That there has never been any proper counseling, therefore it cannot be said that there no prospects of restoration of the marriage.

The Respondent denies that ever since she was employed by the Ministry of Chiefs and Traditional Affairs, she has changed. Her answer is that she loves and respects the Petitioner, and does not know why the Petitioner would make such allegations. The Respondent denies that she takes alcohol, and states that whenever the Petitioner calls her she is at home, and that the only time that she had answered his call at a place where there was noise was when she went to Kitwe to buy household goods, and she was at the bus stop where it was noisy around fourteen hours, and that the next time was when she was a traditional ceremony, which is part of her work.

That the few times that the Respondent has taken alcohol is when she is with the Petitioner. She further denies that she has reduced the frequency of her visits to the matrimonial home, stating that she always takes local leave to visit the Petitioner, and she has been pushing for a transfer so that she can resume

living with the Petitioner. The allegation that the Respondent is pompous is denied, stating that she is submissive to the Petitioner.

Over the allegations on her continued bad behavior, the Respondent denies the same, and that her parents want the marriage to work as they believe the two truly love each other. The allegation that she had an affair with Mr Lumbaya is denied, and her assertion is that Mr Lumbwe who is Mr Lumbaya's nephew was assigned to obtain information about the Respondent, and he developed interest in the Respondent. She states that she brought this to the Petitioner's knowledge, and denies knowing Mr Lumbaya.

The Respondent also denies having confronted the Petitioner and threatening him with a knife, alleging that it was in fact the Petitioner that beat her up, when she confronted him about the pictures of a naked woman on his phone Chilala, whom he has since married. Further that she is the person that reported the incident to the ZNS Administration and they told her not to report to the police, as they would arrest the Petitioner. That she forgave the Petitioner over the incident.

The Respondent denies that the Petitioner's life is at risk, and she that she loves him very much and does not want to live without him. She denies having affairs with other men. That it is not true that the parties last enjoyed their conjugal rights in December, 2016, stating that it was in February, 2017. The Respondent denies having taken the Petitioner's ATM card saying that she asked for it so that she could get money for the children's food and shoes, but that it got captured. She does not deny getting the keys to the Chelstone house, saying that it is her matrimonial home.

The Respondent prays that the petition be dismissed, and that the parties be reconciled, and bear their own costs.

At the hearing, both parties testified and did not call any witnesses. The Petitioner in his testimony repeated the contents of the petition and produced a

copy of the marriage certificate as 'P1'. He further stated that Eunice was born in 2011. As regards the allegation that the marriage has broken down irretrievably as the Respondent has behaved in such a way that he cannot be reasonably expected to live with her, he testified that the Respondent went to work in Lufwanyama in 2013, and her behavior changed. That she would not answer his calls, or would at times block his number.

He further testified that good Samaritans told him that the Respondent was drinking heavily, adding that she would pick up his calls around 22:00 hours to 24:00 hours in very noisy places. That when this went on for some time he informed his in law, who said she would talk to the Respondent, but there was no change. It was also his testimony that Mr Lumbaya who lived in the same house with the Respondent chased his nephew, Mr Lumbwe, as he told the Petitioner that Mr Lumbaya and the Respondent were having an affair.

He stated that when he spoke with Mr Lumbaya on the phone, Mr Lumbaya admitted having an affair with the Respondent, and he forgave her. It was his evidence that the Respondent did not repent as he found messages from her boyfriends on the phone, and that this continued up to December, 2016 when she went home drunk, and threatened to kill him. He told the court that she got a knife and attacked him with it and his fingers on his left hand were cut, and she tried to stab him in the chest, and thereafter stoned him at the back of his head. He showed the court the scar at the back of his head, stating that it was a result of the injury.

Still in his testimony, the Petitioner stated that the Respondent then hit him on the right leg with a mosi bottle, and that injury also left a scar. That he was bleeding heavily and he went to the clinic the next day, where he was told to first report the matter to the police, and he went to the Regional Sergeant Major who told him not to report the matter to the police, due to the nature of his job.

He went to state that in the night his in law went to the house and told him they wanted to get their daughter so that she could go and have a medical

check up, as he had beaten her, and he sent his in law back together with his sister who had gone with her. Then the next day he had called his wife's grandmother in Roma to discuss the issue as she had played a very important role in the marriage, and when he went to Roma with his wife to discuss but this did not happen. He maintained that he had not had sexual relations with the Respondent since December, 2016.

On how many times the Respondent would visit home from Lufwanyama, the Petitioner stated that it was once in six months or twice in nine months, adding that she had forgotten about him and the children, and she would only spend a night and go back the next day. That when the families met, the Petitioner's parents said that the finding a job for the Respondent was not building the marriage, but the Respondent's parents stated that the job was pensionable and they could not stop her from working. He further testified that the Respondent's parents stated that they would get her a transfer after two years, but that had not been done.

It was the Petitioner's evidence that the marriage should be dissolved, and he be granted custody of the children, with reasonable access to the Respondent. Further that there be orders for maintenance and property settlement, and that each party bears their own costs.

When cross examined, the Petitioner testified that they had been sitting down as families to try and resolve the problems, so he had not been waiting for a meeting to be convened.

When called upon to answer to the petition, the Respondent in her testimony told the court that she had not been drinking beer, and that it was the Petitioner who introduced her to the same after they got married. She stated that her mother had told the Petitioner that the problem would be his, as all her children did not drink beer. However the Petitioner had answered that it was just for that day, and would not happen again. The Respondent further in her testimony stated after that they lived well until 2015 when the Petitioner

went for operations in Kafue, and whilst she was in Lufwanyama she received a phone call to the effect that the Petitioner had been caught committing adultery with the caller's wife.

That the caller had told the Respondent that he wanted to be having sex with the Respondent, and he gave the Respondent his wife's phone numbers, but he did not tell her his name. Still in her testimony, the Respondent testified that when she dialed one of the numbers given to her by the caller, she found that it was for a woman whom she had difficulties with when the Petitioner was working at Manda Hill, and the caller identification, identified her as Margaret.

The Respondent went on to state that when she called the Petitioner and informed him about the phone call that she had received, he told her not to answer phone calls from anyone, and he denied the allegations. However the man continued calling the Respondent and told her not call his wife, as his wife had seen the numbers, and she would know that it was him who had given her the numbers, and would not answer her calls. That the Respondent gave her mother the man's number, and her mother threatened to report him to the police when she called him.

She testified that the Petitioner's elder brother and his in law got hold of the developments, and a meeting was convened where the Petitioner's elder brother blamed the Respondent's family for taking her to work, leaving her husband behind, adding that the bible does not allow that. The meeting could not proceed thereafter.

The Respondent also testified that the Petitioner went to Lufwanyama and gave people his phone number, and asked them to watch the Respondent. That he would call her when she was at times at traditional ceremonies, which are noisy, and she would ask him to call later. However the Petitioner would not understand and say that she was drinking beer. Her evidence was further that the Petitioner accused her of having a relationship with Mr Lumbaya, but she had told her husband that Mr Lumbaya had been proposing her, but he

dismissed this saying that she was lying. She agreed that Mr Lumbwe had given the Petitioner this information, adding that it was at the Petitioner's instructions. She denied ever having had any relationships with either Mr Lumbwe or Mr Lumbaya.

She stated that Mr Lumbwe and another person at the Council would inform the Petitioner of her whereabouts. The Respondent also told the court that she started pushing for a transfer, but was told to wait as there were no vacancies. That she even wrote applications to other ministries, and she went to headquarters with the Petitioner over her transfer, but she was told to wait. However, despite all the efforts that she had made to get a transfer, the Petitioner did not understand, and accused her of desiring to get married in Lufwanyama.

On her visits to the matrimonial home, the Respondent testified that she comes home every month end and even gets paid whilst here at the Petitioner's request. That there were leave forms available as proof. It was her testimony that at times she would come home and find that the Petitioner was out on operations, and she would just be with the children. She also testified that the Petitioner beat her and she was swollen, and she denied that she wanted to stab him. That she went to the clinic at Chongwe, but they refused to treat her saying that she should first get a medical report. She further stated that the Regional Sergeant Major went to their home, but they did not resolve the matter, as the Regional Sergeant Major told her that she was just a cleaner and that if she wanted her marriage, she should stop work or else she would find another woman in the house.

That when the Petitioner beat her up, she had called her mother to take her to the clinic, but the Petitioner had told her mother that if she took her, the marriage would end, and he chased the Respondent's mother. It was her testimony that thereafter a family meeting was called, but the Petitioner refused to discuss anything saying that his mother was deceased, and he has

no brothers and sisters. He had stated that only his brother who had raised him was his parent.

The Petitioner in March, 2016, told the Respondent that he had impregnated another woman, and he also told her that the woman was his wife. The Respondent had however declined that the woman's child be brought into the matrimonial home, but told the Petitioner that he could be supporting the child. She stated that the Petitioner has continued the relationship with that woman, saying he wants to marry her, and she stays at his brother's house, as she is not allowed to stay in the ZNS Camp.

The Respondent's position was that she does not want the marriage to end as she still loves him and she wants to raise the children with him. She further testified that the Petitioner had been accusing her of wanting to kill him. That he collects the rentals for the Chelstone house, saying that he built it alone, and refuses to discuss with her. She also stated that she can live in a polygamous marriage, and denied that messages were ever found in her phone, stating that the Petitioner was looking for a reason to divorce her. That she stopped drinking beer a long time ago, and just drinks occasionally such as at annual balls, but even that had been some time back.

In cross examination, the Respondent agreed that the Petitioner introduced her to beer drinking, and that her mother had said that whatever came out of it, would be the Petitioner's fault. She agreed that her mother knows her well, and that is why she had warned the Petitioner. The Respondent denied that people had alleged that she was drinking beer in Lufwanyama, stating that a person from the Council and Mr Lumbwe made the allegations. She denied having been drunk at Lieutenant Nkhata's wedding in the recent past, but agreed that she drank beer at annual balls whilst in the company of the Petitioner. Her evidence was that she did not know why the Petitioner would make allegations that she drinks beer, when he had allowed her to do so.

The Respondent told the court that she lives with the younger child aged six years, after she recently got her, and that Mr Lumbaya is her house mate, but she denied that she does what she wants, being older than the child. The Respondent still in cross examination denied that Mr Lumbaya chased his nephew, as he was having an affair with her. She also stated that there are a lot of functions at the Ministry of Chiefs and Traditional Affairs where she works, and they sometimes end at 18:00 hours. The Respondent denied that the Petitioner had called her around 22:00 hours, and she had told him that she was at a traditional ceremony, but agreed that she had told him so one time, but it was not at 22:00 hours.

On when she last had sexual intercourse with the Petitioner, the Respondent stated that it was at the end of 2017, but he had refused saying that she was sick, and she would make him ill. The Respondent denied knowing a person called Charles, but agreed that the Petitioner helped her try to get a transfer. She however denied that the Petitioner interacted with her supervisor at headquarters, whose name she said she did not recall. She denied having had an affair with Charles, hence her not being transferred, stating that getting a transfer had just been difficult.

Her evidence was that she fought with the Petitioner and she was beaten, but denied that she then threatened to kill him. Her evidence with regard to the injuries that the Petitioner sustained was that he could have been injured at work. She confirmed that the Regional Sergeant Major told her not to obtain a police report, and she also agreed that the parties also own a house in Chelstone, and that she used to collect the rentals for the house at the Petitioner's permission, and would use the same to pay school fees for the children and spend the rest of the money. She denied that she wanted to be married only because of the house in Chelstone, stating that it was because the Petitioner is her husband, and they have children.

In re-examination, the Respondent stated that her mother did not say that she had a drinking problem. That she could keep herself well even if she was away from home, and that she did not know why the Petitioner would allege that she loves the house more than the children. That Mr Lumbwe and people from the Council had been making allegations that she was involved in prostitution, but she denied that they had stated that she was drinking heavily. She also stated that the Petitioner had told people in Lufwanyama that he would give them jobs at ZNS, hence the stories. In conclusion, the Respondent stated that she did know Charles.

I have considered the evidence. Section 8 of the Matrimonial Causes Act, No 20 of 2007, provides for the ground for divorce. It states that;

“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.”

Section 9 of the said Act provides for the facts that need to be proved in order to establish that a marriage has broken down irretrievably. The section provides, and I quote;

“(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 in this matter relies on Section 9 (1) (b) of the Act, which is that the Respondent has behaved in such a way that he cannot reasonably be expected to live with her. In the petition and in his evidence the Petitioner enumerated the acts he claimed amount to unreasonable behavior on the Respondent's part. These range from the Respondent drinking beer and answering his phone calls in a drunken state from noisy places, and that she has failed to stop despite several interventions. That the Respondent has reduced the number of visits home, as well as the amount of time she spends at the matrimonial home, away from Lufwanyama where she works. Further that she is pompous and unruly, telling the Petitioner not to ruin her life.

The Petitioner further alleges that the Respondent had an affair with Mr Lumbaya which was confirmed by his nephew Mr Lumbwe, who was even chased by Mr Lumbaya for revealing the same. That the Respondent admitted to the said affair, and the Petitioner forgave her, but she continued having other relationships as messages were found on her phone. The other allegation is that the Respondent threatened to kill the Petitioner with a knife and he even sustained cuts on his left hand, and she stoned at the back of his head, resulting in injury, and that she also cut him on his leg with a bottle.

Other allegations are that the Respondent got the Petitioner's ATM card and spare keys for the house in Chelstone, and he has not exercised his conjugal rights with her. The Respondent denied all the allegations and made her on own allegations, stating that she loves and respects the Petitioner and has not changed her behavior since getting a job at the Ministry of Chiefs and Traditional Affairs. That to the contrary, she received a phone call from a man claiming that he was the husband to a woman whom the Petitioner was found committing adultery with.

Further that she wants to be with the Petitioner and had been pushing for a transfer even with the help of the Petitioner, and that she has not been having any affairs. That she did not attack the Petitioner, but he beat her up when she confronted him over the naked pictures of Chilala in his phone, a woman whom the Petitioner has married. Her contention was that the parties last exercised their conjugal rights in December, 2017.

In evaluating unreasonable behavior, the test applied is the standard of the reasonable man. The case of **ANNE SUSAN DEWAR V PETER ALEXANDER DEWAR 1971 ZR 38** 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. It has been seen in this case that the Petitioner has made allegations of unreasonable behavior on the Respondent's part. The evidence that the Petitioner gave with regard to the unreasonable behavior was not challenged in cross examination, and it was just suggested that there had never been meetings to resolve the same.

The evidence being unchallenged in cross examination is credible. However I must state that beer drinking on its own is not unreasonable behavior; what is unreasonable about it is when a person drinking neglects themselves or engages in acts that are detrimental. The Petitioner is on record as having introduced the Respondent to beer, and her mother even issued statements that he would be at fault for whatever happened to the Respondent as a result.

The evidence which was adduced by the Petitioner, which was not challenged in cross examination was that the Respondent goes out drinking beer in Lufwanyama until late. The unreasonableness of the drinking beer that was alleged was that the Respondent has had affairs as a result.

The Respondent is alleged to have had an affair with Mr Lumabaya, and the Petitioner's testimony was that he even called Mr Lumbaya who admitted, and that the Respondent also admitted and he forgave her, but she had not changed, as he found messages on her phone from men. The Respondent denied this allegation, and the messages were never produced in court, so this allegation was not proved. However the allegation of the Respondent having had an affair with Mr Lumbaya was proved, as the evidence of the admission to having the affair was not disproved in cross examination. The question is whether the act of having an affair by the Respondent amounted to unreasonable behavior?

The Respondent in her testimony also made allegations that she was phoned by a man claiming to be the husband of a woman alleged to have been found committing adultery with the Petitioner, and whom when called, the Respondent realized was the woman that the Petitioner had had an affair with when he was working at Manda Hill. He did not discredit this evidence in any way.

There was also the evidence that he has a child with a woman, whose naked pictures the Respondent found on his phone, and she was beaten up, and that the woman lives with the Petitioner's brother. This evidence was also not shaken in any way. What the evidence establishes is that both parties have been engaged in adulterous relationships that have affected their marriage, and it cannot be said that it is only the Respondent who has behaved unreasonably in this respect, but such behavior was unjustified.

The fact that the Respondent works from Lufwanyama was implied as a reason for the marriage being affected. Marriage is between two people, and it takes

effort from both parties to work. Therefore if the Respondent was unable to come home due to her work, the Petitioner could have found time to also go and spend with the Respondent in Lufwanyama. It is unrealistic to expect only the Respondent to come to the matrimonial home, and not for the Petitioner to go and see her, and is evidence of the patriarchal attitude of men. The record shows that the parties had even tried to facilitate the transfer of the Respondent.

The evidence also shows that after the Petitioner beat up the Respondent after she found the naked pictures of a woman on his phone, the Respondent also injured the Petitioner. While it is not clear when the parties stopped enjoying their conjugal rights, the behavior of both parties has impacted on this, resulting in love being lost between them. The Respondent testified that she would not want the marriage to be dissolved, as she still loves the Petitioner, and that they have children together, and she is ready to be in a polygamous marriage.

Marriages contracted under the Act, are a union of one woman and one man to the exclusion of all others, and there can be no polygamy entertained in such a union, and amounts to the criminal offence of bigamy. Therefore such arguments cannot stand. The fact that the Petitioner has a child with another woman, and even asked the Respondent that the child moves into the matrimonial home, and the fact that the mother to the said child is living with the Petitioner's brother, as this evidence given by the Respondent was not discredited in any way, shows that the Petitioner finds it intolerable to live with the Respondent, as he is involved in another relationship, and counseling of the parties is unlikely to achieve a positive result.

Section 23 of the Matrimonial Causes Act No 20 of 2007 provides that;

“If any proceedings for divorce the respondent alleges and proves any of the facts referred to in paragraphs (a) to (e) of subsection (1) of section nine, treating the respondent as the petitioner and the

petitioner as the respondent for the purposes of that subsection, the court may give to the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief.

Pursuant to the said section, I find that both parties have established that each has behaved unreasonably, as they have been involved in extra marital affairs, which has led to the breakdown of the marriage. For the Petitioner in particular, this is behavior that he finds unreasonable, and that he cannot be expected to live with the Respondent on that basis. This has culminated in violence brewing between the parties, which could escalate to undesired levels. I accordingly grant a decree nisi for the dissolution of the 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 file a consent order to that effect. In default thereof, an application can be made 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 of the proceedings.

DATED THE 13th DAY OF FEBRUARY, 2018

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**