

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HPF/D245**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

(Divorce Jurisdiction)

**BETWEEN:**



LUBINDA LYANGANGA

**PETITIONER**

**AND**

SARA BESA

**RESPONDENT**

**BEFORE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON THE 16<sup>TH</sup> DAY OF JANUARY, 2018.**

*For the Petitioner:* Mr. M. Mutemwa - Messrs. Mutemwa Chambers

*For the Respondent:* Mr. F. Besa - Messrs. Besa Legal Practitioners

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## **JUDGMENT**

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**LEGISLATION AND OTHER MATERIALS REFERRED TO:**

1. *The Matrimonial Causes Act, Act No. 20 of 2007; and*
2. *The Marriage Act, Chapter 50 of the Laws of Zambia.*

The Petitioner LUBINDA LYANGANGA Petitioned for the Dissolution of Marriage pursuant to **Sections 9 (1) (e) of the Matrimonial Causes Act**<sup>1</sup> on the ground that the marriage has broken down irretrievably by reason of the fact that the parties have lived apart for a continuous period of five (5) years immediately preceding the presentation of this Petition. **Section**

**9 (1) (e)** of the *Matrimonial Causes Act*<sup>1</sup> is couched in the following manner: -

**"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...."**

I refer to **Section 9 (2)** of the *Matrimonial Causes Act*,<sup>1</sup> which provides that: -

**"(2) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent."** (emphasis mine)

In accordance with the said **Section 9 (2)**,<sup>1</sup> I set this matter down for the hearing of the Petition for Dissolution of Marriage on 16<sup>th</sup> January 2018, in order for me to inquire into the facts alleged in the Petition for Dissolution of Marriage presented before this Court by the Petitioner. At the presentation of the Petition, I was satisfied that the Respondent had been duly served with the Petition and other supporting documents by the Acknowledgment of Service filed herein. I was further fortified in my view by the fact that the Respondent and her Advocate were in attendance. I therefore allowed the Petitioner to present his Petition for Dissolution of Marriage.

At the hearing, the Petitioner gave sworn evidence. He testified that he was married to the Respondent SARA BESA on 13<sup>th</sup> December 2003, at the Civic Centre in Chingola in the Copperbelt Province of the Republic of Zambia. He produced a photocopy of his marriage certificate, which was identified as "ID1" and there being no objection raised by the Respondent, it was admitted into evidence as exhibit "P1". It was his testimony that he is domiciled in Zambia. According to the Petitioner, he is a teacher at Itezhi Tezhi Secondary School in Itezhi Tezhi, Central Province of Zambia and that the parties last cohabited together as husband and wife, on 26<sup>th</sup> June 2012, in Mpongwe, Luanshya in Copperbelt Province of the Republic of Zambia. That there is one child of the family, a girl named SEPISO LUBINDA who was born on 29<sup>th</sup> September, 2004. The said child is enrolled in Grade 9 in Luanshya, Zambia. It was also the Petitioner's testimony that from the time that the parties separated, he fathered a child named LISELI LUBINDA with unnamed woman, who was born on 3<sup>rd</sup> June, 2017.

The Petitioner further testified that the said marriage has broken down irretrievably, such that the parties can no longer be expected to live together based on the fact that the parties have lived apart for more than five (5) years immediately preceding the presentation of the Petition for Dissolution of the Marriage. The Petitioner prayed therefore for the dissolution of marriage and that a *Decree Nisi* be granted.

In cross-examination, the Petitioner stated that the child LISELI LUBINDA, whom he fathered with another woman was born on

3<sup>rd</sup> June, 2017. He admitted to having committed adultery and stated that he last lived with the Petitioner as husband and wife on 26<sup>th</sup> June, 2012.

There were no questions put to the Petitioner in re-examination and that marked the close of the Petitioner's case.

The Respondent SARA BESA, a 39 years old School Teacher at Buteko Basic School, in Luanshya aforesaid, did not file any answer or cross-petition herein but elected to give sworn evidence. She testified that she got married to the Petitioner on 10<sup>th</sup> December, 2003 at Chingola Civic Centre, where an original Marriage Certificate was issued to the parties, which certificate has been in her custody. She applied to produce the said certificate and there being no objection raised by the Petitioner, the original marriage certificate was identified by the Respondent and marked "**ID 2**". It was admitted into evidence as "**P 2**".

According to the Respondent's testimony, the parties herein have lived apart since 23<sup>rd</sup> July, 2011 and that she will not oppose the Petition for dissolution of marriage on the ground that marriage has broken down irretrievably due to the fact that the parties have lived apart for 5 years. She further testified that there is one child of the family SEPISO LUBINDA, a girl, who is under her care custody and control. It was the Petitioner's testimony that there are no previous proceedings continuing in Zambia or elsewhere in relation to the said marriage or which are capable of affecting its validity or subsistence. She prayed that the marriage be dissolved and that custody of the child of the family be given

to her. She further prayed for property settlement and that the Petitioner bears the costs incurred herein.

In cross-examination the Respondent, testified that the child of the family SEPISO LUBINDA has visited the Petitioner at his house once only ever since the Petitioner left the matrimonial home.

There was no re-examination of the Respondent and that marked the close of the Respondent's case.

Having heard and inquired into the Petitioner's Petition for the Dissolution of Marriage in accordance with the above cited provision, I am satisfied that the Petitioner was lawfully married to the Respondent at the Registrar's Office in Chingola, in the Copperbelt Province of the Republic of Zambia on 10<sup>th</sup> December, 2003 under the **Marriage Act**<sup>2</sup>, and not 13<sup>th</sup> December, 2003 as testified by the Petitioner.

I refer to **Section 90** of the **Matrimonial Causes Act**,<sup>1</sup> which provides that: -

**"90. Proof of marriage, etc.**

***In proceedings under this Act, the court may receive as evidence of the facts stated in it a document purporting to be either the original or certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Zambia or elsewhere."***

The evidence of fact that the Petitioner was married to the Respondent as per their testimony is the original Certificate of

Marriage admitted into evidence as exhibit marked "**P2**", which was obtained from the Registrar's Office in Chingola after the marriage was solemnised and was issued in accordance with **Section 27** of the **Marriage Act**.<sup>2</sup>

I am satisfied that there is one children of the family namely SEPISO LUBINDA. I am further satisfied that there are no proceedings either in Zambia or elsewhere in the world subsisting which might affect the validity of the marriage or property settlement.

I refer to **Sections 8, 9 (1) (e)** and **9 (3)** of the **Matrimonial Causes Act**,<sup>1</sup> which 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....**

**9. (3) If the Court is satisfied on the evidence of any fact mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably it shall grant a decree of dissolution of marriage."**

It was the Petitioner's testimony that the parties herein last lived together as husband and wife on 26<sup>th</sup> June, 2012. On the other hand, the Respondent testified that the parties last lived together as husband and wife on 23<sup>rd</sup> July, 2011, when the Petitioner left the matrimonial home, which fact was not rebutted by the Petitioner. Therefore, I am satisfied and hereby hold that the marriage solemnised between LUBINDA LYANGANGA and SARA BESA has indeed broken down irretrievably due to the fact that the parties have lived apart for a continuous period of 5 years immediately preceding the presentation of this Petition.

I refer to **Section 71 (1) (b) (i)** of the **Matrimonial Causes Act**,<sup>1</sup> which provides that: -

***"71. Restrictions on decrees for dissolution, annulment or separation affecting children***

***(1) The court shall not make absolute a decree of divorce or nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied—***

***(b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—***

***(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances; ...***

*(emphasis mine)*

Accordingly, it is hereby **ORDERED** that the Marriage solemnised by the Petitioner and the Respondent on the 10<sup>th</sup> December, 2003 **BE** and is **HEREBY DISSOLVED** and a **DECREE NISI** is granted to be made Absolute within six weeks from date of the **DECREE NISI**, provided the issues relating to the custody of the child of the family SEPISO LUBINDA are heard and determined. Either party may formally make an application before this Court for the custody of the said child of the family.

It is **FURTHER ORDERED** that the issue of property settlement is referred for hearing and determination by the District Registrar.

Costs are awarded to the Respondent, to be borne by the Petitioner and to be taxed in default of agreement.

**Delivered on the 16<sup>th</sup> day of January, 2018.**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**