

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

**2017/HPF/D257**

BETWEEN:

**SITWALA MUKULIMA MATARE**

AND

**BEHAVIOUR MATARE**



**PETITIONER**

**RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 12<sup>th</sup> DAY OF  
JANUARY, 2018**

*For the Petitioner : In person*

*For the Respondent : In person*

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## **J U D G M E N T**

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CASES REFERRED TO:

- 1. Mahande V Mahande 1976 ZR 287**

LEGISLATION REFERRED TO:

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

This is a petition for the dissolution of marriage, filed pursuant to Sections 8 and 9 (1) (b) of the Matrimonial Causes Act, No 20 of 2007. The petition states that the Petitioner and the Respondent were lawfully married on the 18<sup>th</sup> March, 2015, at the Office of the Registrar of Marriages. That the parties who are both domiciled in Zambia, last lived as husband and wife at number A21 Ridgeway, Kamwala in Lusaka on 8<sup>th</sup> July, 2016.

The petition further states that there is one child of the family now living, and that there are three children who were born to the Respondent, so far as is known to the Petitioner. It is stated that there have been no previous proceedings in any court in Zambia or elsewhere with respect to the marriage or the property of either or both of them, and that there are no proceedings continuing in any court outside Zambia with reference to the marriage, that are capable of affecting its validity or substance.

The Petitioner alleges 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 named as;

- i. The Respondent going on drinking sprees and returning home as late as 02:00 hours the following morning, behavior which the Petitioner finds intolerable.*
- ii. The Respondent denying the Petitioner conjugal rights for a continuous period of one year, behavior which the Petitioner finds intolerable.*
- iii. The Respondent not supporting the Petitioner financially from the time he chased her from the matrimonial home, which behavior the Petitioner finds intolerable.*

The Petitioner prays that the marriage be dissolved, and that there be orders for maintenance, property settlement and custody of the child of the family.

On 25<sup>th</sup> October, 2017, the Respondent filed an answer in which he denies that the marriage has broken down irretrievably as he has behaved in such a way that the Petitioner cannot reasonably be expected

to live with him. His position with regard to the allegation that he likes going on drinking sprees and returning home in the early hours of the next day was that this happened only four times. He states the first time as being when there was an end of year party at his work place, twice when the parties had a fight, and the last when it was raining heavily, and he had an accident resulting in the vehicle being damaged, which was brought to the Petitioner's attention.

Over the allegation that he has denied the Petitioner her conjugal rights for over year, the Respondent's answer was that it is her that has in fact denied him the same on account of the fact that she told him that she has no feelings for men, and that they could only come in dreams.

The Respondent in answer to the assertion that he has not been supporting the Petitioner since she left the matrimonial home, states that he gives her K1000.00 for her upkeep, buys food and clothes for the child and pays for the Petitioner's and child's medical bills, yet the Petitioner gets rentals from the two roomed house that he helped her complete. He also contends that the Petitioner uses abusive language towards him and the children and he asks to be granted custody of the child in her care. Further that as a result of the Petitioner's vulgar and abusive language it is impossible for him to continue living with her.

At the hearing, both the Petitioner and Respondent testified and the Petitioner called one witness. In her testimony the Petitioner restated the contents of the petition, and added that there is a marriage certificate that she had filed to prove that the parties were married. She also stated that the parties have one child together, a girl named Adela Tendai Matare, born on 9<sup>th</sup> August, 2015, and that the Respondent has three children called Wycliff, Nsama and Marsha aged 9, 11 and 12 as at 2016.

On the particulars of the unreasonable behavior on the Respondent's part, the Petitioner told the court that on 8<sup>th</sup> July, 2016, the Respondent told her to go back to her mother's house on the basis that she wanted to kill him, and after she went, he declined to discuss anything with her family. As regards the allegation that the Respondent goes on drinking sprees, returning home in the early hours of the morning, she stated that she found this intolerable as she could not be waiting for him. The Petitioner with regard to the allegation that the Respondent has denied her sex for a period of over one year, testified that they could not have sex as her vagina would swell, and she would experience pain. That when she went to the hospital she was told that the swelling was due to a fungal infection, and this confused her as the swelling would only occur during and after sex. That when she asked the Respondent for money to go to a proper hospital for treatment, as she thought that the problem may have been due to the caesarian section that she had when giving birth, but he declined to give her the money.

The Petitioner went on to state that when she was due to give birth to the child on 8<sup>th</sup> August, 2015, she was admitted at Levy Mwanawasa hospital as she had booked a bed, as the child was a breach, the Respondent made a trip to Zimbabwe on 9<sup>th</sup> August, 2015, despite this. Further that he had wanted her to go and live in Zimbabwe whilst he remained in Zambia living with her younger sister, and that he did not support her, stating that they were building for the future, and he could not even buy her a pant. She prayed that the marriage be dissolved and that she be maintained, and have custody of the child of the family, and that there be an order for property settlement.

In cross examination, the Petitioner maintained that the Respondent had chased as he had told her to go back to her mother. She stated that the

Respondent had called her sisters so that the marriage could be ended, and not so that the Petitioner could be counseled. She denied that she went to Zimbabwe so that she could be counseled, maintaining that it was just to visit. The Petitioner agreed that the Respondent went to her house after she had left the matrimonial home, twice after he was called, and that they went to see the marriage counsellor Mrs Sakala, but that the Respondent had declined to take her back on the basis that she is too abusive, as she insults.

It was also her testimony in cross examination that the Respondent would buy himself expensive clothes like jeans from Manda Hill, but would decline to buy her decent clothes to wear when going out. She denied that he gave money to buy she wanted, or that she had a shoe rack of shoes or two suitcases of clothes, stating that she had bought the clothes when she was working before he married her.

On the Respondent's assertions that he would take her to private hospitals, the Petitioner stated that he only took her there once. She agreed that the Respondent gives her money for the support of the child every month since they separated. Her evidence was further that her problem had resulted in them not having sex, but stated that the Respondent packed her bags, and told her to go to her parents. She denied insulting and not respecting the Respondent, or that she made him look bad in front of people, and her evidence was that the Respondent would tell her that she was not good to the children, and that he had married her to get a permit, but had failed to obtain it. The Petitioner told the court that Monde's mother only went to their house from Chelstone over her behavior once.

In re-examination, the Petitioner testified that she went to Zimbabwe on about four occasions after the Respondent took her there, and would stay there between a month and two months.

The Petitioner's witness Munalula Mukulima testified that the Petitioner had complained about the Respondent's drinking sprees, and further stated that the Respondent had not been supporting the Petitioner financially, and that he had pushed her to file for divorce. She also testified that the Respondent had stated that he could not live with a person who does not talk and laugh, as she could kill him. Lastly she testified that the Respondent had wanted the Petitioner to live in Zimbabwe and take care of his children, whilst he lived here.

In cross examination, PW2 agreed that the Respondent takes groceries and money for the child, but that he did not give the Petitioner anything. When questioned further she testified that the Respondent does not say that the K1000.00 is for the Petitioner, and that it is the Petitioner who says that the money is for the child.

The Respondent in his testimony told the court that their marriage was characterized by the Petitioner's unruly behavior, and he had told her that he could not live like that. Further that she did not appreciate his efforts to unite the family. It was his evidence that the main issue was the Petitioner's character, and that he would call her family to try and resolve that problem. He gave an example of the Petitioner's bad character as her chasing her brother Misheck whom he had brought to the house.

The Respondent also testified that Mrs Sakala the marriage counsellor had called him after the Petitioner went back to her mother's house and had complained that they had not been having sex, but he had told her

that it was not the issue, but the Petitioner's behavior. He stated that the issue of the permit only came in as they had failed to resolve their problems. The Respondent testified that the Petitioner was aware that his wife had died, and that he had young children whom he had wanted to call the Petitioner as their mother, but she could not listen.

He went on to testify that the Petitioner is lazy, but that was a small issue, as he had brought family members to help her out. However the Petitioner has sharp tongue. On the allegations of him going home late, he said that this happened when they had a fight, and when he had a break down, as well as when he they had an end of year party at the office. In conclusion the Respondent stated that the Petitioner is unruly, and listens to nobody but her mother.

When cross examined, the Respondent denied that he married the Petitioner in order to get a permit, stating that it was because he had wanted her to be his wife. He agreed that he had told her to stop working after she gave birth, and that he bought her a freeze it machine, and rented her a shop in Kalingalinga, However the shop was closed as the Petitioner did go there for six months. The Respondent also agreed to having gone to Zimbabwe on 9<sup>th</sup> August, 2015, when the Petitioner was due to have the caesarian section, but stated that he had left her money for logistics, and added that it was because he went to put a tombstone on his late wife's grave.

He further stated that he still loves the child, even if he was not there when she was born, and he agreed that the Petitioner had asked him how many children he had when they were marrying, and he had said two. The Respondent agreed that later another child of his went there, as well as his sister's child, but he stated that he could not bring the

children to Zambia as he became aware of the Petitioner's character, and knew that she could not keep them. He denied that he had told the Petitioner to go to Zimbabwe to look after the children, stating that it was because he wanted her to see how they lived there.

I have considered the evidence. The petition was brought pursuant to Sections 8 and 9 (1) (b) of the Matrimonial Causes Act No 20 of 2007. Section 8 of the said Act provides for the ground for divorce. It provides 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 on the other hand lays down the facts that need to be proved in order to establish that a marriage has broken down irretrievably. The Section states;

***“ 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.***

In this case the Petitioner alleges that the Respondent has behaved in such a way that she cannot reasonably be expected to live with him. She stated that the Respondent is in the habit of going on drinking sprees and returning home in the early hours of the morning, which behavior she finds intolerable. It was her evidence that she cannot be waiting for the Respondent. The Respondent in his testimony testified that this had only happened four times, twice when the two had fights, once when there was a Christmas party at his work place, and when it was raining heavily, and the vehicle had a breakdown.

In the case of ***MAHANDE V MAHANDE 1976 ZR 287*** it was held that ***"the phrase "cannot reasonably be expected to live with the respondent" necessarily poses an objective test and "the petitioner" means the particular petitioner in the case under consideration, bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage"***.

Thus the question is whether taking into account the Petitioner's faults and attributes, has the Respondent by going out drinking and returning in the early hours of the morning, behaved in such a way that the Petitioner cannot reasonably be expected to live with him? The Respondent told the court that the Petitioner has a sharp tongue and does not listen

to any one but her mother. That he has on a number of occasions called her relatives to resolve the issues. The Petitioner in response to this allegation stated that her sister was only called once over her behaviour. This goes to show that there was something about her behaviour during the marriage.

She however made several allegations against the Respondent stating that when she was due to give birth and had booked a bed at Levy Mwanawasa hospital to have a caesarean section, the Respondent had gone to Zimbabwe during the period. The Petitioner had further alleged that the Respondent had wanted her to go and live in Zimbabwe and take care of her children whilst he remained here in Zambia, and that he had told when they married that he has only two children, yet he has three, and was keeping his sister's child as well.

It is natural that the Petitioner would have expected the Respondent to be by her side when she was giving birth, especially that it was the first child that they were having together. However the Respondent justified the trip to Zimbabwe on the basis that he was going to put a tombstone on his late wife's grave, and that arrangements had already been made, and people informed.

That being the position, the Respondent's absence when the child was born per se, cannot be said to be behaviour that was unreasonable, although it is something that could have been better planned, as he knew that the Petitioner was pregnant, and should have had an idea as to when she was due to deliver the child. Furthermore the Respondent's evidence that he had left the Petitioner money for any eventualities, was unchallenged, which goes to show that he was concerned about the Petitioner's welfare.

The Respondent denied that he had wanted the Petitioner to go and live in Zimbabwe and take care of the children, but when PW2, the Petitioner's sister testified to this effect he did not deny the allegation. Therefore the Respondent wanted the Petitioner to go and live in Zimbabwe and take care of his children while he remained here. This behavior was unreasonable seeing that marriage entails that the couple should live together unless there are justifiable reasons to the contrary. The excuse by the Respondent that he wanted his children to have someone to call their mother cannot stand as he could have brought the children to live with them.

On the allegations that the Respondent lied to the Petitioner about the number of children that he has, is something that goes to trust. Marriage is a partnership that entails that the couple should trust one another. Therefore where one party is untruthful, the trust is lost, and may lead to the breakdown of a marriage. The Respondent did not deny that he had lied to the Petitioner on the number of children that he has.

Then there is the allegation that the Respondent has denied her conjugal rights for over a year. In her testimony the Petitioner testified that the Respondent did not want to have sex with her. She however went on to clarify that she had a condition that made it difficult for the two to have sex, and not that the Respondent did not want to have sex with her. Therefore it cannot be said that the Respondent denied her sex for over a year, and has therefore behaved unreasonably.

The Petitioner further alleges that since she left home, the Respondent has not been supporting her, and that he chased her from the matrimonial home. The Respondent denied having chased her, stating that he had wanted the Petitioner to be counseled. From the evidence on

record, it is clear that there were issues governing the Petitioner's behavior that led to her leaving the matrimonial home.

However the evidence shows that the Respondent has been supporting her by providing money and groceries, as well paying medical bills for both the Petitioner and the child. The only thing is that the Petitioner's complaint was that the Respondent would not buy her expensive things when they were living together. The Respondent cannot be said to have failed to provide support to the Petitioner, which would amount to unreasonable behavior on his part.

Looking at the allegations made by the Petitioner in the petition regarding the Respondent's unreasonable behavior, it cannot be said that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him, as these allegations have not been proved. However there are factors attributable to both the Petitioner and the Respondent that can be said to have led to the breakdown of the marriage. These are in the name of the Respondent desiring that the Petitioner lives in Zimbabwe with his children, while he lives here, which the Petitioner as can be seen from the evidence did not want, and lying about the number of children that he has, and the Petitioner's language affecting the Respondent as he stated that he did not expect to live with her behavior.

Section 23 of the Act 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.***

The Respondent in his answer did not cross petition for dissolution of the marriage based on the Petitioner's behavior, but he did state that he cannot live with her because of her behavior. Pursuant to Section 23 of the Act, I find that the marriage has broken down irretrievably as both the Petitioner and Respondent have behaved in such a way that neither can be expected to live with the other. 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 child and file a consent order to that effect. In default thereof either party can apply to me at chambers. Issues of property settlement and maintenance are referred to the Registrar for determination. Each party shall bear their own costs of the proceedings.

**DELIVERED THIS 12<sup>th</sup> DAY OF JANUARY, 2018**

  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**