

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2018/HPF/D0013



B E T W E E N:

PRISCILLA MALWA HOFISI

PETITIONER

AND

EDGAR HOFISI

RESPONDENT

Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 14th day of March, 2018

For the Petitioner : *In Person*
For the Respondent : *No Appearance*

J U D G M E N T

Cases Referred To:

1. *Thurlow v Thurlow (1975) 2 ALL ER 979*

Legislation Referred To:

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

Other Works Referred To:

1. *Rayden & Jackson's Law and Practice in Divorce and Family Matters, 16th Edition by Booth Dame Margaret Wall Q. C. N, Maple G.J and Biggs A.K. London, Butterworths 1991*

The Petitioner, **Priscilla Malwa Hofisi**, filed a petition for dissolution of marriage on 12th January, 2018, pursuant to sections 8 and 9 (1) (b) of the Matrimonial Causes Act. She was lawfully

married to the Respondent, **Edgar Hofisi** on 10th February, 1997, at the Lusaka Civic Centre. They last lived as husband and wife at House No. 4133, Green field, Shikoswe, Kafue District, their current address.

The Petitioner is a Forester while the Respondent is an Agronomist. There are three children born to the Petitioner and Respondent during the subsistence of their marriage. The Respondent has a child born before their union.

There are no other proceedings in any Court in Zambia or elsewhere regarding the marriage or between the Petitioner and the Respondent regarding any property of either or both of them. There are no proceedings continuing in any Court outside Zambia in respect of the marriage or proceedings which are capable of affecting its validity or subsistence.

The Petitioner alleges that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in an unreasonable manner and she cannot be expected to live with him. The particulars of the unreasonable behaviour given are that:

- (1) *On several occasions throughout the marriage the Respondent has physically and verbally abused the Petitioner. Quite often the Respondent has so abused the Petitioner in front of the children and the couple's relatives. On several occasions, in consequence of the physical abuse, the Petitioner reported the matter to police officers and at Gender Based Violence offices. Further, the Respondent has on several occasions denied to discuss contentious issues in marriage. The Petitioner has in consequence of the foregoing, frequently caused the convening of family meetings to discuss the matter. During these meetings the Respondent would apologise for his conduct but only to resume the same habits complained of not long thereafter. (sic)*
- (2) *Throughout the marriage, the Respondent has exhibited a violent and destructive temper whenever the couple has a disagreement. The Respondent has a habit of fighting using instruments such as planks, golf sticks and an axe. Once the Respondent almost killed the Petitioner when she wanted to commence divorce proceedings. On one occasion when the Petitioner and Respondent were in South Africa, he beat the Petitioner causing her actual bodily harm. The Respondent has also thrown away children's food as they were having their main meal, much to the embarrassment and distress of the Petitioner. Recently the Respondent broke a door using an axe with the intention of killing the Petitioner's nephew who wanted to help resolve their dispute. As a result of his threatening behaviour, the children of the family reported the Respondent to Shikoswe Police Station who apprehended and detained him in custody. The Petitioner also states that she has no access to visit their last born child Edwin Hofisi because of the Respondent's violent behaviour. (sic)*
- (3) *The Respondent has exhibited a lack of interest in the welfare of the Petitioner and the children. On several occasions the Petitioner has lived apart and in different towns owing to job commitments.*
- (4) *Since July, 2017, the Petitioner and the Respondent have not had any sexual relations due to a condition that the Respondent suffered from and has not yielded any results even after seeking medical attention. In consequence,*

their relationship has degenerated to the extent that they do not share the same bedroom anymore. This has caused the Petitioner a lot of anguish and nondescript misery.

The Petitioner prayed to Court to dissolve the marriage and to grant her custody of the children. The Respondent filed an "Affidavit in Reply to the Petition" on 30th January, 2018. He states that he is incarcerated at Shikoswe Police Station in Kafue and is unable to respond to the Petition.

At trial, the Petitioner (**PW**) confirmed the contents of her Petition and testified that she lived well with the Respondent for the first five years of marriage. She migrated with the Respondent to Zimbabwe his home country in 1998 and that was when the marital problems started. The Respondent became violent and on several occasions his parents, sisters or church elders had to intervene in their disputes. PW stated that she wanted to leave the Respondent between 2003/2004 but she stayed on in the marriage after family counseling.

It was PW's evidence that the Respondent committed adultery in 2006 when she went to school. The Respondent's niece told PW that he brought another woman into the matrimonial home with

whom he had an open relationship. They would also drink beer in front of the children. When PW confronted the Respondent, he told her that his heart belonged to another woman. She felt frightened to interrogate him because of his violent behavior.

PW went on to testify that the Respondent got a job in South Africa in 2007. They moved to stay with him and after a while, he sent PW to Zimbabwe. During that period he beleaguered himself to other women whom he took to the matrimonial home. PW's children were exasperated and told her of the Respondent's behaviour. PW further testified that the Respondent once hit her head against the wall and she experienced bad headaches for a long time. Her children asked her to return to Zambia when their sufferings became insurmountable. They feared that PW would contract HIV/AIDS from the Respondent.

PW testified that she decided to stay on with the Respondent, in spite of the hardships. Eventually the Respondent was counseled by a church elder, Brother Elias. He begun to study the Bible and was appointed an unbaptized publisher in Jehovah's Witnesses Church. The Respondent however, returned to his old

habits in 2009. He quit his job because he felt that it was too much of a responsibility to support his family. The children's school fees were 1000 rands per month when the Respondent quit his job. He told PW that he was not prepared to send the children to school. He later on removed the family from their home in Benon and took them to a lodge, which appeared to be a brothel. He immediately abandoned them and went back to Zimbabwe.

PW testified that she was employed as a teacher at Faramiah Primary School in Benon, South Africa. Her employer was kind enough to pay for her accommodation. In December, 2010, the Respondent appeared at the new accommodation and begun to live with them. PW's youngest child later developed a kidney problem and she lost her employment because of the long hospital stays. She was assisted by church mates to settle medical bills and also got a job as a maid and gardener to sustain her family.

PW testified that she returned with her children to Zambia in 2010. She was made to pay a penalty fee of BWP 400 in Botswana because she used an old passport for the children. The Respondent did not follow but went to Zimbabwe with the household goods. She

went to live with her mother and sister in Luanshya. She later asked the Respondent to join them and he did. PW's evidence was that whenever the Respondent was unemployed, he was very peaceful. He eventually got a job with Fisenge Dairy Milk Centre and was given a work permit. She got a volunteer position with the Zambia Forestry College in Kamfinsa and earned about K300,000. Her remuneration included free accommodation, water and electricity. She also sold some goods she came with from South Africa to sustain the family.

PW testified that the Respondent earned K2,000,000 from his employment but only gave her K200,000 for the family. He used to insult her most times and accused her of having affairs with her supervisors. When his violent behaviour heightened, PW suggested a separation and he beat her to a pulp. She was barely rescued by her neighbours who apprehended the Respondent and took him to the police station while she was rushed to Kaunda Square clinic. The Respondent was released at her intervention and immediately deserted the family. He later filed for divorce in the Subordinate Court but abandoned the case after PW raised the issue of jurisdiction.

It was PWs evidence that she formed a landscaping company with her mother in 2013 and also got employed by the Government. In 2014, she was awarded a landscaping contract by La Farge, wherefrom she managed to build a house and buy vehicles. In 2015, she moved to her current residential address and the Respondent suddenly appeared and started living with them. She helped him find a job in Luapula and recently discovered that the Respondent's salary was K10,000 after his incarceration. He only gave her K2,000 after his new employment but demanded money from her while he was working in Luapula.

PW went on to state that in 2016 she registered for a long distance degree programme with the Zambia Forestry College. She is self-sponsored and meets most of the school requirements for her children. There is occasional support from the Respondent. She also testified that in July, 2017, whilst at her home and having lunch with one of her children; the Respondent hit her with a dinner plate on her head. She told him to leave the house and he retorted that he would to kill her and himself.

After a few days, the Respondent called for a family meeting and explained that he wanted to divorce PW. He had just been using her for his selfish ends. The Respondent tried to beat PW after a few days but the children interceded on that occasion. She ran to the bedroom and locked herself in. Her nephew tried to intervene in the dispute and the Respondent was so infuriated that he followed him with an axe to the other bedroom and broke the door.

PW testified that her children were greatly alarmed by the altercation and the Respondent's violence. One of them rushed to Shikoswe Police Station to report the situation. The police picked up the Respondent and he was still in custody at the time of trial. PW prayed to Court to grant her the divorce because the Respondent's behaviour was unreasonable and she was tired of living in fear. She wanted a quick judgment so that she could move out of her current address because she feared the Respondent's reprisal.

The Petitioner was not **cross-examined**.

The Respondent did not attend trial because he is incarcerated at Shikoswe Police Station, Kafue District. However, he could have attended Court if he desired to do so under section 65(1) of the Prisons Act Chapter 97.

I have earnestly considered the Petition and the evidence adduced herein. The only ground upon which a petition for divorce may be presented to the Court is provided in section 8 of the Matrimonial Causes Act which states thus:

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

In order to prove that the marriage has broken down irretrievably, the Petitioner should satisfy the Court of one or more of the facts set out in section 9 (1) (a) to (e) of the Act. Section 9 (1) (b) which is relevant to this Petition provides that:

“9 For the 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:

(b) that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.”

The Learned Authors of **Rayden & Jackson's Law and Practice in Divorce and Family Matters** state at page 214 that:

“Behaviour is not confined to behaviour by the respondent: the behaviour may have reference to the marriage although it is to other members of the family or to outsiders. Any and all behaviour may be taken into account: the Court will have regard to the whole story of the matrimonial relationship. But behaviour is something more than a mere state of affairs or a state of mind. Behaviour in this context is action or conduct by the one which affects the other.”

The Learned Authors further state that:

“The Court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the wife to live with him: In order to decide that, it is necessary to make findings of fact as to the impact of that conduct on the Petitioner.”

In the case of **Thurlow v Thurlow**¹, on deciding the question of unreasonable behavior, the Court held that:

“In order to establish that a respondent had behaved in such a way that the Petitioner could not reasonably be expected to live with the Respondent, it was not sufficient merely to establish that the marriage was dead and it was impossible for the Petitioner to cohabit with the Respondent. It had to be shown that it was the Respondent's behaviour which justified a conclusion by the Court that the Petitioner could not reasonably be expected to endure cohabitation.”

In order to establish unreasonable behaviour, I must be satisfied that the Respondent's actions have exhausted the Petitioner's endurance levels to a point where she cannot be reasonably expected to live with him. The test to be applied in the circumstances is that of a reasonable man.

During her testimony, the Petitioner recounted how the Respondent verbally, physically and emotionally abused her. She testified how she shouldered most of the family's responsibilities with little assistance from the Respondent and had to work as a maid and gardener in South Africa in spite of her qualifications. She also testified that the Respondent disappeared from home for long episodes without communication. Further, her young children were subjected to their father's promiscuity and drinking. They also witnessed their mother being beaten and finally caused their father's arrest after he attempted the last violent episode.

I am convinced that the Respondent's unreasonable behaviour justifies a conclusion that the Petitioner cannot be reasonably expected to endure cohabitation with him. He is violent, reckless and has no sense of responsibility. He has abused the Petitioner for a very long time and her emotional testimony demonstrated the toll that the Respondent's abuse has had on her. In addition, he has threatened PW with death. She became distressed at the thought of the Respondent's release from police custody and finding the family at the matrimonial home. The dissent for the Respondent's

behaviour by PW has also cascaded to the children who went as far as reporting their father to Police and causing his arrest.

In the circumstances, I find that it is in the best interests of this family to end the tumultuous union between PW and the Respondent. The marriage irretrievably broke down a long time ago and PW should not have condoned the abuse she and her children endured. I am satisfied that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with him. I accordingly, dissolve the marriage between the Petitioner and Respondent celebrated on 10th February, 1997 and grant the Petitioner a decree nisi. It will be made absolute six weeks from the date of this judgment.

Before I conclude, I wish to state that the children of the family are all above 18 years old and essentially young adults. Thus, they are able to decide which parent to live with and there is no need to determine the question of custody. The Learned Deputy Registrar will on application by either party determine the question of property settlement. I make no order as to costs.

J14

Dated this 14th day of March, 2018.

MMapani
M. Mapani-Kawimbe
HIGH COURT JUDGE