

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLD AT LUSAKA
(Divorce Jurisdiction)

2017/HPF/D199



BETWEEN:

MACDAN ZIWA

PETITIONER

AND

RACHEAL SILILO MUBITA ZIWA

RESPONDENT

Before Honourable Mrs. Justice S. M. Wanjelani on the 19th day of April, 2018.

For the Petitioner: In person

For the Respondent: In person

JUDGMENT

Cases referred to:

- 1. Mahande V Mahande (1976) ZR 287**
- 2. Livingstone-Stallard V Livingstone-Stallard(1974)2ALL ER 766**
- 3. Katz V Katz (1972) 3 ALL ER 219**

Legislation and other material referred to:

- 1. The Matrimonial Causes Act, No. 20 of 2007**
- 2. Brown on Divorce, 1974 Edition**

This Petition for dissolution of Marriage was filed by **MACDAN ZIWA**, the Petitioner on 15th August, 2017, as amended on 29th December, 2017, pursuant to **Sections 8 and 9 (1)(b) and (d)** the **Matrimonial Causes Act** (hereinafter referred to as the "**Act**"). He avers that the said marriage has broken down irretrievably as the

Respondent has behaved in a manner he cannot reasonably be expected to live with her. The Respondent, **Rachael Sililo Mubita Ziwa** did not file an Answer.

I scheduled the matter for hearing pursuant to **Section 9 (2)** of the **Act**, 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."

At the hearing of the Petition, the Petitioner repeated the contents of the Petition and informed the Court that the Parties were lawfully married on 17th October, 2009, at the Pentecostal Assemblies of God Church, in Lusaka, and last lived together as husband and wife at Sivubwa Primary School Teachers Compound, Choma in 2013.

The Petitioner informed the Court that the Parties are both employed as Teachers and that he is based at Sivubwa Primary School while the Respondent is at Mbole Primary School, both in Choma.

In his continued testimony, the Petitioner stated that both Parties are domiciled in Zambia and that there is one child of the family, namely, **Elijah Madaliso Ziwa**, while the Respondent had one other child prior to the marriage and none after the marriage, as far as is known to the Petitioner.

He added that there had been previous proceedings in the High Court of Zambia with reference to the said marriage under Cause Number **2017/HPF/D125** but it did not affect the validity of the marriage.

In conclusion, the Petitioner averred that the marriage has broken down irretrievably citing unreasonable behaviour by the Respondent such that he cannot be expected to live with her. He relied on the particulars set out in his Petition.

The Petitioner highlighted some of these particulars of unreasonable behaviour as including the Respondent drinking excessively, such that she goes to drink almost every day and when he tries to control her she becomes violent and starts breaking household property. He added that Respondent also drags the child of the family to her drinking sprees, and further that the Respondent had a tendency of singing songs of praising her first boyfriend whenever she was drunk, and even threatened to commit suicide because the said boyfriend did not call her on her birthday. The Petitioner stated that he finds all this behaviour an acceptable and intolerable and further that it has caused him mental torture and stress.

The Petitioner contended that counseling by the parents and the District Education Board had proved futile as at one time the Respondent left the meeting after insulting the Petitioner and his parents.

The Petitioner therefore prayed that the said marriage be dissolved and a decree nissi be granted; that there be no order for the

maintenance of the Respondent; that the Petitioner be granted custody of the child of the family with reasonable access to the Respondent; that there be no order for property settlement; and that costs be in the cause.

Under cross-examination by the Respondent, the Petitioner stated that they had courted for five years and during that period, the Respondent used to drink a bit, not to the extent she does now where she cannot be controlled by anyone including her parents or the School authorities. He added that when the Respondent is drunk, other men can do whatever they wish with her, which behaviour he cannot tolerate.

The Respondent also gave viva voce evidence. She confirmed having received the Petition and understanding the contents therein and that the Parties had lived apart from 2013. She added that the Petitioner had thrown her belongings out of the house in 2013 and she was offered accommodation by the School authorities till she was given temporary accommodation in a Classroom. She averred that the allegations of the behaviour were not true as at now as she had gone for rehabilitation at Chainama Hills Hospital in 2013 for a period of three months. The Respondent informed the Court that she currently teaches at a Mission School which does not have drinking places. She further contended that the Parties have never been counseled over their differences.

Under cross examination, the Respondent stated that she had no alcohol bottles in her house and that the Parents only counseled

them prior to 2013. She conceded that her parents had signed a letter that the parties should go on separation but she was not part of the meeting that made that resolution. She concluded by stating that the Court should grant the Petitioner his wish to end the marriage.

I have considered the Petition filed herein and the Parties' oral testimony before me. The law prescribes one ground for the dissolution of a statutory marriage, that is, the irretrievable break down of a marriage. This is provided in **section 8** of the **Act** which states:

“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.

The Petitioner commenced this Petition relying on section **9(1)(b)** and **(d)** which provide as follows:

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...

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

(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; ... "

Based on the evidence on record, it is clear that although the Parties have lived apart for more than two years, the provisions of section **9(1)(d)** were not alluded to and no consent was given to this effect. In the premise, I will determine this Petition based on section **9(1)(b)** which relates to unreasonable behavior.

It is evident that this is a feebly contested Petition by the Respondent premised on the fact that the Respondent barely denied the particulars of the alleged unreasonable behaviour save to say that those allegations were before she went into rehabilitation for her drinking problem in 2013. Be that as it may, the Petitioner has to prove on a balance of probabilities whether the Respondent has behaved in such a way that he cannot reasonably be expected to live with her.

In the case of **MAHANDE V MAHANDE⁽¹⁾** 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”.

In the case of **LIVINGSTONE STALLARD v LIVINGSTONE STALLARD**⁽²⁾ it was stated as follows:

“would any right thinking person come to the conclusion that this husband has behaved in such a way that his wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties”.

In this case the Petitioner testified that the Respondent drinks excessively such that other men can do whatever they please with her, takes the child on her drinking sprees, and makes reference to her first boyfriend which factors cause the Petitioner mental torture and stress.

In the cited **MAHANDE V MAHANDE**⁽¹⁾ case, reference was made to the case of **KATZ V KATZ**⁽³⁾ where it was stated that:

“behaviour in this context is action or conduct by the one which affects the other. Such conduct may take either acts or the form of an act or omission or may be a course of conduct and, in my view, it must have some reference to the marriage”.

In unraveling and determining this behavioral aspect, further the author in the book titled "**Brown on Divorce**" offers insight and states:

“In this case, it must be for the Judge and not the Petitioner alone to decide whether the conduct is sufficiently grave to make it unreasonable to expect the Petitioner to endure it”.

From the foregoing authorities, the question whether or not in light of the evidence raised in the hearing of this Petition, it can be concluded that the behaviour of the Respondent has been so grave that the Petitioner cannot be reasonably expected to live with her.

I carefully listened and observed the Parties' demeanor when they were giving their evidence and noted that the Petitioner seemed a more credible witness than the Respondent as his evidence was more detailed and consistent while the Respondent did not deny the allegations but to state that she had changed since going into rehabilitation in 2013. It is quite clear from the evidence adduced on record that the Parties herein have had a tumultuous marriage which was attributed to the Respondent's alcohol consumption.

It is evident that the Parties have lived apart for more than four years and I find that there is no intention on the part of the Petitioner to resume cohabitation. I also find that the conduct by Respondent has negatively affected the quality of life of family as a whole in that the environment is not conducive for the wellbeing of a family.

Based on the foregoing, I find that the marriage has broken down irretrievably. I am satisfied that the Petitioner has adduced sufficient evidence to prove on a balance of probabilities that the

Respondent's behaviour, in its cumulative effect is such that he cannot reasonably be expected to live with her and that the marriage has broken down irretrievably.

As the conditions of section **8**, and **9 (1) (b)** of the **Act** have been met, I hereby dissolve the marriage between the Petitioner and the Respondent celebrated on 17th October, 2009 as reflected on the copy of Marriage Certificate and accordingly grant a **DECREE NISI**. The **DECREE NISI** will be made absolute after determination of the custody of the child of the family, which if not settled by consent, shall be settled by either Party making an application before me at Chambers.

I further order that the issue of maintenance and property settlement, if any, be referred to the Deputy Registrar upon the filing of a formal application by either Party. I make no order as to costs.

Delivered at Lusaka this 19th day of April, 2018.



**S.M.WANJELANI
JUDGE**