

IN THE HIGH COURT FOR ZAMBIA
 AT THE FAMILY DIVISION
 HOLDEN AT LUSAKA
 (DIVORCE JURISDICTION)

2019/HPF/D146

BETWEEN:

MIYANDA MWEETWA MATAMBO

PETITIONER

AND

EDWIN MATAMBO

RESPONDENT



BEFORE JUSTICE ELITA PHIRI MWIKISA

FOR THE PETITIONER: MR. F. H. M. HAMAKANDO OF BATOKA CHAMBERS
 FOR THE RESPONDENT: MRS. J. LUMAMBA HAMALEKE LEGAL COUNSEL
 OF LEGAL AID BOARD

JUDGMENT

Cases Referred To:

1. *Thurlow vs. Thurlow* (1975) 2 ALL E.R. 979.
2. *Brighton Soko vs. Petronella Sakala Soko* - SCZ-8-189-2015.
3. *Ash vs. Ash* (1972) 1 A.E.R. 582.
4. *Mahande vs. Mahande* [1976] Z.R. 354 (S.C.).

Legislation and Other Works Referred To:

1. *The Matrimonial Causes Act, Act No. 20 of 2007.*
2. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths.*

3. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts, 11th Edition, London, Butterworths.*

The Petition of Miyanda Mweetwa Matambo showeth that: on 28th December, 2014, the Petitioner was married to the Respondent Edwin Matambo at the Seventh Day Adventist Church, University, Lusaka. The Petitioner also states that she and the Respondent lived together as husband and wife at Kasisi Agric and both Petitioner and Respondent are domiciled in Zambia. The Petitioner states therein that she is a Medical Laboratory Technologist currently working at Mungule Rural Health Centre in Chibombo District of the Central Province of the Republic of Zambia. That the Respondent is an Agriculturalist working at Kasisi Agriculture Training Centre.

The Petitioner **Miyanda Mweetwa Matambo** has Petitioned for the Dissolution of Marriage pursuant to **Sections 8 and 9 (1) (b) of The Matrimonial Causes Act¹** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.

Sections 8 and 9 (1) (b) of The Matrimonial Causes Act¹ provides 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

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

Further, **Section 9 (2) of The Matrimonial Causes Act¹** provides that:

"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." (Court's emphasis)

Section 9 (1) (b) of The Matrimonial Causes Act¹, which I have cited above, provides that irretrievable breakdown may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent, or vice versa in the case of a Cross-Petition. Accordingly, in the circumstances presented before this Court, I will have to decide the question whether both parties have so behaved that it is unreasonable to expect them to live with each other.

The Learned Authors **Rayden and Jackson on Divorce and Family Matters²**, stated that in order to answer the said question, it is necessary to make findings of fact as to what the Respondent actually did, and findings of fact as to the impact of that conduct on the Petitioner. In the case of **Thurlow vs. Thurlow¹**, the Court deciding the question of "unreasonable behaviour" held that: -

"In order to establish that a respondent has 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 that 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."

The Petitioner states that there is one child of the family, namely, Twapewa Matambo, female born on 13th December, 2015. That there is no other child now living born to the Petitioner and Respondent during the subsistence of the marriage so far known to the Petitioner. That there are no previous proceedings in any court in Zambia or elsewhere with reference to the said marriage, neither are there any proceedings continuing in any court within or outside Zambia in relation to the said marriage which is capable of affecting its validity or substance. It was furthermore stated that no agreement or arrangements have been made or proposed to be made between the parties for the support of the Petitioner or maintenance of the child of the family. The Petition showeth that the said marriage has broken down irretrievably due to the Respondent's unreasonable behaviour.

The particulars of unreasonable behaviour as contained in the Petition are that the Respondent took the Petitioner to her father's house in Kalomo, on 26th October, 2016, saying that he had divorced her as he did not love her any more. That the Respondent shunned family meetings called in the past to discuss and possibly help reconcile the

Petitioner and Respondent. That the Respondent has not shown any interest to resume cohabitation with the Petitioner since 2016.

The Petitioner therefore prays that the said marriage be dissolved and that the Petitioner be granted custody of the child of the family with reasonable access to the Respondent. That there be an order for maintenance and property settlement.

At the hearing of the matter on 14th October, 2019, the Petitioner augmented the contents of her Petition by testifying that the marriage has broken down irretrievably on the basis of unreasonable behaviour by the Respondent who had not been speaking to her for 2 months until it was too much for her to bear. She testified that the Respondent was not eating the food she prepared and that the Respondent shunned the meetings arranged to meet the Pastor to try and reconcile them. The Petitioner also told the court that in September, 2019, her father called the Respondent's elder brother for a family meeting which the Respondent also attended together with his relatives and that it was at that meeting that the Respondent refused to reconcile with the Petitioner saying that he wanted a divorce as they were incompatible. She further told the court that the Respondent and herself have lived separate and apart for a continuous period from September, 2016, to the date of hearing of the divorce Petition meaning that they have lived

separate and apart for a continuous period of 2 years or 3 years to be exact. The Petitioner said that she had tried to reconcile with the Respondent during the period they were on separation but to no avail and now she wanted the court to dissolve the marriage.

The Respondent on the other hand filed an Answer and Cross Petition dated 8th August, 2019. The Respondent stated therein that he admits that the marriage has broken down irretrievably but not due to the reasons given by the Petitioner. He denied shunning family meetings called in the past to try and reconcile them. He denies each and every allegation and instead cross petitions that the Petitioner has behaved in such a manner that the Respondent cannot reasonably be expected to live with her. The particulars of unreasonable behaviour according to the Respondent are that the Petitioner lost respect for the Respondent such that when the Respondent goes out with friends, the Petitioner would not open the door for the Respondent upon his return home and would tell him to go back where he came from. The Respondent stated that he used to provide for his family but the Petitioner would never appreciate instead she kept on asking for more and more beyond the Respondent's means. That the Respondent at one time told the Petitioner that what she was asking for was way too much and beyond the Respondent's means but the Petitioner told the Respondent to go

and steal for her. That the Respondent's mother once visited them but the Petitioner would not serve the Respondent's mother or her mother in law food claiming that the food was finished and that she would never bother to cook for the Respondent's mother or her mother in law.

The Respondent further testified that the Petitioner became suicidal as she would always tell the Respondent that when she dies, he should take care of their child and that if the neighbours observed that she was not seen around the house, they should force open the door to get the child. The Respondent furthermore stated in his Cross Petition that, in 2016, he was fired from his job and the Petitioner turned him into a laughing stock as she would gossip about the Respondent with her friends.

The Respondent conceded that the Petitioner and himself have lived separate and apart for a continuous period of 2 years since 2016, and that they have never resumed cohabitation.

The Respondent therefore prays that the marriage be dissolved on grounds set out in the Cross Petition and that the Petitioner be granted custody of the child of the family with liberal access to the Respondent.

That costs for the Petition be in the cause.

At the hearing of the matter, the Respondent testified as he had indicated in his Cross Petition.

On the test to apply on whether the Respondent's behaviour was unreasonable in relation to the Petitioner, the eminent authors of **Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts**³, opined as follows at **page 203, paragraph 25**:

“Nevertheless, in considering what is reasonable, the Court (in accordance with its duty to inquire, so far as reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable: allowance will be made for the sensitive as well as the thick-skinned;...”

The said eminent authors further opined at **page 204, paragraph 26** as follows:

“Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the Respondent.”

In the Supreme Court of Zambia Judgment of **Brighton Soko vs. Petronella Sakala Soko**², their Lordships held as follows at **page J28**:

“In taking the view which we have taken, we have paid careful attention to the reasoning which we have adopted in Mahande namely that when considering the Respondent's behaviour in the context of a divorce petition founded on ‘unreasonable behaviour’ as enacted in Section 9 (1) of the Matrimonial Causes Act No. 20 of 2007, it is not just the behaviour of respondent which is decisive but, equally crucial and as much decisive, is the way in which such behaviour relates to or

interacts with the character, behaviour, personality, disposition and other traits and attributes of the particular petitioner involved.

(Court's emphasis)

In the same case, the Supreme Court of Zambia cited the English case of **Ash vs. Ash**³ wherein it was stated in part by Bagnall, J at **page 140** as follows:

“The general questions may be expanded thus: Can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?”

The **Ash vs. Ash**³ case was also cited with approval in the Judgment of the Supreme Court of Zambia in **Mahande vs. Mahande**⁴, wherein Cullinan, AJS., stated as follows:

“...The following question then arises, to paraphrase the above words of Bagnall, J, and those of Ormrod, J, in Pheasant vs. Pheasant (1972) 1 A.E.R. at p. 591 at c to d; bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage, bearing in mind the characters and the difficulties of both parties, trying to be fair to both of them and expecting neither heroic virtue or selfless abnegation from either, has the respondent then behaved in such way that the petitioner cannot reasonably be expected to live with him?”

I have addressed my mind to **Section 13** of **The Matrimonial Causes Act**¹, which provides that:

“Where in any proceedings for divorce the petitioner alleges that the respondent has behaved in such a way that the petitioner cannot be expected to live with the respondent, but the parties to the marriage have lived with each other for a period or periods not

exceeding six months after the date of the occurrence of the final incident relied on by the petitioner and held by the Court to support the petitioner's allegation, that fact shall be disregarded in determining for the purposes of paragraph (b) of subsection (1) of section nine whether the petitioner cannot reasonably be expected to live with the respondent."

I am guided by the above authorities. As can be seen from the above, it is clear, in my view, that the behaviour required to be proved, must be of such gravity that the parties' powers of endurance are exhausted, to the point where it is clear that they cannot reasonably be expected to live with each other. The standard is an objective one or that of a reasonable man or woman.

I have carefully considered the Petition for dissolution of marriage, the Answer and Cross Petition; together with the viva voce evidence of both parties. I am satisfied that the Petitioner was lawfully married to the Respondent on 28th December, 2014, as shown on the marriage certificate attached to the divorce Petition. The issue to be determined is whether this marriage has broken down irretrievably due to the fact that the Respondent has behaved unreasonably such that the Petitioner cannot be expected to live with the Respondent. Similarly, the Respondent filed a cross Petition in which he alleges that the marriage has not broken down due to his unreasonable behaviour but due to the unreasonable behaviour of the Petitioner whom he said he had behaved in such a way that he cannot reasonably be expected to live with her.

He narrated instances when the Petitioner had behaved unreasonably such as the instances when she would refuse to unlock the door to the matrimonial home whenever he went out with friends and also that she denied food to his mother who at one time had visited them. He alluded to the fact that the Petitioner was suicidal and this evidence was not rebutted by the evidence by the Petitioner under cross examination of the Respondent by the Learned Counsel for the Petitioner.

I therefore find that the Respondent has satisfied this court that not only has the marriage broken down irretrievably but also that the reason why the marriage has broken down is also attributed to the Petitioner's behaviour herein who in my considered view has behaved in such a way that the Respondent cannot reasonably be expected to live with her.

In the case of **Mahande v. Mahande**, it was held as follows:

“The general question maybe expanded thus: can this petitioner with his/her faults and other attributes, good and bad, and having regard to his/her behaviour during the marriage reasonably be expected to live with the Respondent.”

The question to be determined therefore, is whether the Petitioner with all her faults such as her love for money, as alleged by the Respondent and her general conduct cumulatively put together can be said to have behaved in such a way that she cannot reasonably be expected to live with the Respondent. The particulars of unreasonable behaviour

mentioned in the Petition and augmented by the Petitioner in her viva voce evidence in court, are not entirely convincing as she merely points to the fact that the Respondent behaved unreasonably by taking her to her parents in Kalomo against her will saying to her father that he was divorcing her as he did not love her anymore. Further that the Respondent had shunned family meetings called in the past to try and reconcile the parties herein. The Petitioner also stated in her particulars for unreasonable behaviour that the Respondent has not shown any interest to resume cohabitation with the Petitioner in 2016. Yes sex is a vital component to marriage but I find that the Respondent in his Answer convincingly explained why he finds it intolerable to continue living with the Petitioner who he alleges has behaved in such a manner that he cannot reasonably be expected to live with him.

I have looked at the evidence and more especially the testimonies of both parties in court and I am of the considered view that the marriage has broken down irretrievably due to the unreasonable behaviour of the Petitioner who has behaved in such a manner that the Respondent cannot reasonably be expected to live with her. To tell her husband that he should go and steal for her just because she was so greedy and wanted more than the Respondent could afford to give her, is so unreasonable that this court finds the Petitioner's behaviour

unreasonable. She did not even rebut the allegation that she was suicidal thereby causing the Respondent further distress. I therefore agree with the Respondent that the Petitioner and Respondent are incompatible with each other and the Respondent herein finds it intolerable to live with the Petitioner. The Petitioner fails in her Petition but the Respondent succeeds in his cross petition for divorce.

I am also of the considered view that both the Petitioner and Respondent having lived separate and apart for a continuous period of 2 years, namely from 2016, to the date of hearing of the Petition, have met the conditions for divorce as agreed by both parties to the divorce that they have lived separate and apart for a continuous period of 2 years immediately preceding the presentation of the petition, even though this issue was not pleaded as a ground for divorce. Both parties to the divorce petition and cross petition testified that they had lived separate and apart from September, 2016, to the date of hearing of the petition and cross petition. I therefore find that the marriage has broken down irretrievably and I accordingly grant the Petitioner and Respondent a decree nisi for divorce to be made absolute 6 weeks from the date hereof. I also grant the Petitioner custody of the child of the family with reasonable access by the Respondent since the Respondent is agreeable

with that. I refer all maintenance and property settlement issues to the Deputy Registrar for determination.

Leave to appeal is granted.

Dated at Lusaka this1st..... day ofJuly..... 2020

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ELITA PHIRI MWIKISA
JUDGE