

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

2020/HPF/D224

BETWEEN:

WALTER BRIAN HARRISON

AND

ALISON SIACHILUBI CHINYAMA HARRISON



PETITIONER

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 31st
DAY OF AUGUST, 2020**

For the Petitioner : Mosha & Company

For the Respondent : Messrs Muyatwa Legal Practitioners

R U L I N G

LEGISLATION REFERRED TO:

The Matrimonial Causes Act No 20 of 2007

This is a ruling on an application filed by the Respondent on 15th July, 2020, for an order for maintenance pending suit. The application was made pursuant to Section 56 (1) of the Matrimonial Causes Act No 20 of 2007 and is accompanied by an affidavit, a list of authorities and skeleton arguments in support.

In the affidavit in support of the application, which is deposed to by the Respondent, she avers that the Petitioner and herself executed a

Deed of Separation, wherein it was agreed that the Petitioner would be contributing US\$1,500.00 towards the monthly rentals for Plot No. 19046 Mulungushi Road, Lusaka or any other place that the Respondent decided to live at. The Deed of Separation (Deed) is exhibited as "ASCH1" to the affidavit.

She states that the Petitioner has not met his obligations contained in paragraph 3 of the Deed since June, 2020, and as a result, the Respondent is in rental arrears. Exhibited as "ASCH2" is a letter of demand from the Respondent's landlord for the payment of rentals. The Respondent further avers that in terms of the Deed, the Petitioner has the responsibility of paying the school fees for the children of the family at Lusaka International Community School (LICS), as well as the medical insurance for the said children.

The contention is that the Petitioner has failed to honour such payments since April 2020, in respect of Jaiden Alexander Harrison and since January 2020 for Khloe Jessica Harrison. The financial statement from LICS for the outstanding school fees for the children is exhibited as "ASCH3".

The Petitioner in response to the application, filed an affidavit in opposition on 31st July, 2020. He deposes therein that the Deed that was executed by the parties on 17th and 23rd March, 2015, expired on 23rd March, 2017, as it was created to govern the parties' two-year separation, pending presentation of a divorce petition by either party, as stipulated in Clause 2.1 of the said Deed. That he is advised by his advocates and firmly believes it to be so, that the Deed has been

further rendered null and void, upon the presentation of the petition for divorce, and it is therefore of no effect.

That notwithstanding the same, out of the kindness of his heart, and because of the shared custody of the children of the family, the Petitioner has been rendering support to the Respondent in terms of rentals up to 30th May, 2020. He deposes that it sadly came to his attention that the Respondent has been unscrupulously demanding rental money from him over and above the actual rentals that she has been paying, for at least over one (1) year.

To this end, the Petitioner states that the Respondent has exhibited to her affidavit a statement of rentals that indicates the monthly rentals as K11,000.00, but the Respondent has been demanding US\$1,200.00 as monthly rentals. The averment is that the Petitioner has paid US\$13,930.00 to the Respondent and her landlord. Exhibited as "WH1 a-f" is the money transfers from the Petitioner's account to the Respondent's account, and the Respondent's landlord.

He states that the Respondent has unscrupulously and unfairly obtained approximately K75, 081.06 from him, over and above her actual rentals, as pleaded by her, and exhibited as "WH2", is a summary of the payments made to the Respondent, and the computations for the overpayments. It is the Petitioner's averment that the Respondent has failed to produce the lease agreement that she has with her landlord, despite several verbal and written requests to do so, and exhibited to the affidavit in opposition is an electronic screenshot of a conversation that the Petitioner had with the

Respondent requesting for the lease agreement, which is marked as “WH3 a-b”.

Therefore, it is doubtful that the Respondent’s rentals amount to K11,000.00 per month, because that amount is over and above the leasing rate for that residential area for an unfurnished two-bedroomed flat. The Petitioner also deposes that he has been unemployed since 27th October, 2019, and currently, he has no other sources of income and in the foreseeable future.

The letter terminating his employment by way of redundancy, dated 27th August, 2019, is exhibited as “WH4 a-b”. Also exhibited is a copy of his curriculum vitae marked “WH5 a-c”, and the Petitioner deposes that the nature of his expertise is not very commonly sought after in Zambia, as the businesses that require it are few. It is his position that efforts to obtain employment outside Zambia have proved fruitless so far, and therefore the prospects of finding employment in the foreseeable future are bleak.

The Petitioner states that he has been surviving on his savings since the loss of his job in October, 2019, and exhibited to the affidavit are copies of his bank statements showing the closing balances of US\$245 and US\$78. He deposes that he does not own any real estate, and he is currently renting a house which he originally leased at K16,000.00 per month, as shown in the lease agreement exhibited as “WH7a-g”. However, he is now paying K10,000.00 after negotiating with his landlord, who agreed to reduce the rentals for a period of 3 months, before the lease agreement could be reviewed again.

The Petitioner avers that his living expenses are currently as follows:

i.	Rent	ZMK 10,000.00
ii.	Phones	ZMK 1,000.00
iii.	Internet	ZMK 600.00
iv.	Entertainment	ZMK 3,000.00
v.	Zesco	ZMK 2,000.00
vi.	Generator fuel and up keep	ZMK 1,000.00
vii.	Fuel for car	ZMK 1,500.00
viii.	Food	ZMK 6,000.00
ix.	Salaries for staff	ZMK 1,500.00
x.	Miscellaneous (gas, water, etc)	ZMK 500.00

Total: ZMK 27,100.00

It is stated that the Petitioner does not have income at the moment to meet his own living expenses, and has had to borrow money from family members from May, 2020, in order to meet some large expenses such as school fees and rentals. Therefore, he is unable to pay any maintenance pending suit for the Respondent's rent. He contends that the Respondent is in a better financial position than himself because she receives rentals from the flats that she owns, and that the Respondent admitted this fact in her Answer that she filed into court on 15th July, 2020.

The averment is further that exhibited to the affidavit as 'WH8', is a print out from google maps, showing the flats that are owned by the Respondent. The Petitioner deposes that as advised by his advocates, and firmly believing the same, the Respondent has neglected to discharge her responsibility to present all the financial and relevant

information regarding her circumstances to the court, to enable it to examine the evidence in considering this application.

That this responsibility is well articulated and presented in the Respondents' list of authorities and skeleton arguments filed into court on 15th July, 2020. The Petitioner depones that he is fully committed to the payment of the children's school fees, and his current default was as a result of the children not attending school due to the outbreak of COVID-19, and the school failing to justify why they should continue paying school fees during this period.

The email evidencing this is exhibited as "WH9a-c". The Petitioner further avers that he will endeavour to pay the children's school fees within his means, if they can reach an agreement on a fair amount to be paid during the pandemic. However, if an agreement cannot be reached, he will have to find alternative schooling for the children. He deposes in the meantime, that he is fully committed to rendering support to the children, and if need be, to paying for affordable remote learning support.

The Petitioner states that if he is unable to find employment for a prolonged period, it will be inevitable to move the children to a more affordable school. He asks the court to share the cost of the children's maintenance, up keep and education equally pending suit.

The Respondent filed an affidavit in reply on 7th August, 2020 in which she depones that the Petitioner's affidavit contains extraneous matters by way of legal arguments, as to the construction and legal status of the Deed, and that the particular paragraphs should therefore be expunged. She states that she merely demanded that the

Petitioner meets his obligation as per the Deed that the parties executed, and further that the Petitioner commits himself to paying so that he can acquire Zambian residency, and not merely out of kindness.

The lease agreement between the Respondent and her landlord is exhibited as "ASCH1", showing the rentals at a monthly rate of ZMW 11,000.00. She depones that the Petitioner was still receiving an income as of January 2020, even after termination of his employment, and the WhatsApp messages exhibited as "ASCH2", between herself and the Petitioner show the same.

The Respondent states that the Petitioner did not disclose that he maintains a bank account in Zambia, in which other earnings are banked, and that exhibit "ASCH3" are WhatsApp messages, showing that the Petitioner disclosed that he was at the bank at Arcades Shopping Complex. She also avers that the Petitioner's own expenditure, even without the custody of the children, evidences and accounts for her incurring higher expenditure for rent and up keep of the children of the family, over whom she has custody.

The Respondent's bank statement is exhibited as "ASCH4", and it is deposed that it has a closing balance of ZMW 102. 70, as at 31st July, 2020. She further avers that the flat that she owns has no electricity connected to it, and it is currently unoccupied. Therefore, it is not generating any income. The Respondent contends that the google maps exhibited by the Petitioner are not proof of ownership of property, and that records at the Lands and Deeds Registry which are

available for public inspection, do not show that she owns the purported five (5) flats.

She states that the Petitioner has withheld facts such as his earnings, and in this regard, she reasonably believes the Petitioner banks at Stanbic Bank Zambia, which shows that the Petitioner is actually in a far better financial position than herself to meet the rental costs, as well as the costs for maintenance of the children.

I have considered the application. It was brought pursuant to Section 56(1) of the Matrimonial Causes Act No 20 of 2007. The said Section provides that;

“ (1) Subject to the provisions of this section, the Court may, in any matter or cause in which application is made for the maintenance of a party to a marriage, or of children of the family, other than proceedings for an order for maintenance pending the disposal of proceedings, make such an order on such application as it thinks proper having regard to-

(a) the income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage(e) any physical or mental disability of either of the parties to the marriage;

(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit, such as a pension, which as a result of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.”

The above Section deals with powers that the court has when making orders for maintenance. Section 52 of the Act empowers the court to make orders for maintenance pending suit. From the affidavits filed in this matter, it is not in contention that the parties entered into a Deed of Separation on 23rd March, 2015. It is exhibited as ‘ASCH1’ to the affidavit in support of the application. The Deed appears to be the basis upon which the Respondent has made this application.

Clause 6.5 of that Deed states that:

“6.5 The Husband shall on a monthly basis contribute an amount not exceeding United States dollars One Thousand Five Hundred (US\$1,500.00) towards the monthly rentals Plot 19046 Mulungushi Road Roma Lusaka or any other place that the Wife decides to live.

6.5 The Husband shall be responsible for the school fees of the children of the marriage who are currently attending LICS in Lusaka. Any decisions to move the children to a different school must be made jointly by the Husband and Wife and if the Wife unilaterally decides to move the children to a school that has not been agreed upon by the Husband then in that case, he shall not be liable to settle the school fees.”

The contention by the Respondent in the affidavit in support of the application is that the Petitioner has not complied with the above quoted terms of the Deed in the past recent months. The Petitioner however opposes this allegation, and his position is that the Deed was only valid for two (2) years, and it expired on 23rd March, 2017, as per Clause 2.1 of the Deed, which states as follows:

“2.1 After two years of this Deed of Separation and if the Parties shall not have begun living together again, then the Husband or the Wife may present a Petition for the Dissolution of the Marriage pursuant to Section 9(1) (b) of the Matrimonial Causes Act No. 20 of 2007 (based upon the grounds of the two years separation with consent of the Respondent), and may apply for the Decree Nisi to be made Absolute on the earliest available date”

The Petitioner alleges that the Respondent has unscrupulously and unfairly obtained from him an amount over and above the actual amount paid as rent. The Petitioner has further stated that he lost his employment, and therefore, he has no income. He alleges that the

Respondent is actually in a better financial position than he is, as she owns five (5) flats, which she admitted in her answer to the petition.

In reply, the Respondent states that the paragraphs in the affidavit in opposition touching on the Deed contain legal arguments, and should thus be expunged from the affidavit. She has in that affidavit, exhibited the lease agreement that she executed with her landlord, which proves that she pays rentals in the amount of K11,000.00, a month. The Respondent has also deponed that the Petitioner still received a salary as at January, 2020, and that he has a Zambian bank account that he did not disclose to her.

She contends that the house that she owns does not generate income, as it is unoccupied, as it is not electrified, and that google maps cannot serve as proof of ownership of five (5) flats, as alleged by the Petitioner.

I will start with the contention that the affidavit in opposition contains extraneous matters by way of legal arguments. The paragraphs attacked in this respect are from 4 to 6 of the affidavit in opposition. They state as follows:

***“4. That the Deed of Separation executed by the Parties on 17th and 23rd March, 2015 and exhibited in the Respondent’s Affidavit expired on 23rd March, 2017 because the Deed was created to govern the Parties, Two Year Separation pending the presentation of a Divorce Petition by either of the parties to it as specifically stipulated at Clause 2.1 of the said Deed.*”**

5. That I am advised by my Advocates and firmly believe it to be so that in addition to the Deed having expired after the two-year separation period lapsed, it has further been rendered null and void upon the presentation of this Petition for Divorce and therefore is of no effect.

6. That notwithstanding the expiry of the Separation Deed as of 23rd March, 2017, I have, out of the kindness of my heart and because we have had shared custody of the children of the family, been rendering support to the Respondent in terms of rentals up to 30th May, 2020.”

Order 5 rule 15 of the High Court Rules provides that:

“An affidavit shall not contain extraneous matters by way of objection or prayer or legal argument or conclusion.”

Rule 16 of the said Order states that:

“Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.”

The law on affidavits is clear as quoted above, that affidavits must contain only factual statements and not legal arguments. A perusal of paragraphs 4 to 6 of the Affidavit in opposition does not reveal that legal arguments have been pleaded by the Petitioner. The allegations in those paragraphs are in reference to the contents of Clause 2.1 of the Deed, which is factual, just like paragraph 3 of the Respondent’s

affidavit in support of the application makes reference to Clause 6.5 of the Deed.

Therefore, paragraphs 4-6 of the affidavit in opposition having pleaded facts, the argument that the said paragraphs should be expunged from the affidavit in opposition for containing legal arguments fails. It will be noted that under Clause 2.1 of the Deed, the parties agreed that if after two (2) years of separation the parties had not resumed cohabiting, then either party could commence divorce proceedings based on two (2) years separation with consent.

The Deed is silent on what would happen to the agreement in the event that no petition for divorce was filed after the lapse of two (2) years, the period agreed upon as to when proceedings could be commenced. The petition before me has been presented more than five (5) years after the Deed was executed on 17th March, 2015. However, as divorce proceedings have been commenced, the provisions of the Matrimonial Causes Act, No 20 of 2007 with regard to maintenance pending suit kick in.

Coming to the merits of the application, it has been seen that Section 52 of the Matrimonial Causes Act empowers this court to make orders for maintenance pending suit. Section 56(1) of the said Act on the other hand lays down the factors to be considered when granting orders for maintenance pending suit. These include the income, earning capacity and other financial resources which each of the parties to the marriage has.

The respondent in making the application has relied on the Deed on Separation under which the Petitioner agreed to pay rent, and school

fees for the children. She has not shown the court her sources of income although she has exhibited her bank statement to the affidavit in reply, which shows a closing balance of ZMW 102.70.

The Petitioner on the other hand has stated that he has been paying over and above the monthly rentals as requested by the Respondent, and that it is doubtful that the Respondent's rentals are actually even K11,000.00. He has also exhibited a letter of redundancy, which reveals that his employment was terminated on 27th October, 2019. Therefore, he is no longer in gainful employment. The Petitioner has also exhibited his bank account statements, which show that his closing balances as at July, 2020 were \$245.20 and \$78.22.

The Respondent has outlined his current living expenses which amount to ZMK 27,100.00. From, the documents exhibited by the Petitioner, it is clear that he is unable to pay the amount as per the Deed that the parties executed on 17th March, 2015, as he is no longer in gainful employment. The Respondent deposed that even as late as January, 2020, the Petitioner was still earning a salary even though his employment had been terminated.

She has relied on the screenshots of the messages that she exchanged with the Petitioner, which is exhibited as 'ASCH2' to the affidavit in reply. A perusal of this exhibit shows that the messages alleged were exchanged between the parties on 4th November, 2019, and the Petitioner indicated that he had received his pay on that date, and he would be able to pay rentals for two months. Therefore, it is not true that the Petitioner was still getting paid as at January, 2020.

With respect to assets or other income generating sources that the parties may have, the Petitioner alleges that he has no such assets, but that a google search revealed that the Respondent owns five (5) flats. Indeed, as regard the ownership of property, the position of the law is that a certificate of title is conclusive evidence of ownership of land. No certificates of title have been produced to show that the Respondent actually owns the five (5) flats as alleged by the Petitioner.

The Respondent by her affidavits has admitted to owning only one (1) flat, and not five (5) as alleged by the petitioner. She however contends that the same flat is not generating any income, as it is not electrified and it is unoccupied.

While I have noted that a certificate of title is proof of ownership of property, it will be seen that the Petitioner in paragraph 4 of the petition states that the Respondent is unemployed, but that she earns income from flats that she owns. In the answer, the Respondent admits that assertion. Therefore, the Respondent has a source of income, and the evidence on record shows that the Petitioner's only source of income was from his employment, which came to an end.

The Respondent alleges that the Petitioner has another bank account that he did not disclose, but this allegation has not been supported by any evidence. I say so because the WhatsApp conversation that has been exhibited as 'ASCH3' to the affidavit in reply, just states that the Petitioner was stuck at the bank at Arcades. It does not state that the Petitioner has another bank account where he may be holding other funds.

As regards the assertion that the Respondent used to demand money in excess of the rentals that she actually pays, there is exhibited as 'ASCH1' to the affidavit, the lease agreement dated 1st July, 2019. This document shows that the rentals that the respondent has been paying as at that date are K11,000.00, for the property known as House No 2, Plot 609/0/45/2 Chudleigh.

However, when one looks at Clause 6.5 of the Deed of Separation which is exhibited as 'ASCH1' to the affidavit in support of the application, they will note that the Petitioner agreed to pay the amount of not more than US\$1, 500.00 towards the monthly rentals at Plot 19046 Mulungushi Road in Roma, Lusaka or any other place that the Respondent decided to live at. It is clear that the Respondent no longer lives in Roma, but in Chudleigh.

The screenshot messages exhibited as 'WH3a-b' to the affidavit in opposition show conversations between the parties over the rentals. Exhibit 'WHa' has no date, but the messages on that document reflect that the Petitioner asked for the lease agreement from the Respondent saying the rentals were high for the area. Exhibit 'WH3b' on the other hand is dated 8th June, 2020, and the messages on that page reveal that the Petitioner asked the Respondent if she had found a cheaper place.

The Respondent had responded saying that the landlord had agreed to give a discount on account of the rate of the dollar. These messages show that the parties were involved in conversation over the amount that the Petitioner would pay as rentals. They however do not reflect what rent was payable prior to the lease exhibited as 'ASHC1' to the

affidavit in reply being executed. It cannot therefore be said that the Respondent demanded to be paid amounts over and above what was payable, as the lease exhibited only commenced in July, 2020.

It is noteworthy that there is no allegation that points to the Petitioners' default or neglect to pay the Respondent's rentals or the school fees and other needs of the children of the family prior to his loss of employment. This establishes that the recent default by the Petitioner can only be attributed to the fact he is no longer in gainful employment, from which he earned income.

Looking at the factors outlined in Section 56 of the Matrimonial Causes Act No 20 of 2007, it can be concluded that the Respondent is in a better financial position than the Petitioner as she owns property, from which she is generating income. The Petitioner on the other hand is not in gainful employment, which was his only source of income.

However bearing in mind that both parties have the responsibility of caring and providing for the children of the family, and the children are in the custody of the Respondent, I direct that both parties shall contribute equally to the rentals payable for the house in which the Respondent is currently residing, as and when they fall due. The Respondent shall provide for the daily needs of the children.

With regard to the school fees for the children, the Petitioner has stated in the affidavit in opposition, that he will strive to provide them, and I accordingly direct that he shall do so, as and when they fall due. This also goes for the medical insurance for the children. The Respondent having filed an answer, the matter shall come up for

hearing on 11th September, 2020 at 08:30 hours. Costs shall be in the cause. Leave to appeal is granted.

DATED AT LUSAKA THIS 31st DAY OF AUGUST, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**