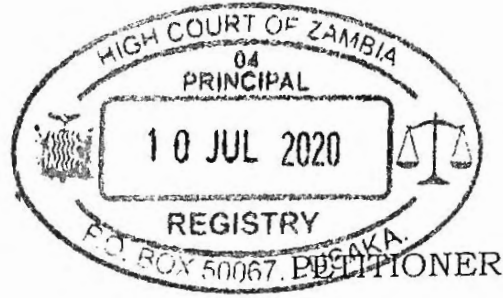


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HP/D0316



BETWEEN

NOKUTHULA GONDWE

AND

JIM MAJERE GONDWE

RESPONDENT

BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 10TH DAY OF
JULY, 2020

APPEARANCES:

For the Petitioner : Mrs R.P Bwalya of Lisitu Chambers

For the Respondent : In Person

JUDGMENT

LEGISLATION REFERRED TO:

1. THE MATRIMONIAL CAUSES ACT NO. 20 OF 2007
2. THE MARRIAGE ACT CHAPTER 50 OF THE LAWS OF ZAMBIA.

AUTHORITIES REFERRED TO

1. HYDE V HYDE AND WOODMANSEE (1866) LR1 P & D 130.
2. THE PEOPLE V CHITAMBALA (1969) ZR 142
3. THE PEOPLE V PAUL NKHOMA (1978) ZR 4
4. DRYDEN V DRYDEN (1973) 3 ALL ER 526

On 3rd December, 2015 **Nokuthula Gondwe**, the petitioner herein, filed a divorce petition against **Jim Majere Gondwe**, the respondent herein, pursuant to Section 9(1)(a) and (b) of the **Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia**.

The petitioner alleged that the irretrievable break down of the marriage was due to the respondent's adultery and that he had also behaved in such a way that the petitioner could not reasonably be expected to live with him. The particulars of the adultery and unreasonable behaviour were cited as follows:

1. That the respondent had affairs with known women namely Faith Makukisa, Constable Chipinde, Mercy Mutonga with whom he had two children and Diana with whom he also had two children.
2. That the respondent had a tendency of beating up the petitioner and that she had on several occasions reported him to the victim support unit at Simon Mwansa Kapwepwe Police Post, YWCA and Human Rights Commission but he did not reform. That the respondent beat her up in the presence of family members and the children of the family. That the respondent rarely slept at home and was verbally abusive towards the petitioner and had on several occasions referred to her as a bitch and a liar.
3. That the respondent had a tendency of sleeping in a separate bedroom and paid no attention to the petitioner.

Despite the respondent having been served with the petition, he did not file any answer to the petition.

When the matter was heard on 25th August, 2016 and both parties were before court. The petitioner was her own sole witness (**PW1**) and the gist of her petition buttressed by her evidence in court was that she was lawfully married to the respondent at the Civic Centre

in Lusaka, Zambia. The petitioner averred that the parties last cohabited at Plot No.487 Avondale, Lusaka. She stated that both her and the respondent were domiciled in Zambia and that she was unemployed but the respondent was a businessman. She indicated that there were two children of the family; Jordan Gondwe who was born on 16th May, 2000 and Tiyezye Gondwe who was born on 19th January, 2006. The petitioner averred that there was one child now living who was born to her prior to her marriage to the respondent. She also averred that there were four children now living who were born to the respondent during the subsistence of their marriage.

The petitioner stated that the respondent had a habit of spending nights away from home and that when she questioned his behaviour, his response was that she had no right to ask about his whereabouts as long as he provided everything she needed in the house. PW1 stated that when she confronted the respondent about one of his girlfriend's faith, his response was that her vagina was not special and therefore she had no right to question him about Faith.

PW1 said that she was subsequently visited by one Diana, a young lady aged 16 years old who informed her that she had a baby with the respondent. According to the petitioner, Diana also informed her that the respondent had warned her against visiting his home because the petitioner would divorce him and he would lose all his money. She stated that when she confronted the respondent about it, he denied having an affair with Diana. She narrated that he was

later summoned to appear before court with regard to Diana's maintenance.

PW1 recalled that after some time, a woman named Mercy phoned to tell her that she was pregnant with the respondent's twins and that she planned to sue him for maintenance. She told the court that when she asked the respondent about Mercy, his answer was that she was just a friend that he was having fun with.

She informed the court that another lady that the respondent was involved with was one Constable Shipili. According to the petitioner, the respondent claimed that his phone calls from her were strictly to advise him on some issues. She stated that on one occasion, the respondent left his phone and petitioner answered it when she noticed that it was the said Constable calling him. The petitioner stated that when she answered it, the Constable's greeting which was meant for the respondent was "Hello sweetie". The petitioner went on to assert that the respondent had assaulted her on a number of occasions. She explained that one incident of assault occurred in 2006 after she had just given birth to their second child. PW1 relayed that the beating ensued when she warned the respondent to inform his other women to desist from phoning her. She stated that the respondent reacted by beating her up and throwing her out of the house. She stated that she spent that night at the gate and sought refuge at Simon Mwansa Kapwepwe Police station the following night.

PW1 recalled that the petitioner had beaten her up again in the year 2014. She explained that this transpired in the presence of

their children. She stated that he also poured dirty water on her and threw her and the children out of the house. She asserted that she reported the incident to the victim support unit but that when the respondent was summoned, he did not avail himself. She stated that subsequently she stayed at YWCA with the children for two weeks. She also stated that when the respondent visited them at the shelter, he apologised and begged them to return home.

It was PW1's evidence that in August, 2015 the respondent kicked her and the children out of the house at gunpoint. She stated that after filing a complaint against the respondent at Central Police Station, they slept at her friend's house in PHI area. She stated that later that night, the respondent took them back home. PW1 narrated that the following day, she told the respondent that they should go separate ways but he insisted that their marital issues could be resolved. He implored her to change her mind and promised to put her name on the certificate of title of one of the cottages at plot 489 Avondale.

The petitioner told the court that the respondent had chased her and her daughter from home one other time. She explained that this transpired when he returned to church a few minutes after dropping her off and found that she was not there. She said that the respondent started hurling insults at the people he found at church and sent her nasty text messages. She stated that she lived with her niece in 15 miles area for three months before she returned home and that during that time, the respondent denied her access to the boys.

In cross-examination, the petitioner informed the court that the respondent paid *lobola* to her father before she moved in with him. The petitioner confirmed that the respondent had informed her that he was married to one Abigail with whom he had two children. She stated that according to the respondent, Abigail had run off to South Africa. The petitioner denied being involved in any extra-marital affairs.

The respondent then put it on record that the marital problems between him and the petitioner were complicated. He then applied for an adjournment on the ground that he was desirous of resolving their issues amicably as he did not want to scandalise the petitioner in court. The application for an adjournment was granted and the parties were given a date for continuation of trial in the event that they failed to settle their issues.

When the matter came up for continued trial, counsel for the petitioner indicated that counsel for the respondent had informed him of the respondent's intention to pursue the petitioner for bigamy. Counsel for the respondent however applied for an adjournment on the basis that the respondent was unwell and that he also needed to formally place himself on record.

On the next date of hearing, counsel for the petitioner applied for leave to amend the petition to that of two years separation with consent. Leave to amend the petition was granted and the parties were allocated 8th November, 2017 as the new date of hearing. The matter was thereafter adjourned whenever it came up at the instance of one of the parties or the unavailability of both. To this

date, no amendment of the petition has been filed and there has been no communication on whether the matter has been resolved *ex curia*. I have therefore proceeded to make a determination on the evidence adduced before me.

From the evidence adduced on record it is common cause that from inception a valid customary marriage was constituted between the parties herein, by the mere fact of them living together, coupled with the payment of lobola (bride price) to the petitioner's father. The marriage was consummated. It is my finding that in the year 2000 the petitioner and the respondent had their first child. A second ceremony of marriage took place under the provisions of the Marriage Act, Chapter 50 of the Laws of Zambia at the Civic Center in Lusaka on 17th August, 2004. It is apparent from the evidence elicited in cross examination that prior to the parties customary union, there was a subsisting marriage between the respondent and a woman named Abigail with whom he had two Children. I am satisfied that the marriage between the petitioner and respondent was polygamous from commencement.

At this juncture, the question which it seems to me that I must decide, is whether the second ceremony of marriage under the Marriage Act between the parties herein can be recognized as a valid conversion of a polygamous marriage into a monogamous marriage. The Marriage Act, Chapter 50 of the Laws of Zambia contemplates a marriage as a voluntary union between one man and one woman to the exclusion of all others in line with the English case of **Hyde v Hyde and Woodmansee**¹. It is on this basis that the Marriage Act in section 38(a) goes further to make it an

offence for a person to contract a marriage if at that time the person is already married to another person under customary law or under the Act. The courts have upheld this provision in the cases of the **The People v Chitambala**² and **The People v Paul Nkhoma**³ wherein it was decided that the accused persons in both cases lacked the capacity to contract a second marriage as they were already married at the time of the second marriage. They were both therefore convicted for the offence of bigamy.

From the foregoing, it also follows that a man and a woman between whom a customary marriage subsists can only convert their marriage to a statutory one if neither of them is a spouse in a subsisting marriage with another person. In casu, since the respondent's marriage to one Abigail was not dissolved at the time that his marriage to the petitioner was converted, he lacked the capacity to have their marriage converted.

Having said that, the question that arises is what is the status of the statutory marriage between the parties in this matter? The position of the law is clearly set out under *Section 27 of the Matrimonial Causes Act No. 20 of 2007* which provides the following under subsection (1)(b):

- (l) A marriage celebrated after the commencement of this Act shall be void on the following grounds:*
- (b) that either party to the marriage was lawfully married to some other person at the time of the marriage.*

The status of the second marriage was also aptly described by the court in the case of **Dryden v Dryden**⁴ in the following words:

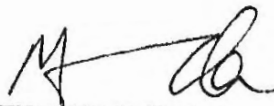
“In such a case, the marriage is obviously void *ab initio* irrespective of whether or not the parties or either of them knew that the marriage was bigamous, and notwithstanding that either or both may have a valid defence to a charge of bigamy, such as mistaken but honest belief on reasonable grounds that the former spouse was dead, or that the marriage had been validly dissolved...”

In the present case the totality of the evidence therefore is that since the Marriage Act renders any person married under customary law incapable of converting anyone of their polygamous unions into a statutory one, the parties marriage under the Act was void *ab initio*. That being the case, the statutory marriage between the petitioner and respondent is to be treated as if it had never taken place and no status of matrimony as ever having been conferred.

The petition for divorce is therefore dismissed and costs are in the cause.

Leave to appeal is granted.

Dated the 10th day of July, 2020.



**M. CHANDA
JUDGE**