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IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT NDOLA

SCZ JUDGMENT NO. 7 OF 2014  
APPEAL NO. 125 OF 2011

(Divorce Jurisdiction)

**IN THE MATTER OF:** A SUITE FOR THE DISSOLUTION OF MARRIAGE

AND

**IN THE MATTER OF:** MATRIMONIAL CAUSE ACT NO. 20 OF 2007 OF THE  
LAWS OF ZAMBIA

B E T W E E N:

**ANDREAS PANAGIOTIS XIROCOSTAS**

APPELLANT

AND

**YOLANDA GUISANDA POMA**

RESPONDENT

CORAM: **MUMBA, AG. DCJ, CHIBOMBA AND WANKI, JJS**

On 5<sup>th</sup> June, 2012 and 22<sup>nd</sup> January, 2014

For the Appellant: Mr. W.B. Nyirenda, SC, Assisted by Mr. K. Bota of  
Messrs. William Nyirenda and Company

For the Respondent: Mr. D. Mazumba of Messrs. Douglas and Partners

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## **J U D G M E N T**

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**WANKI, JS, delivered the Judgment of the Court.**

CASES REFERRED TO:-

- 1. Attorney General -Vs- Ndhlovu (1986) ZR 13.**
- 2. Attorney General -Vs- Achiume (1983) ZR 1.**
- 3. Augustine Kapembwa -Vs- Danny Masubolwa and Attorney General (1981) ZR 127.**

OTHER MATERIALS REFERRED TO:-

4. **Affiliation and Maintenance of Children Act, Chapter 64 of the Laws of Zambia Section 9(i), 11(i)**
5. **Matrimonial Causes Act No. 20 of 2007, of the Laws of Zambia, Sections 56(1), 52(2).**
6. **Raydens Law and Practice in Divorce and Family Matters, in all Courts, Twelfth Edition Volume 1 Text.**

The appellant has appealed against the whole judgment of the High Court, at Kitwe, ordering that the appellant should be paying K2,500,000.00 per month rentals; Ciby's School fees; K3,000,000.00 a month for general upkeep; and that the order is retrospective effective from the date of presentation of the petition.

The respondent made an application in the Kitwe District Registry for maintenance for herself and the children of the family pending suit pursuant to **Sections 52, 58 and 72** of the **MATRIMONIAL CAUSES ACT No. 20 of 2007**.

The application was supported by two affidavits and an affidavit of means.

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In the Affidavits in Support, the respondent stated that when she was cohabiting with the appellant before they became estranged, the petitioner provided accommodation, food, clothing transport, school fees and other needs for the respondent and the children who included Maria Lucia Xirocostas and Ciby Rivera who were 8 years and 2 years old respectively. Although the latter is not the appellant's biological child, she was treated as such. The said Ciby was at Lechwe School in Kitwe but has since moved to another School in Lusaka where her School fees are US\$1,200 per term. She further stated that prior to the divorce proceedings, she was a full time house wife but now she is in employment and getting a gross monthly salary of K3,000,000.00.

She claimed that the appellant used to give her not less than K6,000,000.00 for general family upkeep and groceries when they lived together. She needs to rent a house in Lusaka

as she has been staying with her friends and well wishers since she moved to Lusaka with both children. She further stated that decent accommodation in Lusaka would cost about K3,000,000.00; that she and the children require K6,500,000.00

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for food and groceries. She further claimed that from the appellants' income, he is more than capable of maintaining the family the way he used to before they started living apart. She, therefore, prayed for an order that the appellant pays K6,500,000.00 per moth for general upkeep of the family; and K3,000,00.00 for rent and pays School fees for Ciby.

The appellant filed an Affidavit in Opposition to the application in which he stated that: Ciby's father is still alive in Peru and must pay for her maintenance; he gets a basic salary of K3,662,750.00; out of his salary he spends monthly K230,000.00 on electricity, K135,000.00 on water, K380,000.00 on DSTV, K750,000.00 on a Maid and Gardener and K1,200,000.00 on household items making a total of K2,695,000.00; and that the respondent is capable of providing for Ciby and should do so.

He further stated that during the subsistence of the marriage, their home was to a large extent supplemented by his parents who would provide food and clothing for the children; and

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that he is not able to pay the respondent K9,500,000.00 from his present income but can only pay K1,000,000.00 per month.

The Court below, after considering the affidavit evidence, found that it was not in dispute that Maria Lucia is the biological child of the appellant and the respondent and Ciby is the respondent's child; the appellant was providing financial support for the respondent, Ciby and Maria Lucia when they were living together as a family; and that Ciby's biological father is still alive but lives in Peru which is outside jurisdiction and overseas. The Court further found that there was no evidence that Ciby's biological father has been maintaining her whilst the appellant had been married to the respondent and that he was not even a party to these proceedings.

The Court also found that it was not in dispute that the appellant provided reasonable accommodation for the respondent and the children and not less than K6,000,000.00 for their general upkeep; the appellant had been providing food and clothing for Maria Lucia whilst the couple has been living apart but he has not been maintaining Ciby and the respondent at all.

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The Court accepted that the appellant is employed by “Takkis, Panel Beaters” and getting a salary of K3,662,750.00 out of which he spends K2,695,000.00 on basic requirements leaving a balance of K966,750.00; and that she accepted the evidence that the appellant has other means apart from his salary as his parents do give him extra money for the maintenance of his family.

The Court below ruled that the respondent and the children must maintain the standard of living that they were enjoying before the parties started living apart. It then proceeded to award K3,000,000.00 per month for general upkeep; and ordered that appellant should be paying

K2,500,000.00 per month as rentals. The Court below further ordered the appellant to be paying Ciby's School fees because he had assumed that responsibility.

The Court finally directed that pursuant to **Section 52(2)** of the **MATRIMONIAL CAUSES ACT**, this order is retrospective effective from the date of presentation of the petition until the date of determination of the suit as regards the respondent but until further order as regards the children.

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Dissatisfied with the foregoing orders, the appellant has appealed against the orders advancing three grounds of appeal as follows:-

- 1. The Court below erred in fact and in law to hold that the respondent and Ciby are not maintained by Oscar Castillo when evidence on record is clear that the respondent and Ciby are registered as wife and child respectively in Oscar Castillo's work permit.**
- 2. The Court below erred in fact and in law to award the respondent the sum of K3,000,000.00 per month against the evidence on record to the effect that the appellant is only left with the sum of K966,750.00 from his salary after spending an expenditure on his basic requirements. The award is beyond the means of the appellant and it was unreasonable for the Court below to hold that the appellant has other means apart from his salary without any evidence to that effect. Evidence of the appellant's earnings before the**

**Court relates only to the appellant's salary and anything else is extraneous.**

**3. The Court below erred in law to effectively order that the awards to the respondent and the children should be of retrospective.**

In support of the grounds of appeal, the appellant filed heads of arguments and list of authorities on which he solely relied at the hearing of the appeal.

It was pointed out that the appellant's case is that this is

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proper case for this Court to upset the findings and ruling of the Court below on the grounds here below propounded and generally

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on the basis of a plethora of authorities which are the following:-

**ATTORNEY GENERAL -VS- NDHLOVU <sup>(1)</sup>**

**ATTORNEY GENERAL -VS- ACHIUME <sup>(2)</sup>**

**AUGUSTINE KAPEMBWA -VS- DANNY MASUBOLWA  
AND ATTORNEY GENERAL <sup>(3)</sup>**

It was further submitted that the ratios and dictas in these authorities which are all decisions of this Court are to the effect that although the Appellate Court will not generally reverse



findings of facts made by a trial Judge, there is an exception to cases where the Appellate Court is satisfied that the findings of the lower Court “were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or they were findings which on a proper view of the evidence no trial Court acting correctly can reasonably make” (**ATTORNEY GENERAL -VS- ACHIUME** <sup>(1)</sup> head note).

It was pointed out that the three grounds shall be argued together.

It was further submitted that page 12 of the record of appeal, the Court below had this to say:-

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**“I accept that the petitioner is employed by Takkis Panel Beaters and getting a salary of K3,661,750.00 out of which he spends K2,695,750.00 on his basic requirements leaving a balance of K966,750. I also accept the evidence that the petitioner has other mans apart from his salary as his parents do give him extra money for the maintenance of his family.”**

It was submitted that there was no evidence on record to conclude that the petitioner has other means apart from his salary as his parents give him extra money for the maintenance

of his family. It was contended that this part of the Court's findings is arbitrary. It was pointed out that the Court below proceeded to award to the respondent a sum well over K3,000,000.00 in excess of the appellant's earnings. It was argued that the appellant is in the circumstances, expected to spend on maintenance twice his salary.

It was pointed out that **Section 56(1)** of the **MATRIMONIAL CAUSES ACT** is clear as regards what should be considered in making an order for maintenance when it provides as follows:-

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**"56(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.”**

It was argued that the Court below was oblivious to the provisions of the law in making the ruling on the maintenance sum and the house rentals. It was submitted that the petitioner cannot simply afford this expense.

It was further argued that even though the appellant had generally accepted the responsibility to look after Ciby Rivera, it was erroneous on the part of the Court to proceed to making Ciby Rivera a subject of the Court Order.

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It was contended that the issue in this matter is the respondent and Maria Lucia. Ciby Rivera is the responsibility of the father a Mr. Oscar Castillo, whose employment permit has the respondent and Ciby endorsed thereon as wife and daughter, page 178 in the record of appeal.

It was contended that it was therefore, a misdirection for the Court below to find that there was no evidence to support the proposition that Oscar Castillo's was responsible for Ciby Rivera.

It was further contended that to make the order of maintenance retrospective is punitive in nature and harsh in substance for the following reasons.

- (a) The respondent was sufficiently self supporting to all intents and purposes;**
- (b) Consequently the respondent has not lacked anything to make her live a descent standard of life.**

It was submitted therefore, that by reason of the arguments herein raised and the authorities, the Court upholds this appeal and set aside the ruling of the Court below.

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It was finally submitted that the appellant is amenable to the direction of this Court on the matter of the respondent's maintenance.

On the other hand, the respondent solely relied on the respondent's head of arguments.

In response to ground one of appeal, it was pointed out that it is clear on the record and not in dispute that the respondent came into Zambia with Oscar Castillo and subsequently, the appellant married the respondent. It was argued that if the appellant knew that the respondent was married, he could not have gone ahead to marry the respondent. It was contended that the Court below was on firm ground when it held that: "the circumstances under which the petitioner and Ciby were registered as Castillo's wife and child in his work permit are unknown at this stage. However there is no certificate of marriage between Castillo and the respondent exhibited herein as proof that they are married."

In response to ground two of appeal it was pointed out that, **Section 52 (i)** of the **MATRIMONIAL CAUSES ACT**, provides:-

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**"On a petition for divorce, nullity of marriage or judicial separation, the Court may make an order for maintenance pending suit."**

It was contended that the affidavit of means by the appellant was highly questionable as to his income, the pay-slip exhibited apart from payee, did not have even NAPSA contributions and was written in pen.

It was pointed out that from the appellant's affidavit of means, it is clear that he is employed as a Manager by Takkis Panel Beaters a company owned by his parents.

Further that in the submissions, it was clearly stated as follows:-

**“But from the affidavit of means the petitioner is employed by his parents. The standard of life that my learned friend appears to be referring to was to a large extent subsidized by the petitioner's parents who unfortunately are not the ones who were married to the respondent.”**

It was submitted that, **Section 9 (i)** of the **AFFILIATION AND MAINTENANCE OF CHILDREN ACT** provides that:-

**“The Court may make a maintenance order in respect of a marital child on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time.”**

Further, that **Section 11 (i)** provides that:-

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**(i) It shall be the duty of the Court below making any maintenance order to have regard to all the circumstances of the child concerned.**

- (ii) **Without limiting the generality of Subsection (i) the Court shall have regard to the following matters:-**
- (a) .....
  - (b) **The income, earning capacity, property and other financial resources which each interested person has or is likely to have, in the foreseeable future, including, in the case of earning capacity, any increase in that capacity which it would in the opinion of the Court, be reasonable to expect a person to take steps to acquire;**
  - (c) **The standard of living enjoyed by the family before the breakdown of the marriage, in the case of persons who are divorcing.”**

It was pointed out that the Judge in the Court below made following findings which are cardinal to this matter:-

**“There is no evidence that Ciby’s biological father has been maintaining her whilst the petitioner has been married to the respondent.”**

**“It is also not in dispute that the petitioner provided reasonable accommodation for respondent and the children and not less than K6,000,000.00 for their general upkeep.”**

**“I accept that the petitioner is employed by Takkis Panel Beaters and getting a salary of K3,667,500.00 of which he spends K2,695,000.00 on his basic requirements leaving a balance of K966,750.00”**

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**“I also accept the evidence that the petitioner has other means apart from his salary as his parents do give him extra money for the maintenance of his family.”**

It was submitted that in line with **Section 11 (2) (b)** and **(d)** of the **Affiliation and Maintenance of Children Act** and the Court’s findings as stated above, the Court below was, therefore, in order to award K3,000,000.00 per month as rentals.

In response to ground three of appeal, it was submitted that **Section 52 (2)** of the **Matrimonial Causes Act** provides that:-

- (1) “An Order made under Subsection (2) may require either party to the marriage to make to other such periodical payments for that party’s maintenance and for such periods, beginning not earlier than the date of the presentation of the petition and ending on the date of the determination of the suit as the Court thinks reasonable.”**

It was further submitted that in the book **RAYDEN’S LAW AND PRACTICE IN DIVORCE AND FAMILY MATTERS**, the learned author writes that:-

**“Financial relief during pendency of suit; on a petition for divorce, nullity of marriage or judicial separation, the Court may make an order for maintenance pending suit and the Statute in terms provides that this means an order requiring either party to the marriage**



**to make to the other such periodical payments for his or her maintenance and for such term being a term beginning not earlier than the date of the**

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**presentation of the petition and ending with the date of the determination of the suit as the Court thinks reasonable.”**

It was submitted that with the foregoing authorities, the Court below was on firm ground in ordering the maintenance to be effective from the date of presenting of the petition.

We have considered the grounds of the appeal; the heads of arguments on behalf of the parties; the judgment of the Court below that has been appealed against; and indeed, the authorities that have been referred to.

In ground one, the appellant has attacked the decision of the Court below that the respondent and Ciby are not maintained by Oscar Castillo when evidence on record is clear that the respondent and Ciby are registered as wife and child respectively in Oscar Castillo's work permit.

It was argued on behalf of the appellant that it was a misdirection for the Court below to find that there was no evidence to support the proposition that Oscar Castillo's was responsible for Ciby Rivera.

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On the other hand, it was submitted that it is clear that from the record and not in dispute that the respondent came into Zambia with Oscar Castillo and subsequently, the appellant married the respondent. It was argued that if the appellant knew that the respondent was married, he could not have gone ahead to marry the respondent. It was contended that the Court was on firm ground when it held that the circumstances under which the petitioner and Ciby were registered as Castillo's wife and child in his work permit are unknown at this stage.

We have considered the evidence that was adduced before the Court below relating to the first ground of appeal as contained in the record of appeal. There was no dispute that Ciby Castillo and the respondent were initially registered in the work permit of Oscar Castillo as child and wife respectively. However, further evidence revealed that the whereabouts of Oscar Castillo was not known; that despite the respondent being registered in Oscar Castillo's work permit as wife, the

appellant proceeded to marry her; and that the appellant was maintaining Ciby and paying her School fees.

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The appellant did not lead any evidence to show that the said Oscar Castillo at any time provided maintenance for the respondent and Ciby. In the premises, the Court below cannot be faulted for holding as it did that the respondent and Ciby are not maintained by Oscar Castillo. However, the evidence on record being that the respondent is employed, we direct that she should be responsible for Ciby. The orders by the Court below that, the appellant maintains Ciby and continues to pay her school fees, and pay rent for the respondent are quashed. We, in the circumstances, find that ground one of the appeal partially succeeds.

In ground two of the appeal, the Court below has been attacked for awarding the sum of K3,000,000.00 per month against the evidence on record to the effect that the appellant is only left with the sum of K966,750.00 from his salary after spending an expenditure on his basic requirements. The award is beyond the means of the appellant and it was unreasonable

for the Court below to hold that the appellant has other means apart from his salary without any evidence to that effect.

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On behalf of the appellant, it was submitted that the Court's finding that:-

**“I also accept the evidence that the petitioner has other means apart from his salary as his parents do give him extra money for the maintenance of his family.”**

was arbitrary as there is no evidence on record to conclude that the appellant has other means from his salary.

It was argued on behalf of the respondent that the affidavit of means by the appellant was highly questionable as to his income, the pay-slip exhibited apart from payee, did not have even NAFSA contributions and was written in pen. And further, that from the appellant's affidavit of means it is clear that he is employed as a Manager by Takkis Panel Beaters a company owned by his parents.

We have examined the evidence that was adduced before the Court below relating to the second ground of appeal.

It is clear that the only evidence before the Court below was that the appellant was employed by Takkis Panel Beaters and his earnings were as per pay-slip that was exhibited.

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The respondent did not adduce any evidence to dispute that. The fact that the appellant is at times assisted by his parents does not change his income and cannot be the basis of an award to the respondent. **Section 56** of the **Matrimonial Causes Act** provides that:

**“56(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.”**

As would be noted from the foregoing provisions of the law, the Court, in making an order, is expected to have regard to the income, earning capacity and other financial resources which each of the parties has.

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The only income that the appellant has, is his salary that he gets from his employers. Further, the Court is required to have regard to the financial needs, obligations and responsibilities, which each of the parties has. The evidence that was adduced before and accepted by the Court below was that the appellant, after taking into consideration his needs and responsibilities, remains with a balance of K966.750. In the circumstances, therefore, one wonders how the Court below could award K3,000,000.00 which was far above the appellant's earnings. Further, we have found that the Court below misdirected itself by basing the award on the assistance given by the appellant's parents. In the circumstances, we find merit in ground two of the appeal. It is, accordingly allowed. The award of K3,000,000.00 that was made by the Court below is

set aside. In its place we substitute it with an award of K900,000.00 (KR900.00) per month.

In ground three of the appeal, the appellant has attacked the Court below for ordering that the awards to the respondent and the children should be of retrospective effect.

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It was argued in support that to make the order of maintenance retrospective is punitive in nature and harsh in substance because the respondent is sufficiently self supporting to all intents and purposes; and that the respondent has not lacked anything to give her a decent standard of life.

In response, it was argued that the Court below was on firm grounds in ordering the maintenance to be effective from the date of presentation of the petition.

We have considered ground three of the appeal; the arguments in support and in response; the authorities that have been referred to; and indeed the ruling of the Court below.

From the judgment of the Court below, the trial Judge based the decision to make the order of retrospective effect on

**Section 52(2)** of the **Matrimonial Causes Act** which provides that:-

**“52(2) of the Matrimonial Causes Act No. 20 of 2007 provides:-**

**(1) An order made under Subsection.**

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**(2) May require either party to the marriage to make to other such periodical payments for that party’s maintenance and for such periods beginning not earlier than the date of the presentation of the petition and ending on the date of the determination of the suit as the Court thinks reasonable.**

As would be noted from the foregoing provisions, the Court is empowered to make such order beginning not earlier than the date of the Petition as the Court thinks reasonable. The Court below was therefore within the law when it made the order complained of effective from the date of presentation of the Petition. We, therefore, find no merit in ground three of the appeal. It is, accordingly dismissed. We, however, direct that the payment will be less what the appellant has been paying.

In the light of the foregoing, we find that the appeal has partially succeeded in ground one of the appeal; that the appeal



has succeeded in ground two of the appeal; and that the appeal has not succeeded in ground three of the appeal.

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Each party will therefore bear its costs.

.....  
F.N.M. Mumba,  
**ACTING DEPUTY CHIEF JUSTICE**

.....  
H. Chibomba,  
**SUPREME COURT JUDGE**

.....  
M. E. Wanki,  
**SUPREME COURT JUDGE**