IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ JUDGMENT NO. 30 OF 2008
APPEAL NO.196/2006

(Divorce Jurisdiction)

BETWEEN:

CHANDIWIRA FREDERICK NYIRENDA **APPELLANT**

AND

BIBIAN NYIRENDA (NEE LONGWE) **RESPONDENT**

CORAM: Sakala, CJ., Mushabati JS and Kabalata Ag.JS
on 20th November, 2007 and 14th August, 2008.

For the Appellant: Mr. N. K. Mutuna of NKM and Associates.
For the Respondent: Mrs. L. Mushota of Mushota and Associates.

J U D G M E N T

Sakala, CJ., delivered the Judgment of Court.

Works referred to:

1. ***Rayden & Jackson's Law and Practice in Divorce and Family Matters, 16th Edition at page 214.***
2. ***Bromley's Family Law by P.M. Bromley and N.V. Lowe, page 192.***

This is an appeal against the judgment of the High Court dismissing the Appellant's petition for divorce on the ground that it should have been the Respondent who should have petitioned for divorce;

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but that she had not petitioned; instead, testified that she loved the Petitioner.

For convenience, we shall refer to the Appellant as the Petitioner; and the Respondent as the Respondent, which designations the parties were at trial.

The facts of the case are that the parties were lawfully married on 29th November, 1986, at the Registrar's Office in the Lusaka District of the Republic of Zambia. After the marriage, they lived together as husband and wife at Farm No. 1751/23B, Buckley Estates, Lusaka. There are currently three children living of the family; while another child died in April 1994.

The Petitioner pleaded that the marriage had broken down irretrievably by reason of the fact that the Respondent had behaved in such a way that the Petitioner cannot reasonably be expected to live with her. In the petition, the Petitioner set out the particulars of the Respondent's unreasonable behaviour as:- drunkenness, violent behavior, lack of respect and refusal to follow or accept reasonable advice and false accusations.

In relation to drunkenness, the Petitioner stated in the Petition that for the past four years of the marriage, the Respondent had resorted to drinking excessively, resulting in being in a drunken state on a

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daily basis; and that the reasons she gave was that she was bored with being at home as a house wife. The Petitioner explained that the reasons given by the Respondent prompted him to set up a grocery and butchery business for her in 2003 so that she could have something to while away her idle time. According to the Petitioner, this compounded the problem as it made funds easily accessible to her for purposes of purchasing alcoholic drinks; that she was not only an embarrassment to herself during these episodes; but to the Petitioner as well because on one or two occasions, she was so visibly drunk at the grocery and butchery that some customers were prompted to wait for the Petitioner for purposes of effecting payments for groceries they purchased as they did not feel safe to give the Respondent the money in her drunken state; and that an attempt by him to cut down on the money he gave her on daily rations and her personal entertainment resulted in her resorting to taking of illicit beer from the nearby compound.

In relation to the violent behaviour, the Petitioner pleaded that as a result of drunkenness, the Respondent had repeatedly, on divers days, assaulted him whenever he attempted to advise her against continuing with her drinking bad habits; that the assaults had on many occasions not only been in the form of verbal abuse, but also physical abuse in the presence of the children; that this has had a very traumatic effect on the children, causing them great misery; that the assaults and the verbal abuse had been extended

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to the children, his mother and on other relations on a number of occasions; and that some of the physical assaults on him by the Respondent had been so violent that they resulted in him reporting the matter to the police and the police detaining her.

On the allegation of lack of respect and refusal to follow or accept reasonable advice, the Petitioner pleaded that for the entire period of the marriage, the Respondent displayed a total lack of respect for him and his relatives; that this normally took the form of the Respondent's failure to have or display the basic courtesies expected of a spouse; and that she failed to acknowledge or accept reasonable advice or guidance resulting in a tragic effect on the family.

The Petitioner explained that on divers days, he advised the Respondent that she should only put hot water in the bath tub, when she was ready to have her bath rather than have the hot water in the tub exposing the children to danger; that she did not heed the advice and when repeatedly reminded, she would say " I am not deaf;" and that this conduct, however, resulted into the death of the third child, who entered the tub in which the Respondent had put hot water and sustained severe burns from which she died.

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On false accusations, the Petitioner pleaded that on 2nd January, 2004, the Respondent accused him of philandering with or having an amorous relation with a Maid at the matrimonial home; and that she did this in full view of the children leaving them traumatized.

The petitioner prayed that the marriage be dissolved, that he be granted custody of the three children of the family.

In his oral evidence, the Petitioner repeated the contents of the Petition. In cross-examination, he explained that the behavior of drunkenness started in 2000. He became concerned because she even started drinking illicit beer in Linda Compound. Before then, they drunk together from descent places. Further in cross-examination, the Petitioner testified that the Respondent physically attacked their eldest son by pulling his testicles and tore his clothes; that the Respondent always drank kachasu; that he asked her to leave the bedroom after she accused him of having sex with the maid; that she left the bedroom voluntarily and shifted to the children's bedroom for over a year. He denied injuring the Respondent or being violent to her, though she falsely reported him to the police.

The Respondent filed an Answer in which she denied that the said marriage had broken down irretrievably and denied the alleged unreasonably behavior. According to the Respondent in her Answer,

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the Petitioner taught her to drink; then went to clubs to drink together; that they were always together until he stopped taking her to clubs. She denied the allegation that customers had to wait for payments of their groceries; she explained that the Petitioner threw her out of the bedroom for the slightest reason, forcing her to share a bedroom with her mother-in-law, his cousin and their daughter; and that the child who died, died of pneumonia.

She explained that it was the Petitioner who on 24th January 2005, threw her out of the matrimonial home, which home they built with combined resources when she was in employment; that sometime in 2003, while at home, her mother-in-law informed him that she, the Respondent, had taken alcohol, that he became violent and beat her up and kicked her about to the amusement of his mother who just watched; that on the occasion, the Petitioner broke her leg and it had to be put in a plaster of paris; that the Petitioner is a violent man; that the violence started while they lived in Lesotho in 1998; that at the time, the Petitioner started having extra marital relationships with Sutu women; and that inspite of the Petitioner's behavior she has not found it intolerable to live with him.

The Respondent prayed that the Petition be rejected; and be dismissed; that she be granted such maintenance pending provision or lump sum as may be deemed fit by the court; and that the Petitioner be ordered to leave the matrimonial home for the

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Respondent; if he wants to stay away for the time being; and in the alternative, forthwith find her an alternative home of the standard of their matrimonial home.

In her oral evidence, the Respondent explained that the problems in their home started in 1989, after they had their first born child. In 1999, they went to Lesotho. While in Lesotho, the Petitioner had two girl friends who used to beat her.

The Respondent further testified that in 1995, she stopped working after the Petitioner asked her to do so in order to care for the farm; that when the Petitioner proposed that she works in the butchery, she was not paid for the services; that each time they had a slight difference, he threw her out of the main bedroom and had to share the bedroom with daughters and the mother-in-law and the cousin, depriving her of her privacy; that at one time when she returned from the church service, she found the gate locked; She went to stay with a friend with nothing; and that she had to use a friend's and relatives' clothes.

The Respondent also testified of the various incidences when the Petitioner was violent and at one time she reported him to the police. She explained that her relationship with the children was alright though her son never liked her because the Petitioner fed him with lies; that it was wrong for the Petitioner to allege that her

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daughter died because of negligence. She explained that she did not petition for divorce because she loves the Petitioner and the children.

In cross-examination, she testified that unknown to her the child walked into the bathroom where she had placed a bucket of hot water; that the late child got scalded after she put her hand in the hot water in the bath tab. She further explained that at the time of hearing the petition, she was living with her cousin in Libala South; that before her cousin kept her, she lived in the streets; and that she did not witness the Petitioner indulge in extra marital affairs; but someone told her.

She insisted in Cross-examination that the Petitioner taught her drinking beer. The Petitioner asked her to stop working to help with farm work; and that she did not know whether she drunk excessively.

The Petitioner filed a Reply to the Answer. In the Reply, the Petitioner stated that he never made it mandatory for the Respondent to drink, although they went together to clubs. But that sadly, the Respondent after drinking alcohol had been both disgusting and unreasonable. He maintained that the Respondent drunk excessively and the sources of her income for buying drinks were unknown; that the Respondent was entirely responsible for the

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failure of the mini market to make profit; that he threw the Respondent out of the matrimonial bedroom on account of her unreasonable behavior; and that the death of their child was as a result of the Respondent's gross negligence and irresponsible acts after taking excessive alcohol.

The learned trial Judge, after a **verbatim** reproduction of the Petition and the Answer summarized the oral evidence. The trial Judge found that the unreasonable behavior due to drunkenness was caused by the Petitioner. The court held that the ground of drunkenness failed because the Respondent had discarded the habit.

On the allegation of violent behavior, the Court observed that the Petitioner had highlighted the incident when the Respondent held the private parts of their eldest son, but on the other hand, the Respondent had testified that she was chased from the matrimonial house at 01.00 hours and taken by the armed police to her aunt. Also, that when she returned from church service, she found the gate locked and that the Petitioner had instructed his cousin not to open the gate. According to the trial Judge, the incident weighed heavily against the Petitioner and less against the Respondent.

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On the allegation of lack of respect and refusal to follow or accept reasonable advice, the court noted that the death of the third born child has been used to strengthen the allegation. According to the trial Judge, the death was unfortunate event as the Respondent had equally blamed it on the Petitioner's failure to install a geyser in the house.

On false accusations, the trial Judge held that since the Petitioner alleged that it is the children who were traumatized, he failed to comprehend how that behavior should be intolerable to him. The court concluded as follows:

> ***"In the final analysis, I find that it is the Respondent who could petition for divorce. But she has not done this. Instead she testified she still loves the Petitioner.***
>
> ***Consequently, I decline the petition for divorce.***
> ***Costs follow the event and in default of agreement to be taxed."***

Aggrieved by the Judgment, the Petitioner appealed to this court. He filed five grounds of appeal; namely:

"1. that the Court below erred at law and fact in finding that the marriage had not broken down irretrievably when

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there was overwhelming evidence adduced to the contrary;

2. the Court below erred at law and fact when it found that the trauma suffered by the children had no effect on the Appellant to warrant the grant of the decree of divorce;

3. ***that the Court below erred at law and fact when it found that; the Respondent's violent behavior towards the child of the family weighed against the Petitioner;***

4. ***that the Court erred at law in relying on hearsay evidence in arriving at the decision that the marriage had not broken down irretrievably; and***

5. ***that the Court below erred at law in failing to take into consideration the Appellant's final submissions in arriving at the Judgment."***

On behalf of the Petitioner, Mr. Mutuna filed and relied on written heads of argument. Mrs. Mushota, on behalf of the Respondent, indicated at the hearing, that she would also rely on heads of argument, once filed with the court. Judgment was reserved to

await written heads of argument to be filed by Mrs. Mushota. Suffice it to mention that at the time this Judgment was written,

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Mrs. Mushota had not filed her written heads of argument. We take note from the record of appeal that even at trial, the Respondent's Counsel also defaulted from filing written submissions. The trial court wrote the Judgment without the Respondent's Counsel's written submissions. This Judgment, too, was written without the benefit of the Respondent's Counsel's written heads of argument.

In the written heads of argument, grounds one and two were argued together. But grounds four and five were abandoned except that it was pointed out that in ground four the finding that the Petitioner had a girl friend in Lesotho was based on hearsay evidence and inadmissible.

The gist of the arguments on the two grounds is that the Petitioner had relied on the fact of unreasonable behavior in support of his prayer for a **decree nisi**; that in this respect, the Petitioner highlighted how the Respondent had been violent to him and produced evidence in the form of a police report of threatening violence and assault occasioning actual bodily harm; and that this evidence was not rebutted and was sufficient to sustain the prayer for a **decree nisi**.

It was pointed out that the Petitioner had demonstrated, how on divers days, the Respondent had drunk to the detriment, not only of herself, but also to the Petitioner and the family as a whole; that the

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Petitioner further highlighted the conduct of the Respondent towards the children and how the same had traumatized him and the children of the family. It was submitted that the trial court made a wrong finding that it failed to comprehend how the behavior could be intolerable to the Petitioner because the authorities show that **unreasonable behavior** as it relates to divorce does not necessarily have to be directed at the Petitioner for him to find it intolerable. For this submission, **Rayden & Jackson's Law and Practice in Divorce and Family Matters,**[1] was cited where the authors state as follows:

> ***"Any conduct, active or passive, constitutes behaviour. The behaviour is not confined to behavior to the Respondent: the behavior may have reference to the marriage although it is to other members of the family or to outsiders. Any and all behavior may be taken into account: the Court will have regard to the whole story of the matrimonial relationship. But behavior is something more than a mere state of affairs or a state of mind. Behaviour is this context is action or conduct by the one which affects the other."***

It was pointed out that according to the Petition and the oral evidence, the Respondent's conduct towards the children traumatized him and had an effect on him.

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On drunken behavior, it was pointed out that the court having acknowledged that it was a major problem in the marriage; the court lightly dismissed it alleging that it was brought about by the Petitioner. It was submitted that this was a wrong finding of fact because even assuming the Petitioner taught the Respondent how to drink, which is denied, that fact does not in and of itself grant the Respondent the liberty to be drunk and unreasonable. It was contended that the court should have investigated the nature of the Petitioner as to whether he could find the conduct of the Respondent intolerable, and the impact, if any, on the Petitioner of the Respondent's behaviour. Page 213 of **Rayden & Jackson** was cited in support of the contention where the authors state as follows:

> ***"The court has to decide the single question whether the Respondent has so behaved that it is unreasonable to expect the wife to live with him: in order to decide that, 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."***

Also cited was **Bromley's Family Law by P.M. Bromley and N.V. Lowe[2]**, where at page 192, the Authors stated as follows:

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> ***"The court must have regard to the personalities of the individuals before it, however far these may be removed from some theoretical norm, and it must assess the impact of the Respondent's conduct on the particular Petitioner in the light of the whole history of the marriage and their relationship. The test generally accepted is that formulated by Dunn J. in Livingstone-Stalled and adopted by the majority of the Court of Appeal in O'Neill: would any right – thinking person come to the conclusion that 'this' husband has behaved in such a way that 'this' 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."***

It was submitted that the court below failed to discharge this duty; that the court below did not address its mind to the test set by the authorities; that although the court found that the Petitioner was traumatized as a result of the Respondent's conduct towards the children of the marriage, the court did not consider such trauma relevant nor investigate what effect it had on the Petitioner.

It was pointed out that the court only looked into the effect that the whole marriage has had on the Respondent and found that she would have had a valid claim to petition for divorce; that the court

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went on to find that the Respondent still loved the Petitioner; and that in making these findings, the court did not state the basis of the findings neither did it extend the same courtesy to the Petitioner.

On ground three, relating to a finding that the Respondent's violent behavior towards the children of the family weighed against the Petitioner, the gist of the written heads of argument is that the trial court did not explain the basis upon which it arrived at apportioning the weight of the incidents against the Petitioner; that the two incidents had no bearing whatsoever on each other neither was it alleged that they were committed on the same day. It was pointed out that this court was at large as to why the trial Judge even alluded to them in the same breath.

It was submitted that having found that the Respondent had in fact been violent to the child of the family by holding his private parts, the court should have ascertained whether or not such violent behavior on the part of the Respondent was sufficient enough for the Petitioner to find it intolerable to live with the Respondent. It was submitted that indeed this behavior was such behavior and it

warranted such a finding, thereby rendering the marriage as irretrievably broken down.

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We have considered the pleadings, the oral evidence and the heads of argument on behalf of the Petitioner on the combined grounds one and two and on ground three as well as the Judgment of the trial Court. We have also considered the works referred to us in the submissions. We are greatly indebted to the learned written heads of argument on behalf of the Petitioner. We have reviewed the heads of argument in some detail to narrow down the issue of whether, indeed, the marriage had broken down irretrievably. On account of the view we take of this appeal, based on the detailed heads of argument and the works cited, we do not at this stage intend to repeat the submissions.

At the outset, we must however, state that we are rather confounded with the simplistic and casual approach in which the trial Court handled the whole Petition in its Judgment. In the first place, the whole Judgment is about 16 pages. Of these pages, 14½ pages comprise a ***verbatim*** reproduction of the Petition and the Answer and a short summary of the oral evidence. The findings and conclusion make up only 1½ pages.

The Petition for Dissolution of Marriage was based on the ground that the said marriage had broken down irretrievably by reason of the fact that the Respondent had behaved in such a way that the Petitioner could not reasonably be expected to live with her. The Petitioner set out the particulars of the unreasonable behave as

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being drunkenness, violent behavior, lack of respect and refusal to follow or accept reasonable advice and false accusations. These were elaborated and amplified in the oral evidence.

The Petitioner's complaint in the written heads of argument based on the combined grounds one and two is that the trial Court erred in law and fact in finding that the marriage had not broken down irretrievably when there was overwhelming evidence adduced to the contrary; and that the trial Court erred in fact and law when it found that the trauma suffered by the children had no effect on the Petitioner to warrant the grant of the decree for divorce.

The contention of the Petitioner was that he relied on the fact of unreasonable behavior in support of his prayer for a ***decree nisi;*** and that in this connection, he highlighted evidence of how the Respondent had been violent, which evidence was not contested and sufficient to sustain the prayer for a ***decree nisi;*** that the Petitioner demonstrated how on divers days the Respondent had been drunk and the conduct of the Respondent towards the children.

In rejecting the allegation of drunkenness the trial Court had this to say:-

> "***At page J4, the Petitioner under DRUNKENESS states that it is in the past 4 years that the Respondent***
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>
> ***resorted to excessive drinking. On the other hand, the Respondent admits she started drinking after the Petitioner taught her the habit, though now she has discarded it.***
>
> ***In my view, this is the primacy of the whole matter. Unfortunately, it was caused by the Petitioner. Coincidentally, the Respondent testified she has since discarded the untoward habit. This ground therefore falls away."***

In our view, the trial Court adopted a wrong approach in dealing with the issue of drunkenness. The Court acknowledged that it was a major problem in the marriage; but dismissed it on the ground that it was brought about by the Petitioner. We agree with the submission that this was a wrong finding of fact because even assuming that the Petitioner taught the Respondent how to drink, that in itself or on its own did not grant the Respondent the liberty to be drunk and unreasonable. On the pleadings and the oral evidence, we are satisfied that the Petitioner proved that the Respondent had resorted to drinking excessively.

We allow grounds one and two on the basis that there was overwhelming evidence that the marriage had broken down irretrievably and that the trauma suffered by the children had effect

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on the Petitioner as well to warrant the grant of the decree of divorce.

Indeed, in his conclusion, the trial Judge alluded to the fact that it is the Respondent who should have petitioned, clearly accepting that the marriage had broken down irretrievably.

On ground three, the complaint was that the trial Court erred at law and fact when it found that the Respondent's violent behavior towards the children of the family weighted against the Petition.

In dealing with the allegation of violent behavior, the trial court had this to say:-

> ***"Alluding to violent behavior, the Petitioner has highlighted the unfortunate incident when the Respondent held the private part of the eldest son. On the other hand, the Respondent testified she was chased away from the house at 01.00 hours and taken by armed police to her aunt. Furthermore, one day when she returned from Church service she found the gate locked***

and the Petitioner instructed his cousin not to open for her. This incident weighs heavily against the Petitioner and less against the Respondent."

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The contention, on behalf of the Petitioner, is that the trial Court did not explain the basis upon which it arrived at apportioning the weight of the incidents against the Petitioner and that the two incidents cited had no bearing on each other. We agree.

The trial Court found as a fact that the Respondent had been violent to the child of the family by holding his private parts. In the circumstances, the trial Court should have ascertained whether such behavior was sufficient enough for the Petitioner to find it intolerable to live with the Respondent. We accept the submission on behalf of the Petitioner, that granted the history of this marriage, the Respondent's behavior was intolerable to the Petitioner to live with the Respondent.

We, therefore, also allow ground three that the trial Court erred at law and fact when it found that the Respondent's violent behavior towards the children of the family weighed against the Petitioner. There was no basis for this finding.

The three grounds of appeal having been successful, we set aside the Judgment of the trial Court. We allow the appeal and grant the Petition for divorce.

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We make no order as to costs in this Court.

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E. L. SAKALA
CHIEF JUSTICE

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C. S. M. MUSHABATI	**T. A. KABALATA**
SUPREME COURT JUDGE	**AG/SUPREME COURT JUDGE**

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