

**IN THE HIGH COURT FOR ZAMBIA**

**2015/HP/D273**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Divorce Jurisdiction)*



**BETWEEN:**

ZELIPA CHITSULO NGUNGU

**PETITIONER**

**AND**

GARRY ABRAHAM NGUNGU

**RESPONDENT**

**BEFORE HONOURABLE MADAM JUSTICE P. K. YANGAILO ON THE 10<sup>TH</sup> DAY OF JANUARY, 2018**

*For the Petitioner: Mrs. M. C. Zimba - National Legal Aid Clinic for Women*

*For the Respondent: Mr. Garry Abraham Ngungu - In person*

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## **JUDGMENT**

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**CASES REFERRED TO:**

1. *Thurlow vs. Thurlow (1975) 2 ALL E.R. 979*

**LEGISLATION AND OTHER MATERIALS REFERRED TO:**

1. *The Matrimonial Causes Act, Act No. 20 of 2007;*
2. *The Marriage Act, Chapter 50 of the Laws of Zambia;*
3. *Black's Law Dictionary 10th Edition Bryan A. Garner; and*
4. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths.*

On 16<sup>th</sup> October 2015, the Petitioner ZELIPA CHITSULO NGUNGU Petitioned for the Dissolution of Marriage pursuant to

**Sections 8 and 9 (1) (b) of the Matrimonial Causes Act<sup>1</sup>** on the ground that the marriage has broken down irretrievably by reason of the fact that the Respondent has behaved in such a way that the Petitioner cannot be reasonably expected to live with him. *Verbatim*, the particulars of the unreasonable behaviour were enumerated as follows: -

1. *That the Respondent had moved to South Africa to try and get a job with the help of his friend. The Petitioner then opened up a phone shop and the business was doing fine. The Petitioner would send the Respondent K400 every month for apartment rentals in South Africa. The Respondent was not supportive in that when the Petitioner requested him to buy some stock for her shop, the Respondent would instead buy bad stock which the Petitioner would fail to sell;*
2. *The Petitioner later went into the business of Corporate Branding and each time the Petitioner would send monies to the Respondent for orders he would give the Petitioner stories. The Petitioner ended up sending more money which resulted in the Petitioner making losses*
3. *The Petitioner has had to change phone passwords, email passwords almost every month because the Respondent checks all call records in and out, for Friday after 20:00 hours to Saturday. He would then phone the numbers and insult the callers when he hears a male voice;*
4. *The Respondent moved back to Zambia after suspecting the Petitioner of having extra marital affairs. He moved into the Petitioner's family home, where he was constantly quarrelling with the Petitioner's brothers. The Petitioner asked the Respondent to start running the phone shop, which he unfortunately mismanaged until it run down and closed;*

5. *The Respondent has been verbally abusive and has called the Petitioner all sorts of offensive and insulting names;*
6. *The Petitioner went to reside with her sister for three months after they were evicted from the house that they were in, by the landlord who used Court bailiffs because of non-payments of rentals by the Respondent;*
7. *In July, 2014, the Petitioner decided to go to Rome for a holiday and left three signed cheques with the Respondent and also wrote a letter to Eco Bank indicating that the three cheques should be cashed, one for the clearance of a canter; the other for the Indo Bank order if and when it came through; and the last cheque for the Zambezi Portland cheque, if it came through. Unfortunately the orders fell off and never came through. The Respondent still went ahead and cashed the cheques amounting to a total sum of K76,000.00 leaving a balance of K895.00 in the account. When the Respondent was asked why he did this, he was very rude about it and this caused the Petitioner to take him to Woodlands Police Station hoping that he would tell the officers where he had taken the money but the Respondent contended that he was not obliged to disclose what and where he had taken the money; and*
8. *As a result of the loss of this money, the Petitioner suffered from depression and the her health deteriorated. It is for the reasons stated above that the Petitioner finds the Respondent's behaviour unreasonable, intolerable and cannot continue to live with the him.*

Based on the foregoing, the Petitioner prayed that the marriage be dissolved; that the Court makes an order for property settlement; any other relief that the Court may deem fit; and costs.

On 4<sup>th</sup> November 2016, the Respondent GARRY ABRAHAM NGUNGU filed herein an Answer and Cross-Petition to the Petition for Dissolution of Marriage, wherein he admits that the

marriage has broken down irretrievably but denies that such breakdown has been caused by the Respondent as alleged or at all. Instead, he alleges that the breakdown of the marriage is due to the fact that the Petitioner has committed adultery. The Respondent enumerated the particulars of adultery in his Answer and Cross-Petition as follows: -

1. *That the Petitioner has had extra marital affairs since 2005, which was the main reason for all differences in their home as evidenced by several emails, one set between the Petitioner and one LM, a Zambian and another set between the Petitioner and one GM, a Zimbabwean, all containing exchanges concerning intimate relationships between the Petitioner and these men;*
2. *That the Petitioner has definitely committed adultery, which resulted in her being impregnated by one of her secret lovers;*
3. *That as things stand, the Petitioner has since given birth to a baby boy;*
4. *That the Respondent does not know the names or particulars of the man responsible for the Petitioner's pregnancy, as the parties herein last co-habited more than 18 months ago and have had no sexual relationship for more than two years before the presentation of the Cross-Petition;*
5. *That to the Respondent's knowledge, the Petitioner gave birth to a baby boy at least a month ago while these proceedings have been pending, a fact which shows that the Petitioner has committed adultery;*
6. *That the Petitioner should be able to tell the Court the man responsible for the pregnancy and who is the father of the illegitimate child;*
7. *That it was in an attempt to cover up the pregnancy that the Petitioner rushed to Court to have this marriage dissolved;*

8. *That it was a result of the Petitioner's adulterous behaviour that the Petitioner moved out of the matrimonial house so that she could have more freedom with her lovers; and*
9. *That the Respondent finds the Petitioner's adulterous conduct intolerable and cannot continue to live with the Petitioner.*

On the foregoing, the Respondent prayed that the Petition as presented by the Petitioner be rejected; that the marriage be dissolved; and the Petitioner and the man responsible for the pregnancy of the Petitioner be ordered to pay damages for committing adultery.

On 4<sup>th</sup> May, 2017, the Petitioner filed herein a Reply and Answer to Cross-Petition. In her Reply, the Petitioner joined issue with the Respondent as regards the fact that there are no children born to the Petitioner and Respondent during the subsistence of the marriage. The Petitioner denied each and every allegation of fact contained in the Answer save for the fact that the marriage has broken down irretrievably. In response to the Cross-Petition, the Petitioner stated, *inter alia*, as follows: -

1. *That the Petitioner denies the allegation of having multiple affairs, but admits to having flirted with someone via email about 12 years ago, an incident that the Respondent always refers to. That the only time when she had another affair was when the parties had gone on separation and ceased to cohabit as husband and wife;*
2. *That the Petitioner will state that the real reason for the differences in the home was the fact that the Respondent was deceitful to her from the very beginning. He concealed the fact that he was on suspension at the time that they got married and subsequently lost his job. All along the Petitioner has been*

- providing for the family. Despite not being in gainful employment, the Respondent would waste family resources;*
3. *That the Petitioner admits that she has committed adultery which resulted in a pregnancy and given birth to a baby boy, but avers that the same happened while the parties were on separation;*
  4. *That the Petitioner left the matrimonial home on 14<sup>th</sup> March, 2015 and the Petition for dissolution of the marriage was commenced in October, 2015 way before she got pregnant. In fact the Petitioner delivered in July, 2016 when the matter was already before the Courts of law and that there is therefore no possible way that the commencement of these proceedings was to cover up the pregnancy as there was none at the time; and*
  5. *That the Petitioner reiterates the fact that she left the matrimonial home at the material time because the Respondent behaved in such a way that she could not be reasonably be expected to continue living with him.*

In consideration of this matter, I refer to **Section 9 (2)** of the **Matrimonial Causes Act**,<sup>1</sup> which provides that: -

***"On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent."***  
(emphasis mine)

In accordance with the said **Section 9 (2)**,<sup>1</sup> I set this matter down for the hearing of the Petition for Dissolution of Marriage on 3<sup>rd</sup> August 2017, in order for me to inquire into the facts alleged in the Petition for Dissolution of Marriage presented before this Court by the Petitioner. At the scheduled hearing, both the Petitioner and the Respondent were in attendance, together with the Petitioner's Learned Counsel Mrs. Zimba. I therefore allowed the Petitioner to present her Petition for Dissolution of Marriage.

At the said hearing, the Petitioner gave sworn evidence in English. She testified that she was married to the Respondent GARRY ABRAHAM NGUNGU on 16<sup>th</sup> February 2002, at the Dutch Reformed Church in Lusaka in the Lusaka Province of the Republic of Zambia. She produced an original marriage certificate, which was identified as "ID1" and produced in evidence as exhibit "P1". The Petitioner and Respondent are both domiciled in Zambia. According to the Petitioner, the parties last cohabited together as husband and wife, at House No. 638 Off Chilumbulu Road, Kabwata Site and Service in Lusaka, Zambia. That the Respondent now resides in Kafue Estates and is running his own company called Higher Call Trading. That there are no children of the family born to the Petitioner and the Respondent and that the Respondent does not have any children born out of wedlock, in as far as is known to the Petitioner, but the Petitioner has a male child called JP born on 25<sup>th</sup> July 2016, during the period of 21 months that the parties have been on separation. It is the Petitioner's testimony that there are no previous proceedings continuing in Zambia or elsewhere in relation to the said marriage or which are capable of affecting its validity or subsistence. The Petitioner further testified that the said marriage has broken down irretrievably, such that the parties can no longer be expected to live together based on the facts that the Respondent has behaved unreasonably.

It was also the Petitioner's testimony that at the time that the marriage was solemnised, the Respondent advised the Petitioner that he was on leave from work, which leave he kept extending. It was only after six months in marriage that the Petitioner

discovered that the Respondent was not on leave as alleged, but had actually been dismissed from Stanbic Bank for misappropriation of funds. When approached by the Petitioner with these facts, the Respondent said that it was not necessary to inform the Petitioner of his predicament as that happened before the marriage and that he was afraid of how she would react. From that moment onwards, the Petitioner took up the responsibility of paying for house rent, utilities and food.

According to the Petitioner, two years later, the Petitioner raised money to facilitate the Respondent's travel to South Africa in order for him to look for a job. The Respondent left for South Africa and during his stay in South Africa, the Petitioner would send him K400.00 to cover his monthly rent and food. In 2003, the Petitioner lost her job and to cushion the loss of her income, she opened a cell phone shop in Kabwata Market. She would send money to the Respondent in South Africa, for him to buy stock for the shop, but the Respondent would send accessories which most of the time were not working.

In 2005, the Respondent started suspecting that the Petitioner was having an affair, which led to him returning to Zambia. He moved in with the Petitioner who was at that time residing in her parents' family home in Kabulonga. During this stay, the Respondent often quarrelled with the Petitioner's brothers who were also residing in the family home because they reprimanded the Respondent for being lazy. In order to get the Respondent to earn an upkeep, the Petitioner decided to work for her friend and handed over the phone shop to the Respondent to run it, but the



Respondent mismanaged the shop until it was run down and closed.

In 2008, the Petitioner and Respondent started running a supplying company called Higher Call Trading. Every time the Respondent went to South Africa to buy goods for their clients, the Respondent would either overstay in South Africa or misuse the funds, thereby leaving the Petitioner with no other option but to send him more money. Resulting from the Respondent's behaviour, the company made a loss and some clients brought legal action against the company.

The Petitioner decided to register her own company called Global Banners Limited and left the Higher Call Trading to the Respondent. Both companies shared office space and they allocated responsibilities between them. The Respondent had the responsibility of paying office rentals, while the Petitioner paid staff salaries. The Respondent failed to live up to his responsibility which resulted in the companies almost being evicted twice for non-payment of rent. The Petitioner had to offset the debt on office rent.

In 2008, the parties moved to a rented house in Nyumba Yanga, Lusaka. The Respondent was not paying rent at home and they were evicted by bailiffs. The Petitioner left to live with her eldest sister for three months, whilst the Respondent moved in with a friend and was there until he raised enough money to rent a house in Kabwata site and service, Lusaka. During this time, the Respondent came up with a business proposal of supplying beans to the Ministry of Home Affairs. The Respondent

compelled the Petitioner to obtain a loan of K50,000.00 from Commercial Leasing Finance and to pledge her parents' Certificate of Title as security for the loan. The Petitioner obliged as the Respondent had assured her that he wanted to do something useful in his life for once and would settle the loan within thirty (30) days. The Petitioner gave the Respondent the whole sum of K50,000.00 in cash. The Respondent did not live up to his promise and after six months, Commercial Leasing Finance wrote to the Petitioner demanding payment of the total amount including interest of K99,000.00 failure of which they would commence legal action to reposes the house. This put the Petitioner under immense stress as she had not consulted her siblings before obtaining the loan. When the Petitioner asked the Respondent for documentation relating to the supply of beans to Ministry of Home Affairs so that she could follow up the payments, the Respondent had nothing to show for it but kept telling her that his brother in law, an officer with Zambia Police was following up the issue. Eventually, the Petitioner negotiated with the Advocates for Commercial Leasing Finance on a repayment plan, whereby the Petitioner was given an opportunity to repay the loan through weekly instalments of K3,000.00 to K5,000.00, until she managed to discharge the loan within four months and got back the Certificate of Title to her parents' home. The Respondent did not help with discharging this loan.

During the period 2009 to 2010, the parties would fight a lot because the job that the Petitioner had involved hosting corporate cocktails for clients as she was employed by an Events Management Company. Despite the Respondent being invited to

these cocktails, when going home after the events, he would pick up fights with the Petitioner calling her offensive and degrading names because of the clients that the company entertained at these functions. The fights persisted and all efforts made by the church to reconcile the parties failed as the Respondent did not want to involve his family.

In June 2014, the Petitioner went to visit her cousin in Italy for three weeks. Before she left, she signed three blank cheques meant for clearing her motor vehicle, a canter; for a client at Indo Zambia Bank who had placed an order; and for Zambezi Portland who had also placed an order. These orders were confirmed by the time the Petitioner left, but unfortunately they fell through because she was not around to really push for them. The Respondent took advantage of the fact that the Petitioner had written to the Bank authorising the Respondent to transact on her behalf and withdrew K15,000.00 which he gave to the Petitioner's brother for clearing of the canter. The Respondent, without the Petitioner's consent, went on to further withdraw K35,000.00 and K25,000.00 leaving the account with a balance of K895.00. When the Petitioner received her bank statement, she was extremely shocked. She called the Respondent to ask him where he had taken the money and the Respondent responded by telling her not to disturb him. This situation led to a fight and the Petitioner lodged a complaint at Woodlands Police Station against the Respondent. However, the Respondent informed the Police that he was not obliged to tell them where he had taken the money as the Petitioner was his wife. To date, the Respondent has an outstanding balance of K16,000.00 which he

is yet to pay. The Petitioner was traumatised by this incident and suffered depression as she could not believe that the money she had worked hard to save was all gone.

Eventually, the Petitioner could no longer tolerate the Respondent's behaviour and left the matrimonial home on 14<sup>th</sup> March, 2015. Since then, the parties have lived apart for two years and five months to date.

A few months after leaving the matrimonial home, the Petitioner filed herein the Petition for Dissolution of Marriage and soon after she fell pregnant. The Petitioner testified that there is no hope of resuming cohabitation with the Respondent as she has moved on and prayed that the marriage be dissolved. That marked the close of the Petitioner's evidence in chief.

In cross-examination by the Respondent, the Petitioner testified that her child whom she conceived out of wedlock was born prematurely via caesarean section at seven months two weeks due to pregnancy related diabetes and high blood pressure that she developed. The emergency delivery had also been compounded by her age. She reiterated in her evidence that the Respondent was dismissed from employment for misappropriation of funds and that the Respondent ran down the phone shop that she left him to run on their behalf.

Midway of conducting cross-examination, the Respondent requested for an adjournment to enable him to secure legal representation. The Petitioner objected to the adjournment as the Respondent had previously sought an adjournment to engage legal representation before the record was re-allocated to this

Court. In the interest of justice, this Court granted the application for an adjournment to enable the Respondent to secure legal representation and the matter was adjourned to 25<sup>th</sup> September, 2017 at 08:30 hours. A Notice of Hearing for the return date was issued the same day and served on the parties herein.

On the return date on 25<sup>th</sup> September 2017, only the Petitioner and her Counsel were in attendance. The Respondent was not in attendance and no reason was advanced for his non-attendance. The Court stood down the matter for close to 20 minutes but the Respondent did not show up. Being satisfied that both parties were aware of the return date, I proceeded to hear the matter at 09:05 hours. There was no re-examination of the Petitioner and that marked the close of the Petitioner's case.

Although the Respondent did not appear at the scheduled hearing, I have considered all the pleadings and evidence on record. Having heard and inquired into the Petition for the Dissolution of Marriage in accordance with the provision cited above, I am satisfied that the Petitioner was lawfully married to the Respondent at the Dutch Reformed Church in Lusaka, in the Lusaka Province of the Republic of Zambia on 16<sup>th</sup> February, 2002 under the *Marriage Act*.<sup>2</sup> My finding is supported by **Section 90** of the *Matrimonial Causes Act*,<sup>1</sup> which provides that: -

***"Proof of marriage, etc.***

***In proceedings under this Act, the court may receive as evidence of the facts stated in it a document purporting to be either the***

*original or certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Zambia or elsewhere."*

The evidence of fact that the Petitioner was married to the Respondent as per her testimony is the original Certificate of Marriage produced as "P1", which was issued in accordance with **Section 25** of the **Marriage Act**<sup>2</sup> and obtained from the Dutch Reformed Church in Lusaka after the marriage was solemnised.

*In casu*, the Petitioner relies on **Sections 8** and **9 (1) (b)** of the **Matrimonial Causes Act**<sup>1</sup>, while the Respondent in his Cross-Petition relies on **Sections 8** and **9 (1) (a)** of the **Matrimonial Causes Act**<sup>1</sup>, which provide as follows: -

**"8. A petition for divorce may be presented to the Court by either party to a marriage on the ground that the marriage has broken down irretrievably.**

**9. (1) For purposes of section eight, the Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts... (emphasis mine)**

**(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;** (emphasis mine)

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

I propose to first deal with the allegations that the Respondent has behaved in such a way, that the Petitioner cannot reasonably be expected to live with him. **Section 9 (1) (b)** of **The Matrimonial Causes Act**<sup>1</sup>, which I have cited above, provides

that irretrievable breakdown may be proved by satisfying the Court that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Accordingly, this Court will have to decide the question whether the Respondent has so behaved that it is unreasonable to expect the Petitioner to live with him.

The Learned Authors ***Rayden and Jackson on Divorce and Family Matters***<sup>4</sup>, stated that in order to answer the said question, it is necessary to make findings of fact as to what the Respondent actually did, and findings of fact as to the impact of that conduct on the Petitioner. In the case of ***Thurlow vs. Thurlow***<sup>1</sup>, the Court deciding the question of “unreasonable behaviour” held that: -

***“In order to establish that a respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with the respondent, it was not sufficient merely to establish that the marriage was dead and that it was impossible for the petitioner to cohabit with the respondent. It had to be shown that it was the respondent’s behaviour which justified a conclusion by the Court that the petitioner could not reasonably be expected to endure cohabitation”.***

I also refer to **Section 13** of ***The Matrimonial Causes Act***<sup>1</sup>, which provides that: -

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

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

Looking at the above, it is clear, in my view, that the behaviour required to be proved, must be of such gravity that the Petitioner's powers of endurance are exhausted, to the point where it is clear that a Petitioner cannot reasonably be expected to live with the Respondent. The standard is an objective one or that of a reasonable man or woman.

I have had regard to the whole history of the marriage *in casu*. The particulars of the Respondent's behaviour were disclosed in both the Petition for Dissolution of marriage and the uncontroverted *viva voce* evidence of the Petitioner. It was the Petitioner's testimony, that from the start of the marriage, it has been in the nature of the Respondent to be deceitful and to waste family resources. Looking at the facts presented to this Court, this has been the pattern of the Respondent's behaviour throughout this marriage. The final straw was the last incident in 2014 when the Respondent emptied the Petitioner's savings from her bank account without her consent, which incident immensely traumatised the Petitioner such that she went into a depression. This is what caused the Petitioner to eventually move out of the matrimonial home. Shortly thereafter, the Petitioner filed for dissolution of marriage. She also testified that the parties have not lived together for two years five months and



that there is no hope of resuming cohabitation as she has moved on.

The Respondent squandered his opportunity to challenge the evidence of the Petitioner in cross-examination, without any justifiable explanation by not being present in Court when he ought to have been.

I have considered not only the behaviour of the Respondent as alleged and established in evidence, but the character, personality disposition and behaviour of the parties. Taken together, the behaviour exhibited by the Respondent towards the Petitioner, is of such gravity, clearly unreasonable and I conclude that any right thinking person would come to the conclusion that the Respondent had behaved in such a way that the Petitioner could not reasonably be expected to live with him. The Petitioner had adduced sufficient evidence of the Respondent's behaviour, particularly in the cumulative effect to prove her case. Therefore, I am satisfied, that the Respondent's behaviour is of such gravity, that the Petitioner cannot reasonably be expected to live with the Respondent.

I now turn to the claim of adultery made by the Respondent against the Petitioner in his Cross-Petition. The Respondent, in his Cross-Petition alleged that the Petitioner has had extra marital affairs since 2005 and that this was the cause of all differences in their home. He further alleged that the Petitioner has committed adultery which resulted in her being impregnated by one of her secret lovers and that she has since given birth to a baby boy. He also alleged that it was as a result of the

Petitioner's adulterous behaviour that she moved out of the matrimonial home in order to have more freedom with her lovers and that in an attempt to cover up the pregnancy, the Petitioner rushed to Court to have the marriage dissolved. That the Respondent finds the Petitioner's adulterous conduct intolerable and cannot continue to live with the Petitioner. He therefore prayed that the marriage be dissolved based on the fact that the Petitioner had committed adultery.

The Respondent did not appear at the scheduled date of hearing to present these facts to the Court, thus the Court was not able to inquire into the facts alleged by the Respondent. However, the Petitioner in both her Reply and Answer to Cross Petition, including her *viva voce* evidence revealed that the only time when she committed adultery was when the parties had gone on separation and had ceased to cohabit as husband and wife. The Petitioner also admitted that she conceived out of wedlock after she had petitioned for the dissolution of marriage as evidenced by the fact that she delivered the baby on 25<sup>th</sup> July 2016, which was more than nine months after the institution of this suit.

The Respondent did name two persons that the Petitioner is alleged to have committed adultery with, but these were not cited as parties to this suit. The Respondent did not name the person whom the Petitioner had conceived the child with, nor was this person made a party to this suit. Having not made any person who is alleged to have committed adultery with the Petitioner, a party to these proceedings, the Respondent did not fulfil the

requirement under **Section 10 (1)** of **The Matrimonial Causes Act<sup>1</sup>**, which provides that: -

***"Where in a petition for divorce or in an answer to such a petition, a party to the marriage is alleged to have committed adultery with a specified person, whether or not a decree of dissolution of marriage is sought on the grounds of the adultery, that person shall, except as provided by the rules, be made a party to the proceedings."*** (emphasis mine)

I emphasised the word "shall" in the above provision. In my view, the requirement to join "that person" whom it is alleged the Respondent committed adultery with, is mandatory, in order for the Court to give the allegation due consideration. This affords "that person" an opportunity to be heard and if at the end of the evidence concerning the adultery allegation "that person" is found innocent, their name may be removed from the proceedings in accordance with **Section 10 (2)** of **The Matrimonial Causes Act<sup>1</sup>**.

*In casu*, "that person" with whom the Petitioner is alleged to have committed adultery and who fathered her child was not joined to the proceedings. Consequently, "that person" has not been given an opportunity to be heard. For that reason, I will not reveal the identity of the persons that have been alleged to have committed adultery with the Petitioner.

Referring to **Black's Law Dictionary<sup>3</sup>**, adultery is defined as: -

***"voluntary sexual intercourse between a married person and someone other than the person's spouse."***

As can be seen from **Section 9 (1) (a)** of **The Matrimonial Causes Act**<sup>1</sup>, which is cited above, adultery is a ground for divorce. However, not only is the Respondent required to prove irretrievable breakdown by reason of adultery, but it is necessary also for the Respondent to prove that he finds it intolerable to live with the Petitioner, as the two requirements are connected by the word "**and**", which I underlined in the above provision for emphasis.

As I have already stated above, the Court has a statutory duty to inquire, so far as it reasonably can, into the facts alleged by the Petitioner and Respondent, and this means that the Court has the duty, on the balance of probabilities, to investigate the allegation that the Respondent finds it intolerable to live with the Petitioner. According to the Learned Authors **Rayden and Jackson on Divorce and Family Matters**<sup>4</sup>, in investigating whether a party finds it intolerable to live with the other, the Court may have regard to the history of the marriage; to the circumstances in which the adultery was committed; and to the conduct of both parties before and after the commission of the adultery.

**Section 12 (1) and (2)** of **The Matrimonial Causes Act**<sup>1</sup>, provides that: -

**"(1) For the purposes of paragraph (a) of subsection (1) of section nine, a petitioner shall not be entitled to rely on adultery committed by the respondent if, after it became known to the petitioner that the respondent had committed adultery, the parties have lived with each other**

***for a period exceeding, or periods together exceeding, six months.***

- (2) If the parties have lived with each other after the adultery for a period of six months or less, that time shall be disregarded in determining for the purposes of paragraph (a) of subsection (1) of section nine whether the petitioner finds it intolerable to live with the respondent."***

The Respondent in his Cross-Petition stated that the Petitioner has had extra marital affairs since 2005. He further stated that that the Petitioner committed adultery which resulted in her being impregnated by one of her secret lovers. He also stated that the parties have lived apart and had not had any sexual relationship for more than two years before the presentation of the Cross-Petition, which was presented on 4<sup>th</sup> November, 2016.

The Petitioner stated in her Answer to Cross-Petition and testified *viva voce* that she committed adultery when she left the matrimonial home, after the presentation of the Petition for Dissolution of Marriage, which resulted in her conceiving and giving birth to one child outside the marriage. She further testified that she never committed adultery whilst the parties cohabited in the matrimonial home but admitted to having flirted with a man via e-mail twelve (12) years before the presentation of this suit. She also testified that the parties continued living together after the flirting incident. The Petitioner confirmed that the parties became estranged after she left the matrimonial home on 14<sup>th</sup> March, 2015 and have not had an intimate relationship with the Respondent since then.

It is clear from the above cited provision, that where the parties to the marriage have lived with each other for periods exceeding six months after it became known to the Respondent that the Petitioner had committed adultery, then, the Respondent cannot be entitled to rely on that adultery for the purposes of **Section 12 of The Matrimonial Causes Act**<sup>1</sup>. According to the Petitioner, the unproven accusation of adultery was made by the Respondent in 2005 and the parties continued living together as husband and wife. This piece of evidence by the Petitioner was not successfully challenged and this has led me to believe that the alleged acts of adultery, cannot be relied on by the Respondent as the parties continued to live as husband and wife. Further, according to the provision cited above, the fact of adultery can only be sustained if "*that person*" with whom the Petitioner committed adultery, was joined to the proceedings.

I will now consider the allegation that the Petitioner committed adultery after she left the matrimonial home, conceived and gave birth to baby boy. The learned authors of **Rayden and Jackson on Divorce and Family Matters**<sup>4</sup>, state at **para. 13.3** at **page 200**, that the Petition must be based on adultery prior to its presentation. Thus the allegation presented in the Cross-Petition by the Respondent of the Petitioner having conceived happened way after the presentation of the Petition on 16<sup>th</sup> October, 2015 and cannot be relied upon. The Respondent is therefore, not entitled to rely on the fact of adultery committed after the presentation of the Petition. In my view the Cross-Petition is merely a reaction intended to dispute the facts relied upon by the

Petitioner as the cause for irretrievable breakdown of the marriage.

For the above stated reasons, I do not think that the Respondent has sufficiently proved that by reason of the Petitioner's adultery he found it intolerable to live with the Petitioner because had that been the case, he would have been the first as the aggrieved party on account of the Petitioner's proven adultery to have filed the Petition for Dissolution of the Marriage.

I accordingly dismiss the Cross-Petition and uphold the Petition on account of unreasonable behaviour. In view of that, I hereby hold that the marriage solemnised between ZELIPA CHITSULO NGUNGU and GARRY ABRAHAM NGUNGU has indeed broken down irretrievably due to the fact that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.

I refer to **Section 9 (3)** of the *Matrimonial Causes Act*,<sup>1</sup> which provides that: -

*"If the Court is satisfied on the evidence of any fact mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably it shall grant a decree of dissolution of marriage."*

Accordingly, it is hereby **ORDERED** that the Marriage solemnised by the Petitioner and the Respondent on the 16<sup>th</sup> February, 2002 **BE** and is **HEREBY DISSOLVED** and a **DECREE NISI** is granted to be made Absolute within six weeks from date of the **DECREE NISI**, upon application by either party. The issue of property settlement is referred to the District Registrar.

It is **FURTHER ORDERED** that the Respondent will bear the Petitioner's costs for this suit, said costs to be taxed if not agreed.

Leave to Appeal is granted.

**Delivered at Lusaka on the 10<sup>th</sup> day of January, 2018.**

A handwritten signature in black ink, appearing to read 'P. K. Yangailo', written over a horizontal line.

**P. K. YANGAILO  
HIGH COURT JUDGE**