

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2019/HPF/D034

(Divorce Jurisdiction)



BETWEEN:

JOSEPHINE CHIMFWEMBE SIMUCHIMBA

PETITIONER

AND

PATRICK SIMUCHIMBA

RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 17TH MARCH, 2020.**

*For the Petitioner: Ms. C. Jere – National Legal Aid Clinic
for Women*

*For the Respondent: Mr. G. Lungu – Messrs. Muleza
Mwiimbu and Company*

JUDGMENT

CASES REFERRED TO:

1. *Thurlow vs. Thurlow* (1975) 2 ALL E.R. 979;
2. *Brighton Soko vs. Petronella Sakala Soko* - SCZ-8-189-2015;
3. *Ash vs. Ash* (1972) 1 A.E.R. 582; and
4. *Mahande vs. Mahande* [1976] Z.R. 354 (S.C.).

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Matrimonial Causes Act, Act No. 20 of 2007;*
2. *The Marriage Act, Chapter 50, Volume 5 of the Laws of Zambia;*
3. *Rayden and Jackson on Divorce and Family Matters 16th Edition, Butterworths;*
4. *Bromley's Family Law, Nigel V. Lowe & Gillian Douglas, 9th Edition, Butterworths;*

5. *Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts, 11th Edition, London, Butterworths; and*
6. *Black's Law Dictionary, B. Garner, Ninth Edition, West.*

1 INTRODUCTION

1.1 The Court has been moved to determine whether or not the marriage contracted by the parties herein has broken down irretrievably, thus warranting a dissolution of the marriage.

2 BACKGROUND

2.1 On 4th February, 2019, the Petitioner, **JOSEPHINE CHIMFWEMBE SIMUCHIMBA**, petitioned for the Dissolution of Marriage pursuant to **Sections 8 and 9 (1) (b)** of ***The Matrimonial Causes Act***¹ 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 reasonably be expected to live with him.

2.2 The Respondent responded to the Petition for Dissolution of Marriage by filing an Answer on 15th July, 2019, in which he alleges that the marriage has not broken down irretrievably.

3 PLEADINGS

3.1 The Petitioner in her Petition avers, *inter alia*, the following facts: -

1. *That she was lawfully married to the Respondent on 8th August, 1992, at Northmead Assembly of God Church, in Lusaka, Zambia;*

2. *That immediately after the marriage, the parties resided at Plot No. 1074, Ibex Meanwood, Lusaka and that the Respondent is a Business Man whilst she is unemployed. Both parties are domiciled in Zambia;*
3. *That there are three children of the family now living namely: -*
 - (i) *Lukundo Namuchimba (female) born on 2nd April, 1994 and studying Education and Information Technology at University of Lusaka (UNILUS) where she is in her second year;*
 - (ii) *Joshua Simuchimba (male) born on 14th October, 1995 and studying Economics at University of Lusaka (UNILUS) where he is in his four year; and*
 - (iii) *Annie Simuchimba (male) born on 12th May, 1997 and studying International Relations at University of Manitoba, Canada where she is in her third year.*
4. *That there are no children born to either party before or outside the marriage, so far as is known to the Petitioner;*
5. *That there have been no proceedings continuing in any Court in Zambia relating to the marriage or property of either party and there have been no proceedings outside Zambia pertaining to the validity or subsistence of the marriage;*
6. *That the marriage has broken down irretrievably because the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with him.*
7. *The particulars of the unreasonable behaviour were itemised as follows: -*
 - (i) *The Respondent is unjustifiably temperamental, which has caused the Petitioner emotional and psychological distress. He has distanced himself*

from the Petitioner and has denied her conjugal rights on the basis that she does not satisfy him sexually;

- (ii) In February, 2018, the Respondent informed the Petitioner that he was putting her on separation as he was no longer attracted to her and proceeded to demarcate the matrimonial bed, which caused the Petitioner emotional distress;
- (iii) On 4th November, 2018, the Petitioner invited her sister, her brother in law and her Pastor to attempt to reconcile the party, which made the Respondent furious. He told the guests that he hated the Petitioner and had moved on much to the Petitioner's distress. He further informed her relatives to take her stating that he was fed up of her and when they refused to take her, the Petitioner completely stopped talking to the Petitioner;
- (iv) On 18th November, 2018, the Respondent locked the Petitioner in the kitchen where he spat on her face three times, whilst beating her and threatened to kill her, until she grabbed the keys and ran outside. This caused the Petitioner to move to another bedroom;
- (v) The Respondent has unfounded jealousy and is constantly falsely accusing the Petitioner of having affairs and accuses her of not being submissive to him. The Respondent does not allow the Petitioner to make any decisions without his consent and delights in oppressing the Petitioner by making decisions on her behalf;
- (vi) When the Petitioner started a cake making business, the Respondent interfered in her business, demanding that she should not sell cakes to male

clients and making all financial decisions without the Petitioner's consent; and

(vii) That the Respondent rarely gives the Petitioner any money and would rather spend on other people, such that he has built houses and flats secretly for his two brothers.

3.2 In response to the Petition for Dissolution of Marriage the Respondent, **PATRICK SIMUCHIMBA**, filed into Court an Answer. Therein, the Respondent averred, *inter alia*, as follows: -

- 1) That he denies that the marriage has broken down irretrievably as the same can be retrieved;*
- 2) That he has not or at all behaved in such a way that the Petitioner cannot be expected to continue living with the Respondent;*
- 3) That he has not caused psychological and emotional distress to the Petitioner but instead the Petitioner has refused to undergo counselling. He admits that the marriage is rocked with problems, which he avers started as far back as 1995 and that the Respondent invited the Petitioner's former Pastor in 2006 to help counsel the couple, but the Petitioner refused;*
- 4) That he denies refusing the Petitioner conjugal rights, but instead it is the Petitioner who started sleeping with clothes pretending that she had contracted HIV/AIDS for a period of three years;*
- 5) That the Respondent never demarcated the matrimonial bed nor chased the Petitioner away, but merely questioned her whether intimate love could be effective if parties could stay away from each other for three years without intimacy but sleeping together;*

- 6) *The Respondent admits locking the kitchen door, but avers that the same was done in order to spare the children from listening to their conversation as per the Respondent's culture. That he did not intend any harm or cause alarm to the Petitioner, nor has he beaten her or threatened to kill her;*
- 7) *The Respondent avers that the Petitioner has fabricated stories to justify her claim that the marriage has broken down irretrievably when not hence the Police dismissing the Petitioner's complaint when the Petitioner reported him to Victim Support Unit;*
- 8) *The Respondent admits that he is jealous and avers that it is normal behaviour for people in love and that it emanates from her improper associations with other men. He further avers that the Petitioner is not submissive and does not take his advice;*
- 9) *The Respondent avers that he financially supports the Petitioner and encouraged her to open an account with FNB where he would deposit his personal money and only stopped doing so when his business started performing badly;*
- 10) *The Respondent also avers that he does not even know who hired a truck for the Petitioner to leave the matrimonial home for unknown place in Makeni; and*
- 11) *That he does not know who is paying the Petitioner's rentals in Makeni. He prayed that the marriage should not be dissolved as the same can be retrieved.*

4 EVIDENCE AT TRIAL

4.1 **Section 9 (2) of The Matrimonial Causes Act¹** 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." (Court's emphasis)

- 4.2 In accordance with **Section 9 (2)** of **The Matrimonial Causes Act¹**, I set this matter down for hearing, in order for me to inquire into the facts alleged in the Petition for Dissolution of Marriage and Answer presented before this Court by the Petitioner.
- 4.3 At the scheduled hearing, the Petitioner augmented the contents of her Petition by giving *viva voce* evidence during trial that the Respondent has proved to her that he is no longer interested in her as shown by his behaviour towards her and has verbally told her so.
- 4.4 She testified that the Respondent is abusive verbally, emotionally, physically and financially, which has left her feeling worthless. That the Respondent has threatened to kill her, which has left her living in fear for her life.
- 4.5 She further testified that the Respondent calls her dehumanising words like monkey, dog, dull and does not communicate properly with her. He tells her that she is not submissive for disagreeing with him.
- 4.6 The Petitioner also testified that the Respondent does not find her sexually attractive and does not want her to be his companion as he deems that as being patronising, which has caused her distress.
- 4.7 That he will not allow her to work away from home as he is jealous and accuses her of imaginary affairs with other men, such that he even accused her of having an

affair with the garden boy. He checks her phone and even goes to the extent of calling her sister to find out what they were talking about.

- 4.8 It was her testimony that she moved out of the matrimonial home on 31st December, 2018 and there is no possibility of resuming cohabitation.
- 4.9 She prayed that the marriage be dissolved; that there be maintenance for herself and the children of the family; that there be property settlement; and for costs
- 4.10 In cross-examination, the Petitioner testified that they have been married for 27 years and their marriage had been a troubled one throughout due to the verbal abuse exhibited by the Respondent.
- 4.11 She testified that there have been gaps in their sexual relations, but not for three years and reiterated her evidence that from February, 2018, the Respondent denied her conjugal rights as he put her on separation.
- 4.12 She reiterated her testimony that the Respondent threatened to kill her and she reported the matter to Victim Support Unit, although he was not arrested.
- 4.13 She further testified that she never sat carelessly not exposed her thighs to the Pastor who was their guest in the matrimonial home and that the Pastor never lodged any complaint about her to the Respondent.
- 4.14 She further reiterated her testimony that the Respondent never allowed her to sell cakes to male clients and that he built a house for his cousin.

- 4.15 In re-examination, the Petitioner denied preparing baths for the Pastor who was their house guest and confirmed that her sister, brother in law and Pastor were not invited to discuss their sexual relations, but to assist with their marital woes.
- 4.16 She reiterated her evidence that the Respondent threatened her life and spat in her face.
- 4.17 The Petitioner did not call any other witness and that marked the close of her case.
- 4.18 The Respondent adopted the contents of his Answer which he augmented with *viva voce* evidence. He testified that he has never beaten the Petitioner during their 27 years of marriage nor denied her conjugal rights as she alleged. However, he confirmed that their sexual relationship is not 100% satisfactory.
- 4.19 He further testified that the Petitioner suspected that he had infected her with HIV, but a test undertaken by the Petitioner came back negative. That she is always accusing him of having relationships with other women.
- 4.20 Furthermore, the Respondent testified that at one time he had seen the Petitioner enter the bathroom when the Pastor who was their house guest was still in the bathroom. When queried, the Petitioner stated that she had been cleaning the bathroom and that became the bone of contention in their marriage.
- 4.21 He also testified that he used to give the Petitioner money and most of it went towards educating her

relatives. He insisted that he did not want the marriage to end as the children of the family would be traumatised and that it was not the appropriate thing to do at their advanced ages.

4.22 In cross-examination, the Respondent confirmed that the party had not had sexual intercourse for over two years and that he often suspected the Petitioner of having extra marital affairs. He stated that it was normal to be jealous when one was in love.

4.23 The Respondent admitted that the marriage was rocked with problems but denied that it has broken down as he felt that all the couple needed was counselling, which he insisted that the Petitioner has refused to attend.

4.24 In re-examination, the Respondent reiterated that the marriage can be retrieved and that rushing to Court without being counselled was not the appropriate route.

4.25 The Respondent opted not to call any other witnesses and that marked the close of his case.

4.26 Both parties opted to rely on the evidence on record.

5 ISSUES FOR DETERMINATION

5.1 I have considered the Petition for dissolution of marriage, the Answer and the *viva voce* evidence of both parties.

5.2 The issue to be determined is whether or not this marriage has 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 him.

6 THE LAW

6.1 The person who starts divorce proceedings must prove that the marriage has irretrievably broken down by establishing one of the five facts prescribed in **The Matrimonial Causes Act**¹. The prescribed five facts are the only facts that can be relied on by a party to a marriage who alleges that the marriage has broken down irretrievably.

6.2 **Sections 8 and 9 (1) (b)** of **The Matrimonial Causes Act**¹, which are relevant to this action, provide that: -

"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

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

6.3 For the High Court to entertain a Petition for Dissolution of marriage, proof must be shown that the marriage was contracted under **The Marriage Act**². To

this end, **Section 90** of **The Matrimonial Causes Act¹**, 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."

6.4 In determining this Petition for Dissolution of Marriage, this Court must evaluate the competing evidence of the parties. **Section 9 (3)** of the **Matrimonial Causes Act¹**, 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."

7 ANALYSIS AND FINDINGS

7.1 From onset, I must state that having considered and inquired into the Petition for Dissolution of Marriage and the Answer in accordance with the provision cited above, I am satisfied that the Petitioner was lawfully married to the Respondent on 8th August, 1992, at Northmead Assembly of God Church, in the Lusaka District of the Lusaka Province of the Republic of Zambia under **The Marriage Act²**. My finding is supported by **Section 90** of **The Matrimonial Causes Act¹**, which is cited in paragraph 6.3 above.

- 7.2 The evidence of fact that the Petitioner was married to the Respondent as per her testimony is the duplicate copy of Certificate of Marriage produced as "P1", which was issued to the parties in accordance with **Section 25 of *The Marriage Act***².
- 7.3 In *casu*, the Petitioner relies on **Sections 8 and 9 (1) (b) of *The Matrimonial Causes Act***¹ and particulars presented before this Court, which the Respondent challenged. The Respondent also relied on his Answer. I will thus first address the allegations by the Petitioner that the Respondent has behaved in such a way, that she cannot reasonably be expected to live with him.
- 7.4 **Section 9 (1) (b) of *The Matrimonial Causes Act***¹, which I have cited in paragraph 6.2 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, in the circumstances presented before this Court, I will have to decide the question whether the Respondent has so behaved that it is unreasonable to expect the Petitioner to live with him.
- 7.5 The Learned Authors ***Rayden and Jackson on Divorce and Family Matters***³, 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.

7.6 In the case of **Thurlow vs. Thurlow**¹, 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." (Court's emphasis)

7.7 The learned authors of **Bromley's Family Law**⁴, had this to say at **Page 228**: -

"This provision (relating to unreasonable behaviour) is frequently but erroneously, abbreviated to 'unreasonable behaviour', thereby suggesting that all one has to look at is the quality of Respondent's behaviour, whereas in fact what is important is the effect of that conduct upon the Petitioner." (Court's emphasis)

7.8 On the test to apply on whether the Respondent's behaviour was unreasonable in relation to the Petitioner, the eminent authors of **Rayden's Law & Practice in Divorce & Family Matters in the High Court, County Courts & Magistrates' Courts**⁵, opined as follows at **page 203, paragraph 25**: -

"Nevertheless, in considering what is reasonable, the Court (in accordance with its duty to inquire, so far

as reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable: allowance will be made for the sensitive as well as the thick-skinned;... (Court's emphasis)

7.9 The said eminent authors further opined at **page 204, paragraph 26⁵** as follows: -

"Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is unreasonable in itself, it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the Respondent."

7.10 In the Supreme Court of Zambia Judgment of **Brighton Soko vs. Petronella Sakala Soko²**, their Lordships held as follows at **page J28**: -

"In taking the view which we have taken, we have paid careful attention to the reasoning which we have adopted in Mahande namely that when considering the Respondent's behaviour in the context of a divorce petition founded on 'unreasonable behaviour' as enacted in Section 9 (1) of the Matrimonial Causes Act No. 20 of 2007, it is not just the behaviour of respondent which is decisive but, equally crucial and as much decisive, is the way in which such behaviour relates to or interacts with the character, behaviour, personality, disposition

and other traits and attributes of the particular petitioner involved." (Court's emphasis)

7.11 In the same case, the Supreme Court of Zambia cited the English case of **Ash vs. Ash**³ wherein it was stated in part by Bagnall, J at **page 140** as follows: -

"The general questions may be expanded thus: Can this petitioner with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this Respondent?"

7.12 The **Ash vs. Ash**³ case was also cited with approval in the Judgment of the Supreme Court of Zambia in **Mahande vs. Mahande**⁴, wherein Cullinan, AJS., stated as follows: -

"...The following question then arises, to paraphrase the above words of Bagnall, J, and those of Ormrod, J, in Pheasant vs. Pheasant (1972) 1 A.E.R. at p. 591 at c to d; bearing in mind the petitioner's faults and other attributes, good and bad, and having regard to her behaviour during the marriage, bearing in mind the characters and the difficulties of both parties, trying to be fair to both of them and expecting neither heroic virtue or selfless abnegation from either, has the respondent then behaved in such way that the petitioner cannot reasonably be expected to live with him?"

7.13 I have addressed my mind to **Section 13** of **The Matrimonial Causes Act**¹, 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."

7.14 I am guided by the above authorities. As can be seen from the above, it is clear, in my view, that the behaviour required to be proved, must be of such gravity that the parties' powers of endurance are exhausted, to the point where it is clear that they cannot reasonably be expected to live with each other. The standard is an objective one or that of a reasonable man or woman.

7.15 I have had regard to the whole history of the marriage in *casu*. The particulars of both the Petitioner and Respondent's behaviour were disclosed in the Petition for Dissolution of marriage and Answer, which they entirely relied on and augmented with *viva voce* evidence.

7.16 It was the Petitioner's testimony, *inter alia*, that the Respondent is abusive verbally, emotionally, physically and financially. That the Respondent has physically assaulted the Petitioner and threatened to kill her. His behaviour got out of hand, such that he spat in her

face and called her dehumanising words like monkey, dog or dull. The Respondent chased the Petitioner out of the matrimonial home and asked her relatives to take her away. He told the Petitioner that she does not sexually satisfy him and was unattractive. He eventually stopped having sexual intimacy with the Petitioner and demarcated the matrimonial bed which led to the Petitioner eventually leaving the matrimonial bedroom. The Petitioner's further testimony was that the Respondent is jealous and accuses the Petitioner of having extra marital affairs. He was described as a controlling man who impedes the Petitioner's movements and checks her mobile phone to see whom she has been conversing with. On 18th November, 2018, the Respondent locked the Petitioner in the kitchen where he beat her and threatened to kill her. This led to the Petitioner moving out of the matrimonial home on 31st December, 2018 and has not lived with the Respondent since then.

7.17 I will now address the Respondent's Answer to the Petition. The Respondent avers that it is actually the Petitioner who has been physically abusive and at one time she grabbed his sexual organs. That throughout the marriage, they have had marital woes. That the Petitioner is not submissive to the Respondent and has avoided being intimate with the Respondent, to the extent where it became common for her to sleep in her clothes. That they eventually stayed for over two years

without sharing any intimacy whatsoever. He admitted that he was a jealous man but attributed it to his being in love with the Petitioner and her improper associations with other men.

7.18 It was also his testimony that he saw the Petitioner entering the bathroom, where their male guest was bathing, but did not lead enough evidence to substantiate this pleading. Essentially, the Respondent was alleging that the Petitioner has had improper relationships with other men, but he did not, in his evidence, reveal the names of the men whom the Petitioner has had improper relations with and he did not make these persons parties to the proceedings as required by **Section 10 (1)** of **The Matrimonial Causes Act**¹, 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." (Court's emphasis)

7.19 I emphasised the word "shall" in **Section 10 (1)** of **The Matrimonial Causes Act**¹ cited above. In my view, the requirement to join "*that person*" whom it is alleged the Petitioner had inappropriate relations 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***¹.

7.20 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 allegations raised by the parties. According to the Learned Authors ***Rayden and Jackson on Divorce and Family Matters***³, 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.

7.21 In his Answer, the Respondent alleged that the Petitioner has had inappropriate relationships with other men but he did not mention the names of those persons that the Petitioner is alleged to have had inappropriate relations with. Further, the Respondent did not state when these relationships took place and as such the Court is unable to determine, whether these relationship took place at all. In any case, the Respondent is of the view that the marriage has not broken down, which shows that if at all the Petitioner had any inappropriate relations with other men, this

was condoned by the Respondent as he still wants to continue with this marriage. Therefore, such an allegation in the circumstances of this case does not support the Respondent's Answer and is hereby disregarded. Further, "those persons" with whom the Petitioner is alleged to have had inappropriate relations were not joined to the proceedings. Consequently, I cannot consider this evidence of the Petitioner's alleged inappropriate relations relied upon by the Respondent in his Answer. It is therefore the finding of this Court that the inappropriate relations alleged to have been committed by the Petitioner, have not been established. Accordingly, in the circumstances of this case, I am not satisfied that the Respondent has successfully refuted the allegations in the Petition.

7.22 The Respondent averred that the marriage has not broken down irretrievably, despite the Petitioner having left the matrimonial home following an incident which she could no longer tolerate. **Section 13 of The Matrimonial Causes Act**¹, 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. (Court's emphasis)

7.23 According to the above cited provision, where the parties to the marriage have lived with each other for periods exceeding six months after the final incident of the Respondent's behaviour that the Petitioner finds that she can no longer be reasonably expected to live with, the Petitioner cannot be entitled to rely on that fact for the purposes of **Section 9 (1) (b) of The Matrimonial Causes Act**¹. In *casu*, the final incident of the Respondent's behaviour cited by the Petitioner occurred on 18th November, 2018, when the Respondent locked her in the kitchen, beat her and threatened to kill her. Shortly after that incident, on 31st November, 2018, the Petitioner left the matrimonial home and has never resumed cohabitation with the Respondent. Evidence was led to corroborate this and it was not successfully refuted. In fact, the Respondent confirmed that he had indeed locked the Petitioner in the kitchen and that shortly after that she left the matrimonial home.

7.24 According to the provision cited above, the fact of unreasonable behaviour can only be sustained if after the last incident relied upon, the parties have not lived together more than six months. In *casu*, both the Petitioner and Respondent confirmed that they have not cohabited since the last incident, which the Petitioner found to be behaviour that she cannot

reasonably be expected to live with. It is therefore the finding of this Court that the Petitioner has established that she cannot reasonably be expected to live with the Respondent.

7.25 The other particulars that the Petitioner relied on relate to the temperament of the Respondent. The Respondent is alleged to be jealous, which fact was not disputed. He is further alleged to be controlling and hinders the Petitioner's movements. He also keeps tabs on her phone calls. In response to this, the Respondent stated that the Petitioner is not submissive and does not listen to his advice. I considered these averments and assessed the impact of such behaviour on the Petitioner. In my view, such behaviour can be the cause of the breakdown of the marriage.

7.26 I have further assessed the impact of the conduct of both parties and whether they can be expected to resume cohabitation with each other. I have also considered not only the cumulative effect of the behaviour of the parties as alleged and established in evidence, but the character, personality disposition and behaviour of the parties. The Petitioner had adduced sufficient evidence of the Respondent's behaviour, particularly in the cumulative effect to prove her cases. The Respondent did not successfully challenge the evidence presented by the Petitioner, even though he insists that the marriage has not

broken down irretrievably. I have also critically considered the past behaviour of Respondent, which had been tolerated over the years, until the last violent incident of 18th November, 2018, that saw the Petitioner moving out of the matrimonial bedroom and eventually leaving the matrimonial home on 31st December, 2018. This evidence was uncontroverted by the Respondent.

7.27 The evidence of the Petitioner that the parties have not been sexually intimate for some time was equally not controverted by the Respondent. Further, the Petitioner's uncontroverted evidence is that the parties have not lived together since 31th December, 2018. Taken together, including weighing the evidence of both parties, I find that while the Respondent testified that the marriage has not broken down irretrievably, the Petitioner does not find his last violent behaviour tolerable, which evidence is sufficient to prove the Petitioner's case and that any right thinking person would come to the conclusion that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. The marriage has therefore broken down.

7.28 I accordingly uphold the Petition on account of unreasonable behaviour of the Respondent. In view of that, I hereby hold that the marriage solemnised between **JOSEPHINE CHIMFWEMBE SIMUCHIMBA** and **PATRICK SIMUCHIMBA** 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.

8 CONCLUSION

8.1 I refer to **Section 9 (3)** of the **Matrimonial Causes Act**¹, 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."

8.2 I also refer to **Section 71 (1) (b) (i)** of the **Matrimonial Causes Act**¹, which provides that: -

"Restrictions on decrees for dissolution, annulment or separation affecting children

(1) The court shall not make absolute a decree of divorce or nullity of marriage, or grant a decree of judicial separation, unless the court, by order, has declared that it is satisfied—

(b) that the only children who are or may be children of the family to whom this section applies are the children named in the order and that—

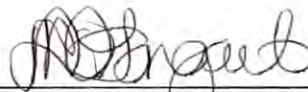
(i) arrangements for the welfare of every child so named have been made and are satisfactory or are the best that can be devised in the circumstances;..." (Court's emphasis)

8.3 Accordingly, it is hereby **ORDERED** that the Marriage solemnised by the Petitioner and the Respondent on the 8th August, 1992, **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 to the Deputy Registrar, provided the issues relating to the welfare of the children of the family who are receiving education at established institutions are heard and determined. Either party may formally make an application for the welfare of the children of the family.

- 8.4 The issues of maintenance and property settlement are referred to the Deputy Registrar.
- 8.5 Costs are for the Petitioner to be taxed in default of agreement.
- 8.6 Leave to Appeal is granted.

Delivered at Lusaka on the 17th day of March, 2020.



P. K. YANGAILO
HIGH COURT JUDGE