

Historical Development of Divorce Law in Zambia

History of Divorce Law

- As a starting point, it's imperative to take note that English law followed the canon law of the Catholic Church in not permitting divorce in the sense in which it is understood today. The ecclesiastical courts were able to grant annulments as well as divorce a Mensa et thoro. (This is a separation of the parties by law and not dissolution of the marriage. It may be granted for extreme cruelty or desertion of the Woman by Husband). This freed the parties from the obligation to cohabit but prohibited remarriage. By the 18th century a procedure for divorce by a private act of parliament was developed and it did allow the parties to remarry. This was however not very popular as it was too expensive and it was popularly estimated to cost at least a thousand pounds and was time consuming. It became apparent that reform was necessary in the area of divorce law.

The Matrimonial Offence (England) 1857 – 1969

- The Matrimonial causes Act 1857 was passed following recommendation from the royal commission which had been appointed in 1850 to enquire into the law relating to matrimonial offences. The 1857 Act created the court for divorce and deal with matrimonial causes. It had the power to dissolve marriages as well as annulments and judicial separations. This power was however limited. A petitioner had to prove that the respondent had committed adultery and that the petitioner was himself free of any matrimonial guilt and that there was no collusion between the parties. A wife had to further show that the H had aggravated the adultery by cruelty or two years desertion or had committed incest, rape or sodomy. Divorce by judicial process was thus permitted but only an injured and legally guiltless spouse could petition.
- Modifications were made to the law over the years. The most significant being the Divorce Reform Act of 1969. This act was a result of a compromise between two groups with opposing views. The church on the one hand proposed that an inquiry should be held in every case to ascertain the breakdown of the marriage whereas the group led by the Lord Chancellor suggested that a good divorce law should seek to buttress rather than undermine the stability of marriage and that when regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with maximum fairness, and the minimum bitterness, distress and

humiliation. The principle they agreed upon was that breakdown should be the sole ground for divorce. It remains the law.

- Thus, by virtue of being a former colony of Britain, Zambia's law relating to divorce was largely borrowed from the divorce of in place in Britain.

GROUND FOR DIVORCE

- It should however be noted that a divorce cannot be granted on this ground alone. Breakdown has to be inferred from certain facts. Thus we have five facts from which a breakdown of marriage can be inferred. These reforms were subsequently incorporated in the Matrimonial Causes Act of 1973 ('MCA') which forms the current law of divorce. In Zambia the passing of the matrimonial causes Act No 20 of 2007 now entails that Zambia has its own law on matrimonial causes.
- The 2007 MCA however is a replica of the English Common law relating matrimonial causes. Thus most of the provisions are borrowed from the case law of England on matrimonial causes.
- For instance By Section 8 of the Matrimonial Causes Act (MCA) 2007, in Zambia only one ground is sufficient to warrant divorce that is, the *irretrievable breakdown of the marriage*. This statement however is somewhat misleading. In practice relationship breakdown, without proof of one of the five facts, will not be sufficient to terminate the legal relationship.
- Thus the above S.8 may be considered to be the same as was elucidated in **Buffery vs. Buffery (1988) 2 F.L.R 365 CA**
a failure by the W to show that the marriage had irretrievably broken down by establishing one of the five facts meant that she cannot succeed on her petition notwithstanding the fact that they had grown apart, no longer had anything in common and could not communicate.

Thus S.8 above may be closely related to the common law practice as to the ground for divorce.

THE FIVE FACTS PROVING IRRETRIEVABLE BREAKDOWN

In Zambia the five facts from which irretrievable breakdown of marriage can be inferred are contained in Section 9 (1) of the MCA 2007 and they are the following:

A. ADULTERY (S9(1) (A) MCA 2007

In order to succeed on this ground the petitioner must prove that the respondent committed adultery and that there was or there must have been sexual intercourse between the respondent and another person who might be cited, and show that because of the adultery she finds it intolerable to live with the respondent. However it is not necessary that the petitioner should find the respondent's adultery intolerable. Both of these elements must be proved together and not separately. An isolated act of adultery will not be sufficient.

If one spouse knows that the other has committed adultery and has continued to live with him or her thereafter for six months or more, a divorce petition cannot be based on this fact – adultery. If they have lived together for less than six months after the adultery, the fact that they have done so is to be disregarded in determining whether the petitioner finds it intolerable to live with the respondent. The test used to determine whether or not the respondent finds it intolerable to live with the petitioner is subjective and a question of fact.

In for example **Sikazwe vs. Sikazwe (1983) HP/D 78,**

Caroline Sikazwe petitioned for divorce on the ground that the marriage had irretrievably broken down on account of the respondent's adultery with Jennifer Nkonde, co-respondent and she found it intolerable to live with him.

A woman who has been raped has not committed adultery because the relationship complained of must be voluntary.

Further in **Goodrich vs. Goodrich (1971) 2 ALL ER 1340**

The Husband petitioned for divorce on the grounds of Wife's adultery and was granted a decree nisi. The judge cited with approval a passage in Rayden on Divorce that it is what "the petitioner finds" intolerable that is the primary consideration.

But it is not enough, he suggested, for a petitioner simply to say "I find it intolerable": some reason, explanation or justification for this assertion should be given so that the court can satisfy itself of the truth of the petition.

- It is therefore clearly evident that the above proof of the ground of adultery to infer Irretrievable breakdown of Marriage that the Zambian courts have adopted and that is contained in the Matrimonial Causes Act 2007 is that which is followed in Britain as shown in the above Goodrich case in England. Thus the common law of England with regards to adultery is the position in Zambia.

B. RESPONDENT'S BEHAVIOUR – s 9(1) (b)

The petitioner must under this fact establish that the marriage has broken down irretrievably by showing that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him. The courts have refrained from any attempt to define behaviour. Each case is looked at on its own merits. The issue to be determined is not the quality of the respondents' behaviour but the effect of that conduct on the petitioner. Thus trivial issues such as forgetting the Wife's birthday, wedding anniversary, failing to give her flowers on the birth of the child or refusing to take her to the cinema will be disregarded in most cases.

S9 (1) (b) of the MCA 2007 provides that the petition can ask the court to infer that there is a breakdown on proof of the fact that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him.

The question is not whether the behaviour is unreasonable but whether it is unreasonable to expect the petitioner to continue to live with the respondent in the circumstances. The test used is objective since the question to be answered is 'can the petitioner reasonably be expected' to live with the respondent. This question is answered by the court after assessing the history of the marriage and their relationship.

Livingstone-Stallard v Livingstone-Stallard [1974] 2 All ER 766

The Husband was 56 and the Wife was 24 when they married; Husband was self-opinionated and treated Wife not as a wife but as a rather stupid child. He criticised her behaviour, her way of life, her friends, her cooking and even her dancing; he complained of her leaving her underclothes soaking overnight in the sink, even though he did the same himself, and he became angry when she offered sherry to a photographer who visited the house while he was out. After a violent argument, Wife left the home and successfully petitioned for divorce under s.1 (2) (b) of England.

Similarly the Zambian courts in **Mahande vs. Mahande (1976) ZR 287** elucidated the following;

The petitioner has an illegitimate child before her marriage to the respondent. The petitioner only disclosed this after two years of the marriage. The respondent forgave her and accepted the child and maintained it. The petitioner petitioned for divorce citing unreasonable behaviour of the respondent. The petitioner testified that she was once locked outside the gate, respondent was suspicious of her movements among others and the court granted a decree nisi pending a decree absolute to end the marriage.

O'Neill v O'Neill [1975] 3 All ER 289, CA

H embarked on major do-it-yourself repairs to the matrimonial home; he removed floorboards, mixed cement in the living room, and removed the lavatory door for some eight months. W was consequently embarrassed to have visitors, and she and their 14-year-old daughter D found it embarrassing to use the lavatory. After two years, W and D moved out, and W petitioned for divorce on the grounds of H's behaviour; H's reply (to W's solicitors) contained allegations that the children

were by some other man. The Court of Appeal, reversing the trial judge, granted a decree nisi; the reply alone showed how badly the marriage had broken down.

Pheasant v Pheasant [1972] 1 All ER 587, Ormrod J

H petitioned for divorce under s.1 (2)(b). He did not seek to establish any serious criticism of W's conduct or behaviour, but claimed she had not been able to give him the spontaneous, demonstrative affection he craved and that it was impossible for him to live with W any longer. Dismissing H's petition, the judge said there was nothing in W's behaviour that could be regarded as a breach on her part of any of the obligations of the married state or as effectively contributing to the break-up of the marriage.

- It may therefore be considered trite that the above ground of unreasonable behaviour in proving breakdown of a marriage that the Zambian courts have followed and contained in the MCA of 2007 is similar to that practised under the common law of England and as such providing evidence of the relationship of the common law and the Zambian law in that regard.

C. DESERTION- S9 (1) (c) MCA

Desertion is one of the traditional matrimonial offences that have survived the reforms unaltered. The respondent leaves the matrimonial home voluntarily and without reasonable cause with the intention of permanently ending cohabitation. Desertion for a continuous period of 2 years is sufficient to prove irretrievable breakdown of marriage. There are four elements that must be present:

1. De facto separation of the parties for at least 2 years.
2. The intention on the part of the spouse in desertion to remain separated permanently.
3. Absence of consent on the part of the deserted spouse.

4. Absence of any reasonable cause for withdrawing from cohabitation on the part of the deserting spouse.

Constructive desertion – respondent behaves in such a way that petitioner is compelled to leave home against his or her wishes under similar conditions. The MCA 2007 makes provision under section 14. The 2 years period applies in this case.

Pizey v Pizey [1961] 2 All ER 658

After admitting an act of adultery, W left home and went to live with her mother. H did not object to her going, but over the next two years they corresponded by letter and on several occasions H visited W and they had sex together. H subsequently petitioned for divorce on the grounds of W's desertion (having effectively condoned the adultery), but his petition failed: the frequent visits amounted to a course of conduct that showed the separation too had been condoned.

Hopes v Hopes (1948) 2 ALL ER 920

The husband petitioned for divorce claiming that desertion began more than 3 years before his presentation of the petition when the wife moved into a separate bedroom no marital intercourse, frequent quarrels between them and she stopped mending or washing his clothes. There was no separate cooking for him although he had meals with members of his family prepared by the wife in the dining room. Held, that there was no de facto separation and therefore no desertion of the husband by the wife. They had to maintain two separate households for petition to succeed.

- It may therefore be considered apparent that the above ground of desertion stems from the common law of England as evidenced from case law above, this in turn does bring out a relationship between the common law and the Zambian law in this regard.

D. LIVING APART – S9 (1) (d) AND (e) MCA 2007

This involves the parties living apart for a specified period of time. The first type of living apart requires a 2 year period and the respondent must consent to the decree being granted. This is sometimes called divorce by consent. The consent may be withdrawn at any time before the pronouncement of the decree. The other fact is that the parties have lived apart for a period of 5 years preceding the presentation of the petition –s 9(1) (e).

Living apart involves both physical and mental elements. As far as physical separation is concerned the courts have adopted the old law of desertion and have held that what is in issue is separation from a state of affairs rather than from a place. The question to be asked is whether there is any community of life between the parties. For instance if H & W share the same living room, eat at the same table, or watch TV together, they are still regarded as living in the same household. The households can be established in the same house where the parties establish individual living arrangements. It is immaterial that they do this for the sake of the children. If they are living under the same roof, they will only be said to be living apart if they maintain two separate households. They will also be regarded as living apart if consortium comes to an end.

Fuller vs. Fuller (1973) 2 ALL ER 650

H and W separated after 22 years' marriage; W went to live with P and called herself Mrs P. Four years later H became seriously ill and went to live with P and W; W cooked H's meals and did his laundry, but continued to sleep with P; H paid£7 per week for his board and lodging. W subsequently petitioned for divorce on the basis of s.1 (2) (e), and the Court of Appeal allowed her appeal against the judge's dismissal of her petition. Lord Denning MR said H and W were not "living together as husband and wife", and that was the meaning to be ascribed to the section.

Mouncer v Mouncer (1972) 1 ALL ER 289

The H and W were on very bad terms and resorted to sleeping in separate rooms. However they continued to take their meals, cooked by the W, together with either one or both of the children and shared cleaning the house, making no distinction one part of the house and the other. A subsequent petition for

divorce on account of living apart failed because a rejection of a normal physical relationship coupled with an absence of normal affection was not sufficient to amount to living apart within the law.

🚩 **Read also B vs. B (1977) ZR 159 (HC)**

The other fact is that they have lived apart for a continuous period of 5 years- s9 (1) (b) (e). The respondent can oppose a petition under 5 years separation and if the court is of the opinion that the dissolution of the marriage will result in grave financial difficulties or other hardship to the respondent and that in all the circumstances including the conduct of the parties and the interests of the parties and any child or children of the marriage it would be wrong to dissolve the marriage.

The court cannot make the decree absolute until it is satisfied that the petitioner should not be required to make financial provision for the respondent or that financial provision which has been made is just and fair. It should be noted that the hardship must result from the divorce not the breakdown of the marriage.

Conclusion

It may be considered trite that the current law on divorce that is followed by the courts and contained in the relevant statutes may be considered to be that which is practiced under the English common law. This is largely based on the fact that Zambia being a former colony of England which practices the English common law had its matrimonial law develop on the basis of what was the English common law both during the pre and post independence matrimonial causes law.