

HOLDEN AT LUSAKA

(Civil Jurisdiction)

**BETWEEN:**

**MUTALE MUSWEU**

**AND**

**IAN MUSWEU**



**APPELLANT**

**RESPONDENT**

**CORAM: Chisanga JP, Majula and Ngulube, JJA**

**On 22<sup>nd</sup> May, 2019 and 4<sup>th</sup> December 2019.**

*For the Appellant: Mrs. Findlay, D. Findlay & Associates and Ms. Mwape Bwalya, Mwenye Mwitwa Advocates*

*For the Respondent: Ms. I. Nambula, Sharpe and Howard Legal Practitioners*

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

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**CHISANGA**, JP delivered the Judgment of the Court

Cases Referred to:

- 1. Zanetta Nyendwa vs Kenneth Spooner SCZ judgment (2013) ZR 1 Vol. 2**
- 2. Re C(A) an infant C vs C (1970) 1 All ER 309**
- 3. J vs C (1969) 1 All ER 788**
- 4. D vs M (Minor Custody Appeal) (1982) 3 All ER 897**
- 5. Mponda vs Mponda Appeal No. 199 of 2015 SC**
- 6. The Minister of Home Affairs and Another vs Lee Habasonde (2007) ZR 207**
- 7. Kitwe City Council vs Nguni (2005) ZR 57**
- 8. Sililo vs Mend-a-bath Zambia Limited and Another SCZ 168 of 2014**
- 9. Promart Investment Limited vs African Life Financial Services Zambia Limited and Others (2013) ZR 341 Vol 1**
- 10. C vs C (Minors: Custody) (1988) 2 FLR 291**
- 11. Richard Mweemba vs Mary Munthali Mweemba SCZ Appeal No. 143 of 2010**

12. *Clissold vs Clissold* (1964) 108 Sol Jo 220,
13. *Willoughby vs Willoughby* (1951) P 184.
14. *Re F (a minor)* (1995) 3 All ER 641
15. *Re Adoption Application No. 41/61*, (1962) 3 ALL ER 553, p. 560
16. *R v Gygall* (1893) 2 QB 232 at p. 248
17. *Copeland vs Copeland* 904 50 2d 1066 (Miss. 2004)
18. *Re B (an infant)* (1962) 1 ALL ER at 875

Other works referred to:

1. **Bromley on Family Law, 3<sup>rd</sup> Edition at page 327**
2. **Rayden and Jackson on Divorce 5<sup>th</sup> edition at page 1410**

In this appeal, we will refer to the Appellant as the Petitioner, which is what she was in the Court below. The brief facts of the appeal are that the Petitioner and the Respondent's marriage was dissolved, at the instance of the Petitioner, by a Judgment dated 30<sup>th</sup> December, 2016. On 28<sup>th</sup> August, 2017, the Respondent, by summons, applied for a joint custody order of the child of the family. His affidavit evidence revealed that he would like to be granted joint custody of LM, the child of the family as efforts to access the said child in the past had proved futile. He had made arrangements for a live-in maid and his older sister to be readily available to attend to the child whenever she was at his home.

According to the affidavit, he reminded the court that it had made an order, on an application by the appellant for sole custody, that care and control was granted of the petitioner, with reasonable access to him. However, the appellant did not formalize the order. He came to learn of this through a search conducted by his advocates. Although he had seen Luwa Musweu occasionally

during school days at her school, he wished to have joint custody of the infant. He complained that the petitioner had not delivered the child to him as agreed earlier. She had also insisted that there be an adult person to accompany the child when allowing him access.

In seeking joint custody, he informed the court that he had made arrangements for a live-in maid, and his older sister to be available when the child visits him.

The Petitioner objected to the application, citing traumatising behaviour by the Respondent in the past which had led to the child to insist that she shares a bed with the Petitioner. She asserted that the respondent did not show concern for the child's well-being, safety or happiness. He did not relate with her because he suspected that the child was not his. The other reason was that the child's routine would be disturbed if a joint custody order was granted, and further that Luwa Musweu would be separated from her older sister. She stated that the Respondent frequently worked out of town and also worked on Saturdays while she had flexible working hours that allowed her to stay home with the child after picking her up from school thereby providing continuity. She also feared that the child would be constantly exposed to the Respondent's male friends who gather at his residence before motor bike riding or to play video games.

In his reply, the Respondent deposed that the Petitioner's allegations were baseless and a fabrication, aimed at portraying him as an unfit, irresponsible

