

The Legal Ramifications of the Importation of English Law

By

**Kondwani Sibande**

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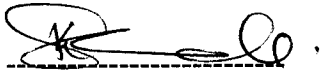
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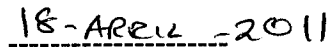
Being a directed research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

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I, Sibande, Kondwani do hereby declare that this Directed Research Essay is my bona fide work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of the Bachelor of Laws Degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorization in writing of the author.



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Kondwani Sibande

(Computer Number)

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Mr. Mabvuto Sakala

(Supervisor)

25/04/2011  
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09/05/2011

## **DEDICATION**

This work is dedicated to my loving and supportive mother, Harriet Hlupekile Sibande and to my young brother Fwambo Sinyangwe, I love you so much.

## ABSTRACT

It is essential for every society or country to have laws that reflect the aspirations of the people it seeks to govern. For this reason this dissertation looks at the ramifications of the application of English Law in Zambia without making the necessary changes to it in order to suit the social, economic, political and cultural status of Zambia. The paper looks at the application of the English common law, statutory law as well as case law and how such English Law has affected the Zambian legal system as well as the Zambian people at large. It is clear that English Law should be applied in Zambia only when and where there is a lacuna.<sup>1</sup> The case of *Ruth Kumbi v Robinson Kaleb Zulu*<sup>2</sup> made the White Book of 1999 applicable to Zambia and subsequently, made all cases stated therein, binding on the Zambian courts. This means that the White Book is now applicable even where there is no default in the laws of Zambia.

Zambia has her own legal system which should be peculiar only to her in that it should operate in Zambia in accordance with her problems or condition of living. The Matrimonial Causes Act of 2007<sup>3</sup> is a reproduction of the English Matrimonial Causes Act of 2007 and as such has not reflected the problems and conditions of the Zambian people. Therefore, English Law must not be applied in Zambia without making all the necessary modifications to it in order to suit the needs of the Zambian citizenry. The Zambian legislature will be on firm ground borrow from English law considering the fact that it is more complex than Zambian Law, however in so doing they must borrow only to the extent that such English Law does not diverge completely from the aspirations of the Zambian people.

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<sup>1</sup> The English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia and the British Acts (Extension) Act Chapter 10 of the Laws of Zambia

<sup>2</sup> S.C.Z No.19 of 2009

<sup>3</sup> Act No. 20 of 2007 of the Laws of Zambia

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I thank my mother for editing some of my work and for all the support and encouragement she gave me throughout my research especially when I felt like giving up. I thank her for being my inspiration because raising two children as a single mother is not an easy task but she still managed to give me the attention I needed in my life to get me this far. I love you mother and for this reason I will continue to make you proud.

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**LIST OF STATUTES**

- The British Acts Extension Act Chapter 10 of the Laws of Zambia
- The Constitution of Zambia Chapter 1 of the Laws of Zambia
- The English Law (Extent of Application) Act Cap 11 of the Laws of Zambia
- The Food and Drugs Act Chapter 303 of the Laws of Zambia
- The Foreign Judgments (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia
- The High Court (Amendment) Act, 2002, of the Laws of Zambia
- The High Court Act Chapter 27 of the Laws of Zambia
- The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
- The Marriage Act Chapter 50 of the Laws of Zambia
- The Matrimonial Causes Act 1973
- The Matrimonial Causes Act 2007 Act No. 20 of 2007 of the Laws of Zambia
- The Northern Rhodesia Order in Council 1900
- The Zambia Law Development Commission Act Chapter 32 of the Laws of Zambia



**TABLE OF CASES**

- Associated Chemicals Limited V Hill and Delamain Zambia Limited and Ellis And Company  
(As A Law Firm) (1998) S.J. 7 (S.C.)
- Attorney General v Chiluba and 7 others, 2007/HP/FJ/004
- Bishopsgates motor finance Corp. Ltd v transport Brakes Ltd [1949] 1 KB 322
- Carter v Boehm [1766] 3 Burr 1905
- Donoghue v Stevenson [1932] A.C. 562
- Lonrho Cotton Zambia Limited v Mukuba Textiles Limited SCZ Judgment No. 11 of 2002
- Michael Chilufya Sata Mp v Zambia Bottlers Limited (2003) Z.R.1
- Nyali Limited v The Attorney General [1955] ALL ER 646
- Rosemary Chibwe v Austin Chibwe S.C.Z. NO. 38 of 2000
- Ruth Kumbi v Robinson Kaleb Zulu SCZ No. 19 of 2009

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## CHAPTER ONE

### THE RAMIFICATIONS OF THE IMPORTATION OF ENGLISH LAW

#### 1.0 INTRODUCTION

Zambia is a former protectorate of Britain and after acquiring independence, English Law was handed down to her by England in order to help govern the country. As the law stands today, English Law is still applicable to Zambia pursuant to The English Law (Extent of Application) Act<sup>1</sup> and British Acts Extension Act<sup>2</sup> as well as through the adoption of English Law into the Zambian legal framework such as the Matrimonial Causes Act.<sup>3</sup> The reception of English Law into the Zambian legal framework was to have it operate side by side with customary law so long as customary law was not repugnant to good conscience, natural justice or any written law.<sup>4</sup> English Law is still applicable in Zambia to date despite the fact that Zambia can now enact laws that reflect her own social, economic, cultural, as well as political aspirations.

The paper intends to examine the legal ramifications of applying English Law in Zambia without making the necessary modifications to this law in order for it to suit the needs of the Zambian people. The paper will examine the application of the English common law, statute law as well as case law. It will further examine the Matrimonial Causes Act<sup>5</sup> in order to show the legal ramifications of importing substantive English Law. Furthermore, the *Ruth Kumbi*<sup>6</sup> will be scrutinized to show the legal ramifications of importing procedural English Law.

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<sup>1</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>2</sup> Section 2 of Chapter 10 of the Laws of Zambia

<sup>3</sup> Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia

<sup>4</sup> Northern Rhodesia Order In Council 1900 Article 17

<sup>5</sup> Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia

<sup>6</sup> *Ruth Kumbi v Robinson Kaleb Zulu* SCZ No. 19 of 2009

## 1.1 STATEMENT OF THE PROBLEM

Laws respond to the social, economic, political and cultural factors subsisting in a given country therefore, the laws that apply in England cannot be expected to apply in the same way in Zambia.<sup>7</sup> The problem of importing English Law into the Zambian legal framework is that, these laws do not fit well into the Zambian society and thus, Zambia has been faced with several ramifications due to such application.

There have been legal ramifications as a result of the importation of substantive laws of England into the Zambian legal framework. For instance, it was the Matrimonial Causes Act of 1973, which was enacted in England, that applied to Zambia automatically by virtue of section 11 (1) of the High Court Act<sup>8</sup>. This section provided that in divorce proceedings the “law and the practice for the time being in force in England” would be in force in Zambia. The implication of this provision was that, in divorce and matrimonial causes Zambia did not have her own laws but relied on those existing in England. Therefore, the Matrimonial Causes Act 2007 pertaining to divorce proceedings was a re-production of the 1973 English Act which was made for the peculiarity of the people of England and thus should have been applied to Zambia with all the necessary modifications so as to suit the needs of the Zambian people.

The *Ruth Kumbi case*<sup>9</sup> on the other hand, has been examined to show the legal ramifications of the importation of procedural laws of England into the Zambian Legal framework. The general implication of the judgment in this case is that it permits the use of the White Book of 1999 where there is no lacuna. The intention of parliament, as embedded in the English Law (Extent of Application) Act<sup>10</sup>, was not to use the White Book of 1999 as an alternative to the rules of procedure set out in the High Court<sup>11</sup>,

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<sup>7</sup> Nyali Limited v Attorney General (1955) ALL ER 646

<sup>8</sup> Chapter 27 of the Laws of Zambia

<sup>9</sup> Ruth Kumbi v Robinson Kaleb Zulu SCZ No. 19 of 2009

<sup>10</sup> Chapter 11 of the Laws of Zambia

<sup>11</sup> The High Court Act Chapter 27 of the Laws of Zambia

Subordinate Court<sup>12</sup> or Supreme Court Rules<sup>13</sup> but was intended to be applied only where and when there is a lacuna. Another implication of this judgment is that, all English precedents stated in the White Book of 1999 are binding on the Zambian courts regardless to the fact that there is Zambian precedent on a particular principle similar to the one in contention in the English cases.

## **1.2 RESEARCH OBJECTIVE AND RESEARCH QUESTIONS**

The objective of this essay is to show that English law cannot be applied in Zambia without making all the necessary amendments in order to suit the needs and aspirations of the Zambian people. The English common law, statute law, case law, the Matrimonial Causes Act<sup>14</sup> as well as the *Ruth Kumbi* case have been thoroughly examined in order to achieve this objective.

In order to achieve the set out objective various questions have been answered in the paper namely; Why does Zambia use English Law; Can English Law be expected to yield the same results in Zambia as it does in England, without having any regard to the differences in customs in both countries and lastly; Should English Law be applied in Zambia when and where there is a lacuna, or alongside Zambian domestic laws or whether English Law should not be applied at all.

## **1.3 SIGNIFICANCE OF THE STUDY**

This research is of great importance for it shows the consequences of importing English Law into the Zambian legal framework without making any necessary changes required to suit the living standards in Zambia, that is to say, the political, social, economic as well as cultural aspirations of the Zambian people. The study also demonstrates the need to settle the issue on how English Law should be applied in Zambia. Zambia has her own legal system which should be peculiar only to the needs of the Zambian people and must reflect

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<sup>12</sup> The Subordinate Court Act Chapter 28 of the Laws of Zambia

<sup>13</sup> The Supreme Court Act Chapter 25 of the Laws of Zambia

<sup>14</sup> Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia

the aspirations of the Zambian citizenry. It is a fact that English Law was handed down to Zambia to help govern the country, but this was simply because at the time Zambia gained independence she was not yet in a position to enact her own laws. Therefore, this study has shown that there is no need to apply English Law when Zambia can easily enact laws to suit the aspirations of the Zambian people. Conclusively, the case of *Nyali Limited v Attorney General*<sup>15</sup> suggests that an oak tree grown in England cannot be expected to grow in the same way in Zambia. If this tree is planted in Zambia it will grow differently or it will not grow at all. On the strength of this case, it follows therefore, that English Law cannot be expected to yield the same results in Zambia as it does in England.

#### **1.4 METHODOLOGY**

This legal research paper is qualitative as well as quantitative. Statutory law and case law were used to generate primary data and secondary data was obtained from books, scholarly articles as well as the internet.

#### **1.5 RESERCH DESIGN (Outline of Chapters)**

Chapter two will examine the legal ramifications of the importation of English Law in Zambia. The chapter will examine the application of English common law, statute law as well as case law in Zambia. In discussing the applicability of English Law in Zambian the paper will also look at the reasons why English Law cannot be applied in Zambia without making any necessary changes.

The Matrimonial Causes Act of 2007<sup>16</sup>, a brief history of its enactment and the ramifications of its application in Zambia will be discussed chapter three.

Chapter four will look at the legal basis of the White Book of 1999 and it will further give an appraisal of the *Ruth Kumbi* Case.

Lastly, the general conclusion and the recommendations will be summarised in chapter five of the essay.

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<sup>15</sup> [1955] ALL ER 646

<sup>16</sup> Act No. 20 of 2007 of the Laws of Zambia

## CHAPTER TWO

### ENGLISH COMMON LAW, STATUTE LAW AND CASE LAW

#### 2.0 INTRODUCTION

It has been alluded to in chapter one that English Law was handed down to Zambia by Britain in order to help govern this newly independent country. This law is applicable either directly through English statutes applicable to Zambia or indirectly through Zambian statutes enacted on the basis of English Law. In accordance with the English Law (Extent of Application) Act<sup>17</sup> the common law, the doctrines of equity and the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911), shall be in force in the Republic. The British Acts Extension Act<sup>18</sup> is another way through which English Law has been made applicable to Zambia. This Act permits the application of British Acts enacted after 1911 which are listed in the said Act. Zambia has also enacted law on the basis of English statutes such as the Matrimonial Causes Act of 1973<sup>19</sup> into her legal framework.

This chapter will look at the applicability of English Law in Zambia by giving a brief historical analysis on how English Law has force in Zambia. It will further delve into the consequences of not applying English Law without the necessary modifications and this will be illustrated with the aid of case law as well as statute law.

#### 2.1 BRIEF HISTORY OF ENGLISH LAW

Zambia traces her system of law to that of England and hence a brief history will be given on how English Law was born. The birth of the common law and the doctrines of Equity can be traced as far back as the 11<sup>th</sup> century around the year of 1066. The administrative ability of the Normans begun the process destined to lead to a unified system of law which was nevertheless evolutionary in its development. At the time the Normans conquered the

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<sup>17</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>18</sup> Section 2 of Chapter 10 of the Laws of Zambia

<sup>19</sup> Matrimonial Causes Act No.20 of 2007 of the Laws of Zambia



English, they were not concerned with changing the English customary law but instead, they were mainly concerned with the unification of the conquered and the conquerors.<sup>20</sup>

English Law begun in the reign of Henry II, who ruled between 1154 and 1189.<sup>21</sup> Justice for the most part, was administered in local courts by the country sheriffs and mainly this was done in their areas. Under their court system, the English also had what was known as the Royal Court '*Curia Regis*' (Kings Court) which was only available for high ranking persons to whom the King granted interests in large estates. Their court system was held together by *stare decisis* which meant that the court had to stand by its previous decisions.

In essence, common law is a judge-made system of law originating from ancient customs which were clarified, much extended and universalized by the judges (although that part of the common law which concerned the ownership of land was derived mainly from the system of feudal tenures introduced to Europe after the Norman Conquest).<sup>22</sup>

Kenan also wrote on the evolution of the doctrines of equity. According to him, these doctrines came about as a result of the defects in the common law. These defects included among other things, a rigid writ system, rigid procedures especially for trivial matters and corruption within the legal system. The remedies that common law offered were limited to damages only and in certain cases this proved inadequate.<sup>23</sup> These defects needed to be addressed so as to administer equal justice to all members of the society hence the birth of the doctrines of Equity. These doctrines were available in the court of Chancery but with the enactment of the Judicature Acts of 1873 and 1874 equity and common law were merged and this meant that both laws were to be applied in the same court and where there was a conflict between the two, equity was to prevail.<sup>24</sup>

Zambia (Northern Rhodesia at the time) on the other hand, was divided into two separate units that is, North-Eastern Rhodesia and North-Western Rhodesia. These two units were

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<sup>20</sup> D. Kenan. Smith and Kenan's English Law. 9<sup>th</sup> ed, Pitman Publishing Limited, London, 1989. Page 4

<sup>21</sup> D. Kenan. Smith and Kenan's English Law. Page 4

<sup>22</sup> D. Kenan. Smith and Kenan's English Law. Page 4

<sup>23</sup> D. Kenan. Smith and Kenan's English Law. Page 5

<sup>24</sup> R. Harrison, Good Faith in Sales, Sweet and Maxwell, London, 1997.

administered separately by the British South African Company (BSA Company) until 1911 when they were merged to form Northern Rhodesia. In 1923, the BSA Company ceded control of Northern Rhodesia to the British Government after the government decided not to renew the Company's Charter.<sup>25</sup> Northern Rhodesia became the Republic of Zambia on 24 October 1964, with Kaunda as the first president. At independence, despite its considerable mineral wealth, Zambia faced major challenges. Domestically, there were few trained and educated Zambians capable of running the government, and the economy was also largely dependent on foreign expertise. Zambia, like any other British colony that became independent also received common law precedent. Therefore, as of the date of independence, the common law was to be the default law, to the extent not explicitly rejected by the newly freed colony's founding documents or government.<sup>26</sup>

## 2.2 APPLICATION OF ENGLISH LAW TO ZAMBIA THROUGH COMMON LAW

This part of chapter two focuses on the application of the common law in Zambia. This common law on negligence, with regards to damages, under the law of tort was applied in the case of *Michael Chilufya Sata Mp v Zambia Bottlers Limited*<sup>27</sup>.

This was a case concerning the liability of a manufacturer to an ultimate consumer. Zambia has no codified law on damages hence the common law as was decided in the case of *Donoghue v Stevenson*<sup>28</sup> was applied. In the case of Michael Sata, the court held that, the Food and Drugs Act makes it a criminal offence to sell any food or drink which is contaminated with any foreign matter; that negligence is only actionable if actual damage is proved; that there is no right of action for nominal damages and that there was no injury or damages caused to the appellant by the adulterated drink as he did not consume any part of it. This judgement was held in accordance with the maxim *damnum sine injuria and injuria sino damnum* which means that there can be no action for negligence or damages alone for the two must co-exist to secure a cause of action.

<sup>25</sup> <http://en.wikipedia.org/wiki/Zambia> 'Zambia' 11th December, 2010

<sup>26</sup> <http://en.wikipedia.org/wiki/CommonLaw> 'Common Law', 19 December 2010

<sup>27</sup> SCZ Judgement No. 1 of 2003)

<sup>28</sup> [1932] A.C. 562

The court decided to apply this principle and disregarded the Food and Drugs Act<sup>29</sup> which provides that, a person who sells food that consists in whole or in part of any filthy, putrid, rotten, decomposed or diseased substance or foreign matter, or is otherwise unfit for human consumption is guilty of an offence. The Act is silent about civil liability as was alluded to in the aforementioned case however, if a manufacturer is guilty of such an offence he or she is criminally liable to the state alone.

The court in the case of *Associated Chemicals Limited V Hill and Delamain Zambia Limited And Ellis And Company (As A Law Firm)*<sup>30</sup> held that a company is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence. This means it cannot be imprisoned but can pay a fine to the state. In the instant case the appellant was the affected party and therefore, should have been redressed. In Zambia one can sue under civil law using the Food and Drugs Act, but a point of concern does arise when such adulterated products, contrary to the Act, are consumed. In this instance the state did not carry out any inspections in accordance with section 27 of the said Act for it to actually find the manufacturing company liable. The consumer was the one that brought an action against the company and as such must be redressed.

Therefore, if the Act finds the manufacturing company criminally liable for such breach of the law, it must follow that such a company must be civilly liable in damages for any physical or mental injury caused by the consummation of adulterated products. For this reason, the common law's need for one to have consumed the adulterated product and suffered some injury proven by medical evidence is extraneous of the fact that the drink was adulterated and caused an injury, mental or physical.

In the case of *Michael Sata*<sup>31</sup>, the appellant was mentally tortured from the sight of the cockroach in his drink and he should have been entitled to a remedy for an injury which injury is not only confined to physical injury but is also mental injury. Therefore, the manufacturer must not only be liable to the state but also to the ultimate consumer. This shows how the common law in a case of damages in relation to negligence must not be

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<sup>29</sup> Section 3(b) of Chapter 303 of the Laws of Zambia

<sup>30</sup> (1998) S.J. 7 (S.C.)

<sup>31</sup> SCZ Judgement No. 1 of 2003

applied without modifications. The courts must be able to make the necessary adjustments so as to suit the political, economical, cultural and social status of Zambia.

The learned trial judge made mention that cockroaches are a common sight in Zambia of which the court took judicial notice. If this is the case it follows therefore, that manufacturers who are negligent in the packaging of their products must be ready to suffer the consequences either civilly or criminally. The common law evolves to meet changing social needs and improved understanding therefore, Zambia must be able to create her own precedent in accordance with the changing social needs of the country.

### 2.3 APPLICATION OF ENGLISH STATUTES TO ZAMBIA

The application of English statutes in Zambia can be done either directly or indirectly. Zambia applies English Law directly pursuant to the English Law (Extent of Application) Act<sup>32</sup> and the British Acts Extension Act<sup>33</sup>. Conversely, this law can also be applied indirectly through the enactment of Zambian statutes based on English statutes as will and this will be looked into in chapter three.

Taking the Sale of Goods Act of 1873 as an example, this part will look at the impracticability of the principles of good faith, caveat emptor and *nemo dat quod non habet* (*Nemo dat* rule) and how they affect commercial transactions in Zambia.

The principle of good faith was introduced into English Law by Lord Mansfield in the case of *Carter v Boehm*<sup>34</sup> he stated that

Good faith forbids either party from concealing what he privately knows, to draw the other into a bargain, from his ignorance of the fact, and his believing the contrary.

This principle of good faith was decided in the court of Chancery so it has its roots in equity rather than common law. The period of industrialization led to the birth of *laissez faire*, which means let alone, were the state was to have no hand in the running of the economy.

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<sup>32</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>33</sup> Section 2 of Chapter 10 of the Laws of Zambia

<sup>34</sup> [1766] 3 Burr 1905

Due to the *laissez faire* approach by governments, there was and there still is little room for contracts to be negotiated on the grounds of fairness.<sup>35</sup>

In Zambia the Sale of Goods Act 1873 is still applicable for it was enacted before 1911 and also because there is no general codified law in Zambia concerning the sale of goods and contracts in general. The issue of good faith has not been encoded or defined in the aforesaid Act (though the Sale of Goods 1979 has introduced a definition of good faith) hence it makes it difficult to be certain as to what good faith really is. In Zambia like any other country, sanctity of a contract is respected however, due to the *laissez faire* approach that the state has on the economy there is little room for contracts to be negotiated on grounds of fairness.

For example in a case of perishable goods that are pre-packed such as tomatoes, one may not desire to buy all the tomatoes in a packet but due to its pre-packed state they have no choice but to purchase the whole packet. The seller in this situation may have knowledge that not all tomatoes are favourable for human consumption but will nevertheless sell the goods on a 'take it or leave it' basis. This example shows an act lacking good faith and is very common in Zambia in both the formal and informal sector and there is need to apply the Sale of Goods Act 1873 with the necessary modifications so as to address the problems being faced by Zambians in such contractual transactions. There are times when it is not possible to inspect all the items that are yet to be purchased in bulk but this does not mean there should be no redress for the damaged or wrong goods.

Unfortunately, the Sale of Goods Act 1873 imposes a duty on the buyer to inspect the goods before purchase and this is what is referred to as *caveat emptor* meaning 'buyer beware'. Fitzgibbon LJ explains the legal impact of *caveat emptor* and goes on to say that, this does not mean in law or Latin that the buyer must 'take a chance', it means that he must 'take care'. He further adds that it is a term of the contract, express or implied that the buyer shall not rely on the skill or judgment of the seller.<sup>36</sup>

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<sup>35</sup> C. Austin, 'To what Extent does Good Faith have a role to play in English Commercial Law and with the Sale of Goods transactions in particular?', *The Student Law Journal* (2009). Page 2

<sup>36</sup> *Wallis v Russell* [1902] 2 IR 585 at 615

The seller's skill or judgment is valued by any buyer for the seller is in a better position to advise a buyer before the goods are purchased and so a buyer will always rely on the seller. If a buyer has to be cautious or aware in a sale of goods transactions then this leaves little or no room for notions of good faith hence in the end the Sale of Goods Act 1873 does not protect the buyer from such situations. It is an appreciated fact that when it comes to contract law, Zambia is lagging behind and has no option but to rely on English Law, however, this should not be the reason why the legislature cannot enact Zambia's own laws on contracts. The legislature could get ideas from the Sale of Goods Act and enact law which is peculiar to Zambia rather than apply English Law without any adjustments to suit the needs of the Zambian people.

Another issue to note in the Sale of Goods Act 1873 is the *Nemo dat* rule. Charles Austin terms it as the most controversial issue in the Act when it comes to practicability of the Act. Section 21 of this Act provides that:

'Where goods are sold by a person who is not their owner, and who does not sell them under authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.'

He gives a classic example in his article <sup>37</sup> in which a rogue acquires property by deceit and sells it to a third party. In accordance with the *nemo dat* rule the innocent party will not obtain title because the rogue never had good title to pass. This is a controversial issue for it concerns two innocent parties. Lord Denning LJ in the case of *Bishopsgates motor finance Corp. Ltd v transport Brakes Ltd*<sup>38</sup> eloquently summed up such a situation into what was termed as 'two principles that have striven to mastery.' In the first place there is need for protection of property under which no one can pass better title than he himself possesses. Secondly, there is the need for the protection of commercial transactions under which a person, who obtains property in good faith and for value without notice, should get good title.

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<sup>37</sup> C. Austin, 'To what Extent does Good Faith have a role to play in English Commercial Law and with the Sale of Goods transactions in particular?', The Student Law Journal (2009). Page 6

<sup>38</sup> [1949] 1 KB 322

In Zambia, such situations occur on a daily basis on the commercial scene where items such as phones, cars and computers are stolen or acquired by deceit. The case of *Lonrho Cotton Zambia Limited v Mukuba Textiles Limited*<sup>39</sup> the court held that, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. And further held that, where goods are sold in the market overt, according to the usage of the market the buyer obtain a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the owner of goods.

This *nemo dat* rule was applied in the instant case, but the Sale of Goods Act is not fair towards the original owner were his or her goods are sold to a bona fide purchaser. Simply because there is no notice of defect of title on the part of the bona fide purchaser, the original owner loses his or her title if the item was sold in a market overt. This shows that the Act does not necessarily protect the original owner from losing title to his or her goods. Title only reverts back to the original owner were there is no market overt and the third party has notice of the defective title. This rule allows people who have defective title to pass such title so long as they have come within the ambit of the satisfactions of the *nemo dat* rule hence the only recourse for the original owner will be to bring a separate action in Tort under conversion of a chattel. Therefore, the Sale of Goods Act must not be applied as it is but must be modified in order to acknowledge and address the day to day transactions of the sale of goods in Zambia.

#### **2.4 APPLICATION OF ENGLISH PRECEDENT TO ZAMBIA**

In this part of the chapter, the paper will look at the High Court decision regarding the registration of the London Court Judgement against Chiluba and seven others.<sup>40</sup> This case will be used to show some of the reasons why English Law cannot be expected to yield the same results in Zambia as it does in England.

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<sup>39</sup> SCZ Judgment No. 11 of 2002

<sup>40</sup> Attorney General v Chiluba and 7 others, 2007/HP/FJ/004

The aforementioned case was commenced pursuant to the Foreign Judgments (Reciprocal Enforcement) Act <sup>41</sup> which is an Act to make provision for the enforcement in the Republic, of judgments given in foreign countries which accord reciprocal treatment to judgments given in the Republic, for facilitating the enforcement in foreign countries of judgments given in the Republic and for other purposes in connection with the matters aforesaid. The Act goes on to state that these judgments must be those made in respect of compensation or damages to an injured party.

The debtors in the aforesaid case eloquently argued that Zambia is a sovereign nation and therefore, the Zambian courts have jurisdiction to deal with civil claims in the same way that they deal with criminal proceedings. This means that Zambia does not need to go to English courts in order to enforce the laws it has enacted, as a sovereign state. The Zambian courts are the only courts that have jurisdiction and competence to decide matters on the breach of Zambian Law.

Counsels for the debtors also stated that, since it was the Zambian laws that were said to have been breached then the Zambian courts were best suited to interpret Zambian laws. These arguments just show that our country does not need judicial colonization by the English Law for in the same way that Zambia is capable of enacting law, it is also capable of interpreting it rather than rely on the English courts to administer justice in this sovereign state.

The arguments put forward by counsels for the defendants to disregard the English judgment's application in Zambia, are of great importance for they help show why Zambia must not enforce English Law without making the necessary adjustments to suit the status of the country. The government in the *Chiluba case* had both jurisdictional and competency problems with the Zambian courts and they further averred that Chiluba's matrix of plunder was too complicated for an average Zambian judge to comprehend or even handle.<sup>42</sup> This shows that the Zambian government is not confident in its own legal system and it still wants the country to be colonized again by the English only this time it will be judicial.

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<sup>41</sup> Chapter 76 of the Laws of Zambia

<sup>42</sup> <http://www.lusakatimes.com> "Zambia: London Court Judgment: Chiluba wins", Sunday, August 15, 2010



However, there is need to appreciate English Law for there are some difficulties faced with applying and complying with Zambian Law. For instance, Zambia has no law in the area of judicial review. Were a government administrative officer acts outside his scope of authority, there is need to have his actions rendered null and void and this can only be done through judicial review. The White Book of 1999<sup>43</sup> of England, which will be looked at in chapter four, has provisions to this effect therefore, Zambia uses it to ensure administrative functions of government officials are kept within the ambit of the conferred powers. Nevertheless, English Law must not be applied with complete disregard to the political, economic, cultural and social status of Zambia.

## 2.5 CONCLUSION

Conclusively, in the words of George Kunda (Minister of legal affairs and Vice President of Zambia) “the time has come for the country to enact its own legislation and to completely depart from the English Law”.<sup>44</sup> However, it should be noted that, as Zambia enacts her own laws there will be need to do so systematically and not hurriedly so as to have the whole exercise conducted in a smooth manner and not inconvenience the public.

The next chapter will delve into the ramifications of the importation of English Law indirectly through the adoption of an English statute. It will look at the enactment of the Matrimonial Causes Act of 2007 by giving a brief historical analysis on how the Act was enacted. The chapter will further look into the problems faced by the application of the Matrimonial Causes Act of 2007 especially with regards to customary law which makes up the most part of marriages in Zambia.

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<sup>43</sup> The Supreme Court Practice Rules 1999

<sup>44</sup> <http://www.timesofzambia.co.zm> ‘Zambia to depart from English law’, 10<sup>th</sup> December, 2010

## CHAPTER THREE

### THE MATRIMONIAL CAUSES ACT OF 2007

#### 3.0 INTRODUCTION

Zambia, on the 24<sup>th</sup> of October 1964 gained her independence and with this independence came the beginning of a dual legal system. The dual legal system comprises of civil law on one hand, which is law that the English handed down to Zambia and includes laws that are codified as well as those that are not codified and on the other hand is customary law, which was the law that governed the indigenous people of Zambia and it was not codified (it is still not codified thus far). These two types of law have since been administered in a parallel manner under two separate legal systems. Not only does Zambia use English Law enacted before 1911<sup>45</sup> and after 1911,<sup>46</sup> but it also uses English Law through the domestication of English Acts into the Zambian legal framework such as the domestication of the Matrimonial Causes Act of 1973 (which is now the Matrimonial Causes Act 2007)<sup>47</sup>.

This chapter will look at the ramifications faced by the Zambian society as a result of the adoption of a purely English Act into the Zambian legal framework. It will begin by showing what is meant by a dual legal system as well as a brief background on the Matrimonial Causes Act<sup>48</sup> and how it came to be part of the existing laws in Zambia. The chapter will then look at the effects of the adopted English Act by examining the duality of the two legal systems with regards to marriages in Zambia. Subsequently, the sustainability of a dual legal system will be discussed before arriving at a brief conclusion which will be a summation of what has been discussed in this chapter.

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<sup>45</sup>Section 2 of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

<sup>46</sup> Section 2 of the British Acts Extension Act, Chapter 10 of the Laws of Zambia

<sup>47</sup> Act No.20 of 2007 of the Laws of Zambia

<sup>48</sup> Act No.20 of 2007 of the Laws of Zambia

### 3.1 BRIEF BACKGROUND OF THE MATRIMONIAL CAUSES ACT 2007

Before the 6<sup>th</sup> September, 2007, not only did Zambia apply the English Matrimonial Causes Act of 1973 to resolve matrimonial disputes but it also used British Acts in relation to the Matrimonial Causes Act of 1973 such as the Children Act of 1989, the Domicile and Matrimonial Proceedings Act of 1973, the Family Law Reform Act of 1987, the Matrimonial and Family Proceedings Act of 1984, the Child Abduction and Custody Act 1985 and the Matrimonial Causes Rules 1977. The Matrimonial Causes Act of 1973 which was an enactment of the English Parliament, automatically operated in Zambia by virtue of section 11 (1) of the High Court Act<sup>49</sup> which provided that:

11. (1) The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England.

(2) The law and practice for the time being in force for the Probate, Divorce and Admiralty Divisions of the High Court of Justice in England with respect to the Queen's Proctor shall, subject to rules of court and to any rules made under the provisions of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, of the United Kingdom, apply to the Attorney-General.

(3) The jurisdiction of the Court in probate causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911).

(4) No probate of a will or letters of administration granted prior to the commencement of this Act to any person shall be invalid by reason only that the right to the grant was determined in accordance with any law in force in England after the 17th August, 1911.

(5) No suit or other legal proceedings shall be instituted against any person by reason only that the deceased person's estate was administered in accordance with the law in force in England after the 17th August, 1911.

The rationale behind the initial application of British laws in the independent Republic of Zambia was to provide a foundation upon which laws, specifically enacted for Zambia, could later be based. However, the intention of the drafters was not to make British laws apply to Zambia ceaselessly but it was only intended to be applied temporarily so as to serve as a foundation for the Zambian legal system (before new Zambian laws could be enacted).

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<sup>49</sup> Section 11 of Chapter 27 of the Laws of Zambia

Throughout the application of the Matrimonial Causes Act 1973 there had been some criticism because Zambia did not only rely on the 1973 Act but also on the 'law and the practice for the time being in force in England'<sup>50</sup>. The implication of section 11 of the High Court Act<sup>51</sup> was that in divorce and matrimonial causes Zambia did not have her own laws but relied on what the British Parliament provided for England. Therefore, this meant that, if the British parliament made an amendment to their laws on divorce and matrimonial causes for a reason specific to their situation (which they always did), that change affected the people of Zambia despite the fact that Zambia is a third world country with conditions far much different from those pertaining in the United Kingdom. For this reason the Ministry of Justice decided that the time had come for Zambia to have her own Act to deal with matrimonial disputes, hence the Zambia Law Development Commission (ZLDC) was tasked with the duty to look into the creation of a purely Zambian Matrimonial Causes Act.

The Zambia Law Development Commission in 2007 pursuant to the Zambia Law Development Commission Act<sup>52</sup> prepared an issue paper intended to encompass the active participation of the community so as to arrive at an Act that reflected the aspirations of the Zambia people with regards to matrimonial causes. The paper was purposed to achieve a number of objectives namely to announce the investigation into the enactment of such an Act; to elucidate the aim and the extent of the investigation; to point out possible options that are available for solving existing problems and; to initiate and stimulate debate on identified issues.

The application of the 1973 English Act to divorce proceedings had raised concern in that the Zambian society had and still has values and other conditions which are totally different from the values and conditions obtaining in the English society. Family law in Zambia was and still is undergoing change as a result of social, economic and cultural developments such

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<sup>50</sup> Section 11(1) of Chapter 27 of the Laws of Zambia

<sup>51</sup> Section 11 of Chapter 27 of the Laws of Zambia

<sup>52</sup> Section 4 of Chapter 32 of the Laws of Zambia

as inter-marriages among the indigenous tribal groups as well as between Zambians and other nationalities of different cultures.

The findings of the Zambia Law Development Commission were made subject to debate in Parliament before the Matrimonial Causes Act of 2007 was enacted.<sup>53</sup> The extensive debates that went on in Parliament will be discussed as the chapter unfolds and the content of the debates will also be used to show the effects of the new Matrimonial causes Act 2007, which is purely an English Act adopted into the Zambian legal framework.

### 3.2 THE ZAMBIAN DUAL LEGAL SYSTEM

The dual legal system in Zambia stemmed from the fact that there was differentiation between the white settlers and the natives in relation to which laws were applicable to which group of people. For instance, during the colonial era, the validity of a marriage in Northern Rhodesia (present day Zambia) was based on what type of law was used to enter into a particular marriage. This meant that, where a marriage was entered into under customary law it was viewed as invalid and conversely valid when entered into under the English Law.<sup>54</sup> Obviously, this arrangement did not prove to be fair to the natives hence after Zambia gained her independence, there were two systems of law that were applied namely civil law and Zambian customary law. It must be noted at this point that customary law seems to have a greater effect on matrimonial causes than other aspects of the law such as crime.

The Matrimonial Causes Act<sup>55</sup> was an Act only intended to regulate marriages under civil law (English Law) and not those under customary law. However, as the chapter unfolds it will be seen that the aforementioned Act does also, to a certain extent, govern customary law

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<sup>53</sup> The National Assembly of Zambia, 1st Session of the Tenth Assembly, Daily Parliamentary Debates for the First Session of the Tenth Assembly, Tuesday 7th August, 2007.

<sup>54</sup> F, Malata. 'Marriage Laws in Zambia: Is there need for Codification or Unification.' UNZA (1993) Page 1

<sup>55</sup> Act No. 20 of 2007 of the Laws of Zambia

marriages especially where cases reach the High Court for Zambia on appeal.<sup>56</sup> Unfortunately there is no codified law for customary law and today there seems to be a thin line between the two laws because marriages are now being entered into using both types of law. For example, when two people are getting married in the Zambian setup, (regardless of what culture they use or what ethnic group the two parties come from) payment of *lobola* (bride price) is made more often than not and after all other customary matters are attended to, the couple then moves on to fulfill their obligations under the Marriage Act<sup>57</sup> such as registering the marriage at the Registry of Marriages for Zambia offices.<sup>58</sup>

### **3.3.0 THE EFFECTS OF THE MATRIMONIAL CAUSES ACT 2007<sup>59</sup>**

The preamble to the Matrimonial Causes Act 2007 states that the Act is an Act to make provisions for divorce and other matrimonial causes; to provide for the maintenance of a party to a marriage and for the children of the family; to provide for settlement of property between parties to a marriage on dissolution or annulment of the marriage; to provide for the custody of the guardianship of children of the marriage to which the matrimonial proceedings relate; and to provide for the matters connected with or incidental to the foregoing.

#### **3.3.1 SUBSTANTIVE PROVISIONS WITHIN THE ACT**

The Matrimonial Causes Act 2007 as has already been alluded to is a Zambian Act based on the English Matrimonial Causes Act of 1973 which was said to have been unsuitable for the Zambian people for it was enacted for the peculiarities of the English. For this reason the Zambia Law Development Commission was tasked with the duty to come up with recommendations that will enable parliament to enact an Act suitable for the matrimonial disputes faced by Zambians in this day and age. However, even after the Commission's

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<sup>56</sup> *Rosemary Chibwe v Austin Chibwe* S.C.Z. NO. 38 of 2000

<sup>57</sup> Chapter 50 of the Laws of Zambia

<sup>58</sup> Section 29 of Chapter 50 of the Laws of Zambia

<sup>59</sup> Act No.20 of 2007 of the Laws of Zambia

investigations, the Matrimonial Causes Act of 2007 turned out to be a replica of the English Matrimonial Causes Act 1973. This is so because the parliamentarians debating the Matrimonial Causes Bill of 2007 felt that there was no need to change anything for the Matrimonial Causes Act 1973 was sensible just the way it was. The question one would ask at this moment is why this bill presented to parliament in the first place. The reasonable action that parliament should have taken was to simply amend the English Law (Extent Of Application) Act <sup>60</sup> and make English Law on matrimonial causes up to a certain date, applicable to Zambia just like they did with the Supreme Court Practice Rules (The White Book) when parliament made the White book up to 1999 applicable to Zambia . <sup>61</sup>

### 3.3.2 DIVORCE AND MAINTENANCE OF THE DIVORCED PARTIES

This part of the chapter will now concentrate on divorce and maintenance of a spouse after a divorce. The Zambia Law Development Commission's report<sup>62</sup> outlined the Matrimonial Causes Act 1973 provisions and significant issues that required discussion. This was done so that it was understood from a Zambian perspective. The Matrimonial Causes Act of 1973 provided for only one ground for divorce which must be that, the marriage has broken down irretrievably and has been maintained in the Matrimonial Causes Act 2007 <sup>63</sup> under section 8 which provides 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.

Section 9 further provides for the facts upon which the marriage can be held to have irretrievably broken down:

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.

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

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<sup>60</sup> Chapter 11 of the Laws of Zambia

<sup>61</sup> Section 2(e) of the English Law (Extent Of Application) Act, Chapter 11 of the Laws of Zambia

<sup>62</sup> Livingstone Work Report 25th to 26th April, 2005

<sup>63</sup> Section 8 of the Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia

- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
  - (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
  - (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted; or
  - (e) that the parties to the marriage have lived apart for continuous period of at least five years immediately preceding the presentation of the petition.
- (2) 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.
- (3) 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.
- (4) A decree of dissolution of marriage shall not be made if the Court is satisfied that there is a reasonable likelihood of cohabitation being resumed.

It was common cause that the petitioner to a divorce action had to prove that the marriage has so broken down and to prove this, such petitioner must rely on at least one of the five facts set out in the Matrimonial Causes Act of 1973. The main concern of the Zambia Law Development Commission was that of the separation periods of two and five years set out in the Matrimonial Causes Act of 1973.

The arguments put forward in this report were on the right footing for they were of the view that the two year separation period<sup>64</sup> as stipulated by the Act was too long and a reduction ought to be explored. Similarly, the five year separation period<sup>65</sup> also ought to be reduced to something more practical for both parties to the marriage.<sup>66</sup> It must be noted that if two people decide to enter into an institution of marriage they must be allowed to leave such institution if they cannot reasonably be expected to live together. If they are left to live together when they do not wish to do so, eventually one of them will die literally or

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<sup>64</sup> Section 9 (d) of the Matrimonial Causes Act No. 20 2007 of the Laws of Zambia

<sup>65</sup> Section 9 (e) of the Matrimonial Causes Act No. 20 2007 of the Laws of Zambia

<sup>66</sup> Livingstone Work Report 25th to 26th April, 2005



metaphorically. It follows therefore, that where such a decision has been made by either one of the parties, time should not be a bar to their happiness.

It must be well thought-out that, going through a divorce is different from waiting on a verdict for breach of a contract. A divorce affects people's lives in every aspect of life and thus there must be sensitivity with regards to the time that the parties should be given before a divorce can be granted so as to allow them to move on with their lives in peace. The sooner the two parties are separated the better for them to adjust and continue with their lives. In view of this, a period for couples to be separated so as to meet the divorce requirements is unreasonable, for the parties involved will have their lives put on hold until the court grants them divorce and due to this parties to the marriage including children tend to be bitter.

For example, if two parties are on judicial separation or are apart for two to five years, the financially able spouse is under the obligation to maintain the other spouse pending the divorce petition<sup>67</sup> as well as maintain himself or herself. If these two parties are not living together, costs of living become higher than when they are actually living together. Not only do the spouses have to worry about finances but they also have to think of the children (if any) and how they will be affected by the divorce. Children later lose faith in marriage simply because that of their parents broke down and this later leads to promiscuity and having illegitimate children for fear of entering into a marriage. Therefore, parliament should have taken the time to also look into this issue no matter how complex it might have seemed. This would have been a better option rather than rushing into enacting an Act that already exists<sup>68</sup> and then calling it a *Zambian Matrimonial Causes Act*.<sup>69</sup>

In the report<sup>70</sup> it was proposed that the current approach towards reconciliation should be revisited. Legal practitioners currently undertake to reconcile parties before filing

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<sup>67</sup> Section 52 of the *Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia*

<sup>68</sup> *The Matrimonial Causes Act 1973*

<sup>69</sup> *The Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia*

<sup>70</sup> *Livingstone Work Report 25th to 26th April, 2005*

proceedings but it has been noted that this is nothing more than a formality, as they have no particular counseling skills. Besides, the practitioners also want to get paid at the end of the day therefore, reconciliation is not a matter they are concerned with and thus expert counselors are required especially where one claims unreasonable behavior as a factor of the ground for divorce for any behavior is capable of being dealt with.<sup>71</sup> What must be taken into account is that, if the couple vowed to be married through thick and thin until death do them part then so be it all hence a party to a marriage must not be permitted by the law to rely on this factor solely.

As Mr. Mwiimbu, Honorable Member of Parliament (MP) from Monze<sup>72</sup> noted, there has been a misconception that, once you get married in church, that marriage would be regulated by the Marriage Act and thus some people have been finding it difficult to divorce based on the Christian marriage they contracted. Divorce under the Christian marriage is not permitted unless one commits adultery or dies. Therefore, if one is of the Christian faith and wants a divorce for unreasonable behavior they must seek guidance from the church and not the courts unless they expressly want to be governed by the civil law alone. At this point, the Matrimonial Causes Act<sup>73</sup> seems to govern more than just a civil marriage and thus should have included provisions to distinguish one marriage from the other and also to state how each marriage will be affected by the aforementioned Act.

What is not clear is why a 'new' Matrimonial Causes Act was needed if all that was going to be done by parliament was to re-enact the very same Matrimonial Causes Act<sup>74</sup> that was enacted in England by the English parliament. The reason why the ZLDC was tasked with the duty to come up with suggestions to enable the enactment of an Act to govern Zambia's matrimonial causes was, to make such an Act that was going to be a reflection of the aspirations and status (political, social economical and cultural) of the country. However, the

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<sup>71</sup> Section 9 (b) of the Matrimonial Causes Act No. 20 2007 of the Laws of Zambia

<sup>72</sup> The National Assembly of Zambia, 1st Session of the Tenth Assembly, Daily Parliamentary Debates for the First Session of the Tenth Assembly, Tuesday 7th August, 2007 at page 4

<sup>73</sup> Act No. 20 of 2007 of the Laws of Zambia

<sup>74</sup> Matrimonial Causes Act of 1973

‘new’ Matrimonial Causes Act was not changed to suit the needs of the Zambian people but was enacted just as it was in England in 1973.

Therefore, at this point it is quite difficult to appreciate the fact that parliament wanted to enact a Zambian Matrimonial Causes Act, for when it came to enacting such an Act parliament simply domesticated the English Matrimonial Causes Act of 1973. If the Matrimonial Causes Act of 1973 had problems before 2007 then it follows therefore, that it will still have the same problems as before. This situation can be equated to the mathematical problem of adding one and one and expecting the answer to be eleven but the answer still remains two. Therefore, this shows that Zambia is not ready to cut off the umbilical cord that ties her to her colonial masters and thus is still being colonized by the English even after 46 years of independence.

### **3.4 THE RELATIONSHIP OF THE MATRIMONIAL CAUSES ACT 2007 AND THE ZAMBIAN CUSTOMARY LAW**

Customary law as already alluded to is on the other side of the dual legal system and is recognized in Zambia under the Marriage Act<sup>75</sup>, the Local Court Act<sup>76</sup> and the Subordinate Court Act.<sup>77</sup> This customary law is not codified and some authors feel that in as much as civil law is codified and that English Law is applicable to Zambia it should also follow that customary laws must be codified in order to reflect the aspirations of the society that each type of law seeks to govern.<sup>78</sup> Despite it not being codified, it is still recognized as law in Zambia though it is made subject to the Marriage Act<sup>79</sup>, the Local Court Act<sup>80</sup> and the Subordinate Court Act.<sup>81</sup>

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<sup>75</sup> Section 38 of Chapter 50 of the Laws of Zambia

<sup>76</sup> Section 12 of Chapter 29 of the Laws of Zambia

<sup>77</sup> Section 16 of Chapter 28 of the Laws of Zambia

<sup>78</sup> M. Simwatachela, ‘The dual legal system and its effects on the administration of justice in Zambia’.

UNZA(2006) Page 44

<sup>79</sup> Section 38 of Chapter 50 of the Laws of Zambia

<sup>80</sup> Section 12 of Chapter 29 of the Laws of Zambia

<sup>81</sup> Section 16 of Chapter 28 of the Laws of Zambia

When it comes to marriages, parties to a marriage can decide which law they want to be applicable to any of their matrimonial causes. However, with the Matrimonial Causes Act of 1973 and 2007, there have been some difficulties in leaving customary marriages to the customs of the parties to the marriage.

The status of customary law in Zambia today is that each ethnic group has its own customary law which it seeks to follow and this must be respected by the 'new' Matrimonial Causes Act of 2007<sup>82</sup> whether it is in contravention of this Act or not. It is an appreciated fact that each one of these ethnic groups have customs that they want to follow by the letter, however, some Members of Parliament were of the view that there is need to address the governance of customary marriages which means that there is need to codify customary law. Honorable Musokotwane (MP) for Katombola, was of the view that, the idea of a Matrimonial Causes Act was to protect the average Zambian (who is marrying under the Customary Law and is in the majority). This meant that parliament should have thought about that 'average Zambian'. For this reason, the Matrimonial Cause Act that was being made was only for the elite in society who are less than a third of the population of this country.<sup>83</sup>

Despite the fact that Zambia has the benefit of a dual legal system, Zambians tend to mix the two laws in relation to marriages. For instance, before two people are married consent from their respective families is required<sup>84</sup> and at the same time *lobola* (bride price) needs to be paid. Furthermore, where a civil ceremony is held there is, more often than not, the delivery of the bride to the matrimonial home by her family which is required under customary law and at the same time the marriage will be registered.<sup>85</sup> Therefore, if this is the approach that the Zambian people have decided to take, then it follows therefore, that the Matrimonial Causes Act 2007 should have given effect to these aspirations instead of giving effect to

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<sup>82</sup> Matrimonial causes Act No. 20 of 2007 of the Laws of Zambia

<sup>83</sup> The National Assembly of Zambia, 1st Session of the Tenth Assembly, Daily Parliamentary Debates for the First Session of the Tenth Assembly, Tuesday 7th August, 2007 at page 13

<sup>84</sup> Section 16 the Marriage Act, Chapter 50 of the Laws of Zambia

<sup>85</sup> Section 29 of the Marriage Act, Chapter 50 of the Laws of Zambia

aspirations of the English in a different country (Zambia). However, in the Zambian courts today, statutory law is more often than not, applied to customary law issues.

For instance, the case of *Rosemary Chibwe v Austin Chibwe*<sup>86</sup> statutory law was applied to a customary law marriage, as a result creating two justice paradigms. The Supreme Court observed that, the dichotomy results from the application of an unrecorded customary law against a background of the changed environment of macro-economics, the growth of the common law of Zambia as well as the changes in social values influenced by international values received by Zambia all contributed to how family law was to be administered. In this case the issue of maintenance was discussed and the court held that she should be maintained. This maintenance however, was not that of *Ushi* customary law maintenance, but that found in the Matrimonial Causes Act.

The moment Mrs. Chibwe decided to marry under customary law she agreed to be governed by it. Prior to this decision a woman married under *Ushi* customary law did not support maintenance of a divorced or separated wife but after the judgment was passed maintenance under *Ushi* customary law was redefined (and this redefined customary law will remain the law should a similar case come before the courts).<sup>87</sup> However, looking at the observation of the Supreme Court on the changing society, the new Matrimonial Causes Act of 2007 should have made provisions for such situations for if the courts are faced by such a scenario again they will follow this judgment therefore it would be better to encode the application of the Act to customary law and accordingly this will serve as a permanent solution to all matrimonial causes in Zambia.

Honorable Minister of Justice George Kunda was of the view that slotting a section in the Matrimonial Causes Bill that will also apply to Customary Law would be procedurally complicated. He stated that there are rules of procedure that need to be followed including

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<sup>86</sup> S.C.Z. NO. 38 of 2000

<sup>87</sup> L. Mushota, *Family Law in Zambia: Cases and Materials*,  
(Lusaka: University of Zambia Press, 2005) Page 368

hiring a State Counsel which is very costly.<sup>88</sup> The Honorable Minister's arguments are difficult to agree with because it becomes difficult to understand the reason why a country would have laws that do not reflect the situations in the country. It would be better if parliament could enact laws that reflect the situation in Zambia and make all the necessary adjustments to make such laws enforceable. For instance, a court system specifically for family matters can be set up which will have non-stringent procedures and which must be affordable for all parties involved.

Family matters are not like business matters therefore a legal practitioner should not expect to make a fortune from breaking a home. Therefore, no matter how difficult it will be for legal practitioners to adjust to any changes made to current procedures of court,<sup>89</sup> these legal practitioners can still make adjustments in handling family matters. For that reason, the argument put forward by Honorable George Kunda that, lawyers are used to procedures of court and can not be expected to adjust is very difficult to comprehend and thus parliament should be ready to endeavor into the process of enacting proper laws no matter how complex it may seem.

For the reasons set out above, it would only be right that the Matrimonial Causes Act of 2007<sup>90</sup> be applied in conjunction with customary law. This will mean that aforementioned Act can be invoked where there is a lacuna in customary law or where the parties choose to oust the jurisdiction of customary law and thus use the Act. If this cannot be achieved, as was pointed out by many members of parliament while debating the matrimonial Causes bill, then it only leaves Zambia with the obvious choice which is, to have the dual legal system remain parallel. Yet again, if this proves futile then Zambia should reconsider her dual legal system so as to satisfy both sets of laws.

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<sup>88</sup> The National Assembly of Zambia, 1st Session of the Tenth Assembly, Daily Parliamentary Debates for the First Session of the Tenth Assembly, Tuesday 7th August, 2007 at page 9

<sup>89</sup> Honorable George Kunda, The National Assembly of Zambia, 1st Session of the Tenth Assembly, Daily Parliamentary Debates for the First Session of the Tenth Assembly, Tuesday 7th August, 2007 at page 32

<sup>90</sup> Act No. 20 of 2007 of the Laws of Zambia

### 3.5 EFFECTS OF THE DUAL LEGAL SYSTEM IN ZAMBIA

As a Zambian citizen, one has the privilege to choose which law will govern certain aspects of their lives such as marriage. One can choose either customary law or civil law to regulate their marriage and the subsequent matrimonial causes such as maintenance, property settlement as well as custody of the children of the family. Where parties choose civil law to regulate their marriage, there seems to be no problem at all when it comes to maintenance, property settlement or custody of the children after a divorce takes place. However, where parties decide to have their marriage regulated by customary law, all matrimonial causes under this law tend to be subjected to legislation.

The co-existence of the Zambian statutory law and customary law does give rise to internal conflicts between the two systems of law. Furthermore, internal conflicts may also arise where the parties to a dispute belong to different tribes with different customary laws. As has been shown, where there is a conflict between customary law and statutory law, the latter seems to prevail. However, in a case where the two parties belong to different ethnic groupings and both their customs were applied when entering the marriage, conflict will definitely arise with regards to which law should be applied. If one law is repugnant to natural justice, equity and conscience or contrary to any written law<sup>91</sup> then it will not be invoked and this will mean customs are not being followed simply because statutory law does not permit.

Another problem that customary law faces within the dual system can be seen in the Local Court<sup>92</sup> and Subordinate Court Acts<sup>93</sup>.

Section 12 of the Local Court Act states that:

12 (1) Subject to the provisions of this Act, a local court shall administer

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<sup>91</sup> Section 16 of Chapter 28 of the Laws of Zambia

<sup>92</sup> Section 12 of Chapter 29 of the Laws of Zambia

<sup>93</sup> Section 16 of Chapter 28 of the Laws of Zambia

- (a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law;

According to section 16 of the Subordinate Courts Act, customary law applies in civil causes and matters between Africans generally, and between Africans and non-Africans in limited circumstances. However, customary law will not apply if it is considered by the court to be repugnant to justice, equity and conscience, or incompatible with any written law. This just shows that customary law is not given full effect in the dual legal system in Zambia for the very Acts that grant the use of two separate laws are the same Acts that oust the jurisdiction of the other system of law (customary law). Therefore, the duality of the two legal systems in Zambia exists only in theory and not in fact.

Furthermore, were there is a lacuna in the application of the two systems of law in Zambia, it seems open for a judge to decide the dispute by resorting to the notions of justice, equity and good conscience. However, in cases where it is very clear that customary law is the one to be followed, the judge would go ahead and use statutory law and this can be seen in the case of *Munalo v Vengesai*<sup>94</sup> in which section 38 of the Local Court Act<sup>95</sup> was invoked and this saw the denial of the use of customary law to distribute the estate of a deceased person. The judge is given immense power to use either customary law or statutory law to distribute land of someone who has died intestate. If someone owns land it becomes his property therefore, if this acquisition was made through customary law it only follows that customary law must be used in distributing the estate should the owner die intestate. This shows that statutory law overrides customary law and thus the existence of a dual legal system is a legal fiction.

The dual legal system that exists in Zambia is ineffective because one system is subject to the other and yet there are meant to run parallel from each other. Therefore, it seems only right that there should be a law specifically meant to govern customary law marriages and such law will provide for any conflict of customs instead of letting statutory law govern

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<sup>94</sup> (1974) Z.R. 91

<sup>95</sup> Section 38 of Chapter 29 of the Laws of Zambia



customary affairs. This new law, if passed, should not contemplate that Zambia should do away completely with customary law marriages but it must intend redefine the customary law and any law relating to customary marriages.

Another problem that marriages in Zambia are faced with, as a result of the dual legal system, is that of the right age to marry. The Marriage Act<sup>96</sup> provides that:

33. (1) A marriage between persons either of whom is under the age of sixteen years shall be void:

Provided that this section shall not apply when a Judge of the High Court has, on application being made, and on being satisfied that in the particular circumstances of the case it is not contrary to the public interest, given his consent to the marriage.

In Zambia a minor is a person below the age of 18 years, under which they can not vote nor get a drivers license and neither can they enter into contracts that are not for necessities. Therefore, the fact that the aforementioned section provides an exception is very difficult to appreciate. Judges are in the judiciary to give effect to the law and not to violate it where it is deemed 'fit'. Allowing children to marry at the age of sixteen is no different from allowing the same child to participate in sexual intercourse with an adult. If this is the case, the Penal Code will be invoked and such an act will be termed as defilement which becomes a crime.<sup>97</sup>

### 3.6 CONCLUSION

Having laws that reflect the aspirations of Zambia at a given time is vital to the sustainability of the country. In 1964 not only did Zambia gain her independence but also the country enforced a dual legal system due to the fact that there were two groups of people living in the country that is the white settlers and the indigenous Zambians. English Law was thus handed down to Zambia so as to help set a foundation for the development of the Zambian legal system. Due to the fact that there is a dual legal system in Zambia it only

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<sup>96</sup> Section 33 of Chapter 50 of the Laws of Zambia

<sup>97</sup> Section 138 of the Penal Code, Chapter 87 of the Laws of Zambia

follows that laws enacted after 1964 must be able to reflect the aspirations and status (political, social, cultural or economical) of the country. It was for this reason that the Zambia Law Development was tasked with the duty to look into the enactment of a purely Zambian Act. The Commission was to come up with a report on how best Zambia can address the issue of matrimonial causes. Unfortunately, their views were not given effect and thus the Matrimonial Causes Act of 2007 was a re-production of the English Matrimonial Causes Act of 1973.

As has been shown in the chapter, the dual legal system only exists in theory but not in fact because customary law always seems to be subject to statutory law and this was seen in the aforementioned cases.<sup>98</sup> It is for this reason that the Matrimonial causes Act 2007 does not reflect the aspirations of the Zambian people for it is an Act based on a purely English Act. Therefore, there is need to reconsider the Act with regards to the factors for the ground for divorce and all the subsequent matters.

This chapter has looked at the ramifications of substantively adopting a purely English Act in Zambia. The next chapter will look at the legal ramifications that the Zambian legal system is faced with due to the importation of substantive English law. The chapter will look at the legal basis of the White Book in Zambia. It will further look at some of the provisions in the White Book that are incompatible with the Zambian legal system. Furthermore, the chapter will appraise the Ruth Kumbi case<sup>99</sup> as well as show the ramifications that the law in Zambia will face as a result of this Supreme Court judgment.

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<sup>98</sup> *Munalo v Vengesai* (1974) Z.R. 91 and *Rosemary Chibwe v Austin Chibwe* S.C.Z. NO. 38 of 2000

<sup>99</sup> *Ruth Kumbi v Robinson Kaleb Zulu* S.C.Z. No. 19 of 2009

## CHAPTER FOUR

### AN APPRAISAL OF THE RUTH KUMBI CASE

#### 4.0 INTRODUCTION

The Republic of Zambia, not only imported substantive laws from England but it also imported procedural laws of England.<sup>100</sup> In accordance with section 2 (e) of the English Law (Extent of Application) Act,<sup>101</sup> the Supreme Court Practice Rules of England in force until 1999 are applicable to Zambia and are Subject to the provisions of the Constitution of Zambia and to any other written law. Consequently, this chapter will examine the legal basis of the Supreme Court Practice Rules of England (herein referred to as the White Book of 1999). The chapter will further go on to show examples of provisions within the White Book of 1999 that are in conflict with the Zambian Law. Subsequently, the paper will show the ramifications of the Supreme Court decision in the case of *Ruth Kumbi v Robinson Kaleb Zulu*<sup>102</sup> and will arrive at a conclusion which will be a summation of what has been discussed in the chapter.

#### 4.1 THE LEGAL BASIS OF THE WHITE BOOK OF 1999

English Law derives its force of law in Zambia from the English Law (Extent of Application) Act<sup>103</sup> and the British Acts Extension Act<sup>104</sup>. The former Act provides that:

2. Subject to the provisions of the Constitution of Zambia and to any other written law-
  - (e) The Supreme Court Practice Rules of England in force until 1999:

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<sup>100</sup>Section 2 of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia

<sup>101</sup> Chapter 11 of the Laws of Zambia

<sup>102</sup> S.C.Z No.19 of 2009

<sup>103</sup> Section 2 of chapter 11 of the Laws of Zambia

<sup>104</sup> Chapter 10 of the Law of Zambia

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes shall be in force in the Republic.

The latter Act provides for the extension of British Acts to Zambia and its preamble reads:

The British Acts Extension Act is an Act to provide for the extension or application of certain British Acts to Zambia; and to provide for amendments to certain British Acts in their application to Zambia.

In the schedule of the Act, all the British Acts that have been extended to Zambia have been listed. It must be noted however, that these Acts must be applied with all the necessary modifications to reflect the aspirations of the Zambian people of which the law seeks to govern.

Section 8 of the Supreme Court Act<sup>105</sup> also intimates the use of English law. The said section provides that, where the Act or rules of court do not make provision for any particular point of practice or procedure, then the practice and procedure of the Court shall be, in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the court of Appeal in England.

The legal meaning of the aforementioned provisions of the law in Zambia is that, English law is to be applied in Zambia subject to Zambian Law. In essence this means that English law should only be applied when and where there is a lacuna.

#### **4.2 SOME OF THE PROVISIONS IN THE WHITE BOOK OF 1999 THAT ARE IN CONFLICT WITH ZAMBIAN LAW**

The learned Supreme Court Judges in the case of *Ruth Kumbi v Robinson Kaleb Zulu*<sup>106</sup> stated that the White Book of 1999 has now been incorporated into Zambian Law by statute and thus has become part of Zambian Law and therefore, all precedent that is contained in

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<sup>105</sup> Chapter 25 of the Laws of Zambia

<sup>106</sup> S.C.Z No.19 of 2009

the White Book of 1999 is now binding and not persuasive. Following this decision, certain provisions within the White Book of 1999 will directly be in conflict with the rules of court.

For instance, rule 1 of Order 9 of the High Court Act<sup>107</sup> provides that a writ of summons will be valid for not more than 12 months. On the other hand, rule 1 of Order 8 of the White Book of 1999 provides that a writ of summons will only be valid for four months. The principle in law concerning the conflict of two laws made or passed at different time intervals is that, the latter law supersedes the former law. The Zambian Supreme Court Rules concerning renewal of writs has not been amended since 1959<sup>108</sup> and as such it follows therefore, that rule 1 of Order 8 of the White Book of 1999 must prevail for it is the latter rule in time. The intention of the Zambian legislators was not to have the White Book of 1999 supersede all Zambian rules of practice and procedure in Zambia, the intention of section 2 of the English Acts (Extent of Application) Act<sup>109</sup>. As has already been alluded to the intention of the insertion section 2 was to have the White Book of 1999 apply to Zambia subject to Zambian written law. In essence the purpose of rule 1 of Order 9 of the High Court Rules becomes obsolete.

Another provision of the White Book of 1999 that is difficult to reconcile with Zambian rules of court is sub rule 2 of rule 1 of Order 10 of the White Book of 1999. This rule provides that a writ within the jurisdiction may be served on a defendant by ordinary first class post to the defendant's usual or last known address. In the case of *Nyali Limited v The Attorney General*<sup>110</sup> the court duly stated that an oak tree grown in England cannot be expected to grow in the same way in a different country. Sub rule 1 of rule 2 of Order 10 of the High Court Rules<sup>111</sup> provides that all writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications, in respect of which personal service is not a requisite, shall be sufficiently served if left at the address for service

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<sup>107</sup> Chapter 27 of the Laws of Zambia

<sup>108</sup> Amendment Act No. 106 of 1959

<sup>109</sup> Chapter 11 of the Laws of Zambia

<sup>110</sup> [1955] ALL ER 646

<sup>111</sup> Chapter 27 of the Laws of Zambia

of the person to be served, as defined by Orders 7 and 11, with any person resident at or belonging to such place, or if posted in a prepaid registered envelope addressed to the person to be served at the postal address for service as aforesaid.

This pre-paid postage does not necessarily mean ordinary post therefore, Order 10, rule 1, sub rule 2 of the White Book of 1999 will be difficult to be apply to Zambia taking into account Zambia's low technological efficiency and effectiveness. It must also be noted that in Zambia, the ordinary postal services are not as efficient and effective as those in England. Service of process by post is recognized in Zambia as can be evidenced by Section 5 of the Interpretation and General Provisions Act<sup>112</sup> which states that:

Where any written law authorizes or requires any document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

However, service of process by post must not be looked at literally for there is great need to look into the technological transfer of information in Zambia which at the moment is not as effective and efficient as that obtaining in England. Therefore, using ordinary post as stipulated in the white Book of 1999, which is the later law to that of the Zambian rules of practice and procedure, will be unjust on the recipient party for the postal services in Zambia are not as effective and efficient as those in England.

Applying the White Book of 1999 and Zambian rules of court at the same time is not practically possible for in as much as some of the provisions in the White Book of 1999 and the Zambian rules of court are at par, it cannot be ignored that some other provisions are not at par with the rules of practice and procedure in Zambia. Where there is a conflict between two laws in Zambia, the Constitution sets the validity of the force of each one of the laws in conflict. Next in the hierarchy of validity of the force of law is statutory law. However, in a situation where both laws in conflict have the force of law conferred on them by statute then the latter law supersedes the former law. Lucidly, it can be argued that the White Book of

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<sup>112</sup> Chapter 2 of the Laws of Zambia

1999 is more comprehensive as compared to Zambian rules of court. Therefore, if the White book of 1999 is substantially more comprehensive than local rules of court then it only follows that these local rules of practice and procedure should be rendered obsolete and this flies in the teeth of the intention of the legislatures when they inserted section 2 into the English Acts (Extent of Application) Act<sup>113</sup>.

### 4.3 THE RUTH KUMBI V ROBINSON KALEB ZULU CASE<sup>114</sup>

The brief history of the motion in this case is that on 28<sup>th</sup> of January, 2008 a single Judge of the Supreme Court granted leave in an application to dismiss the appeal of the aforementioned case<sup>115</sup> by the respondent. At the hearing of the motion to dismiss the appeal, the learned Judge on her own volition granted leave in an “unless” order directing the applicant to file her record of appeal out of time within 14 days. The other condition of this order was that failure to file the record of appeal within 14 days would result in the appeal being dismissed. The applicant failed to comply with the order as a result the Court dismissed the appeal. The applicant applied for restoration of the appeal to the active cause list, which was duly granted by the full bench of the Supreme Court of Zambia.

The Supreme Court made mention of section 2 of the English Acts (Extent of Application) Act<sup>116</sup> and added the following statement in their judgment;

‘now by statute, the Zambian courts are bound to follow all the rules and procedures followed as stated in the 1999 edition of the white Book.’

The entire provisions of the Rules of the Supreme Court as expounded in the White Book, 1999 edition, including the decided cases, are now law by statute and as such binding on Zambian courts.

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<sup>113</sup> Chapter 11 of the Laws of Zambia

<sup>114</sup> S.C.Z No.19 of 2009

<sup>115</sup> Appeal No. SCZ 28/288/2007

<sup>116</sup> Chapter 11 of the Laws of Zambia

The ramifications of this holding are quite extensive in that, not only will the incorporation of the White Book of 1999 in the Zambian Law affect procedural law in Zambia but it will also affect the substantive law that exists in Zambia. The court in this case misinterpreted the English Acts (Extent of Application) Act<sup>117</sup> to Zambia. The provisions of this Act are only to be applied subject to the provisions of the Constitution<sup>118</sup> of Zambia and to any other written law. It follows therefore, that English law must only be applicable in Zambia when and where there is no legal instrument governing a particular set of circumstances or that, such English Law must be modified in such a way that it fits within the ambit of the constitution or any other written law in Zambia. The intention of the drafters was not to make the White Book of 1999 part of Zambian statutory law but the insertion of section (2) (e) in the English Acts (Extent of Application) Act<sup>119</sup> was to apply the White Book of 1999 when and where there is a lacuna in the Zambia legal system.

In Zambia, section 10 of the High Court Act<sup>120</sup> states that:

The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice;

Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia unless they relate to matrimonial Causes.<sup>121</sup>

The effect of the amendment of section 10 of the High Court Act<sup>122</sup> is that the High Court Act could only use rules of practice and procedure of England which was enacted before

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<sup>117</sup> Chapter 11 of the Laws of Zambia

<sup>118</sup> Chapter 1 of the Laws of Zambia

<sup>119</sup> Chapter 11 of the Laws of Zambia

<sup>120</sup> Chapter 27 of the Laws of Zambia

<sup>121</sup> Section 2(b) of the High Court (Amendment) Act, 2002, of the Laws of Zambia

<sup>122</sup> Chapter 27 of the Laws of Zambia



1999 and only where there is a lacuna in Zambia rules of practice and procedure. Therefore, the holding in the instant case that, by statute the White Book of 1999 has force in Zambia means that, not only does it have force in Zambia but it will be used even where there is no default in the Zambian rules of procedure and this was not the intention of the legislators.

The Supreme Court stated that the White Book has by statute become part of Zambian statutory law. This essentially means that the White Book of 1999 has the full force of law in Zambia under statutory law and can be used even where there is no default in the Zambia rules of practice and procedure. This in itself will encourage unpredictability of the law and this goes against the tenets of a good legal system.<sup>123</sup>

Furthermore, the Supreme Court stated that decided cases of England pertaining to practice and procedure, are no longer of persuasive value but are now binding in Zambia. This statement is very difficult to appreciate because the use of English precedent stated in the White Book of 1999 will interfere with the precedent of the Zambian courts. If English cases become binding there will be a direct conflict with domestic precedent in that, where there will be a conflict between a decided English case and a Zambian one, one of them has to supersede the other. It is a principle of law that the latter law supersedes the former one and it follows therefore, that a case decided later in time will take precedent over the earlier one.

Where there will be a case before the court with two different precedents decided by two different courts at different times, the courts will be faced with a predicament. It is very clear that an earlier decision will take precedent, but what will happen when the case before court is on all fours with a Zambian case decided earlier than an English case but on the same principle.

It will mean that the English cases decided later in time will take precedent despite the fact that it was not decided on the peculiarities of the Zambian people. Therefore, there will be

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<sup>123</sup> M. Munalula, *Legal Process: Cases and Materials*, UNZA Press, Lusaka, 2006. Page 4

no justice dispensed in Zambia based on the aspirations of the Zambian people and this flies in the teeth of the intention of the legislators.<sup>124</sup>

Furthermore, not only will the lower courts be bound by English cases but the Supreme Court of Zambia will also be bound by English precedent and this will lead to judicial colonialism by the English judicial system. The Supreme Court will only be able to set new precedent when they override the English case and this will bring their competence as custodians of the law in question for it will be clear that they cannot set laws that suit the needs of the people they seek to dispense justice to. The case of *Times of Zambia LTD v Kapwepwe*<sup>125</sup> noted that it is still the function and duty of the courts in Zambia to develop the law against the background of Zambia's own social conditions and not those of England. This in turn means that English cases must and should remain of persuasive value and should not be binding. The Court also stated that after independence the courts in Zambia are not bound by English decisions but where a House of Lords decision is relevant to the law in Zambia it will normally be regarded as a highly persuasive authority.

The *Ruth Kumbi* case will bring about conflicts between precedents for the Zambian courts will be faced with a predicament to decide to either disregard Zambian precedent, which reflects the aspirations of the country, or to apply the English cases set out in the white Book of 1999 despite the fact that they were decided upon based on the aspirations of England. Clearly, this was not the intention of the legislators when amending the English Acts (extent of Application) Act<sup>126</sup> by inserting section 2 (e).

#### 4.4 CONCLUSION

It is an appreciated fact that after Zambia gained her independence she needed to integrate English Law into her legal system so that this English Law should serve as a legal base on which Zambia could enact her own laws. However, it is important for each country to have a

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<sup>124</sup> Chapter 11 of the Laws of Zambia

<sup>125</sup> (1973) Z.R 292

<sup>126</sup> Chapter 11 of the Laws of Zambia

set of laws that reflect the aspirations of its people and not those of the people of another country. Zambia has a competent legal framework to govern almost all aspects of life. However, this legal framework has its flaws and limitations and thus the English Acts (extent of Application) Act<sup>127</sup> and the British Acts Extension Act<sup>128</sup> have been enacted so as to serve as fillers where there are lacunas in Zambian Law. It is from these Acts that the White Book of 1999 derives its authority as law in Zambia.

However, the case of *Ruth Kumbi v Robinson Kaleb Zulu*<sup>129</sup> incorporated the White Book of 1999 into the statutory law of Zambia. This case has far reaching ramifications as has been alluded to. The judgment will bring about uncertainty and unpredictability in the law and this will go against the tenets of a good legal system. It is impracticable to use the provisions within the White Book of 1999 and those found in the Zambian rules of court at the same time for the two sources of law will more often than not be in conflict with each other. And when this occurs, the latter in time will supersede the earlier in time.

The court also made mention to the fact that since the White book of 1999 has by statute become part of Zambian Law and as such it follows therefore, that the decided English cases contained in the White Book of 1999 will no longer be of persuasive value but will now be binding on the Zambian courts. This in essence will erode the local case law in that if an English case is used authority upon which the court must decide a particular case before them, the court will be bound by such an English case. Another problem that the courts will face due to the judgment in the *Ruth Kumbi*<sup>130</sup> case is that where an English case is used as authority but at the same time there is a Zambian case on all fours with a current situation but is earlier in time, the courts will have no choice but to follow the principle set out in the English case on the same matter unless the court otherwise decides to override both decisions.

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<sup>127</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>128</sup> Section 2 Chapter 10 of the Laws of Zambia

<sup>129</sup> S.C.Z No.19 of 2009

<sup>130</sup> S.C.Z No.19 of 2009

Conclusively, the English Law applicable in Zambia, pursuant to the English Acts (extent of Application) Act<sup>131</sup> and the British Acts Extension Act<sup>132</sup> is only to be applied when and where there is a lacuna in the domestic laws. It is not practicable to apply the White Book 1999 in Zambia when there are rules of court that provide for practice and procedure.

It is an appreciated fact that Zambia can rely on English Law when it has no provisions within the law to go about an unprecedented situation and this was the intention of the legislators when they enacted the English Acts (extent of Application) Act<sup>133</sup> and the British Acts Extension Act<sup>134</sup>. Therefore the White book of 1999 should remain subject to the Constitution and any other written law and must not be incorporated into the statutory law of Zambia.

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<sup>131</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>132</sup> Section 2 Chapter 10 of the Laws of Zambia

<sup>133</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>134</sup> Section 2 Chapter 10 of the Laws of Zambia

## CHAPTER FIVE

### GENERAL CONCLUSION AND RECOMMENDATIONS

#### 5.0 CONCLUSION

Zambia is a former protectorate of Britain and after acquiring independence, English Law was handed down to her by England in order to help govern the country. As the law stands today, English Law is still applicable in Zambia pursuant to the English Law (Extent of Application) Act<sup>135</sup> and British Acts Extension Act<sup>136</sup> as well as through the adoption of English Law into the Zambian legal framework such as the Matrimonial Causes Act.<sup>137</sup> The problem of importing English Law into the Zambian legal framework is that, these laws do not fit well into the Zambia society thus Zambia has been faced with several ramifications due to such application.

In chapter two the ramifications faced in Zambia due to the application of common law, English Acts and English Case law were discussed. The case of *Michael Chilufya Sata Mp v Zambia Bottlers Limited*<sup>138</sup> common law was applied which made an action against a manufacturer for adulterated goods unmeritous for reasons that the consumer did not consume the goods and subsequently get injured. The fact that common law evolves to meet changing social needs and improved understanding of England was not taken into account and thus should not have been applied without any modifications.

The principles of good faith, caveat emptor and *nemo dat quod non habet* (*Nemo dat* rule) found in the Sale of Goods Act of 1873 affect commercial transactions in Zambia in that the *laissez faire* approach that Zambia as a state has taken on the economy, leaves little room for contracts to be negotiated on grounds of fairness. In turn a buyer fails to rely on the skill and knowledge of the seller and thus will enter into a contract which will be detrimental to him or her.

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<sup>135</sup> Section 2 of Chapter 11 of the Laws of Zambia

<sup>136</sup> Section 2 of Chapter 10 of the Laws of Zambia

<sup>137</sup> Matrimonial Causes Act No. 20 of 2007 of the Laws of Zambia

<sup>138</sup> (2003) Z.R. 1

In light of applying English decided cases in Zambia, Zambia is a sovereign nation and therefore, the Zambian courts have jurisdiction to deal with civil claims in the same way that they deal with criminal proceedings. This means that Zambia does not need to go to English courts in order to enforce the laws it has enacted, as a sovereign state.<sup>139</sup>

In chapter three the paper sought to show the effects of the Matrimonial Causes Act in Zambia. Due to the fact that there is a dual legal system in Zambia which is supposed to cater for statutory as well as customary law, it only follows that laws enacted after 1964 must be able to reflect the aspirations and status (political, social, cultural or economical) of the country. The Zambian dual legal system only exists in theory but not in fact because customary law is always subjected to statutory law.<sup>140</sup> Before two parties enter into marriage they carry out statutory as well as customary requirements and for this reason the law must have been formulated in such a way as to cater for the needs and wants of the Zambian people. If parties to a marriage can not reasonably be expected to live together, they must not be subjected to stringent laws in order for them to be granted divorce. For the reasons stated above, the Matrimonial Causes Act of 2007 was not enacted in the best interests of the Zambian society.

The paper in chapter four looked at the ramifications of the position of the White Book of 1999 in Zambia.<sup>141</sup> The English Law (Extent of Application) Act<sup>142</sup>, was intended to be applied only where and when there is a lacuna. Subsequent to the *Ruth Kumbi* judgment, all English precedent stated in the White Book of 1999 is now binding upon the Zambian courts whether or not there is Zambian precedent applicable to the facts of a case. Such ramifications fly in the jaws of the English Law (Extent of Application) Act<sup>143</sup> and thus defeat the whole purpose of the legislature's intention.

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<sup>139</sup> *Attorney General v Chiluba and 7 others*<sup>139</sup>

<sup>140</sup> The Local Court Act Chapter 29 and Subordinate Court Act Chapter 28

<sup>141</sup> *Ruth Kumbi v Robinson Kaleb Zulu* SCZ No. 19 of 2009

<sup>142</sup> Chapter 11 of the Laws of Zambia

<sup>143</sup> Chapter 11 of the Laws of Zambia

## 5.1 RECOMMENDATIONS

In light of what has been discussed in the paper the time has come for Zambia to enact its own legislation and to completely depart from the English Law.<sup>144</sup> The Zambian legislature must borrow from the English Law and enact laws that are a complete reflection of the aspirations and lifestyle of the Zambian people. It is a matter of fact that English Law is more developed than Zambian Law and it is for this reason that the Zambian legislature must borrow from the English and enact laws in Zambia with all the necessary variations to suit the aspirations of the Zambian people.

The Zambia Law Development Commission is in existence to give recommendations on how the law must be developed to suit the needs of the Zambian people. Where such a commission is empowered to give such recommendations, the legislature must consider them and not create law in a vacuum. In view of the Commission's submissions on Zambia's own Matrimonial Causes Act, the Matrimonial Causes Act of 2007 does not reflect the needs of the Zambian society for it does not give full effect customary law marriages. Therefore, in light of the above, the legislature needs to revisit the law concerning matrimonial causes in Zambia so as to address Christian marriages as well as the application of customary law to Zambian marriages.

There is also need to reduce the separation periods required by the Matrimonial Causes Act of 2007 in order to satisfy the grounds for divorce. The preamble of the Constitution of Zambia has declared Zambia as a Christian nation and in this vein the Matrimonial Causes Act needs to give effect to Christian values of marriage. This means that the Act must give effect to Christian values on marriage and in doing so it must not be applied to such marriages for under Christian values there are only two grounds for divorce namely; adultery and death of a spouse. Therefore, the Matrimonial Causes Act of 2007 must be amended or repealed so as to give birth to an Act that will give effect to all the values of all the Zambian people and not just the elite of society.

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<sup>144</sup> <http://www.timesofzambia.co.zm> 'Zambia to depart from English law', 10<sup>th</sup> December, 2010

With regards to the application of English Law, the English Law (Extent of Application) Act and the British Acts Extension Act<sup>145</sup> must be repealed and the legislature must enact laws to suit the needs of the Zambian people. As a sovereign nation, Zambia must be able to enact laws that will deal with all civil and criminal matters that arise within its borders. In essence, Zambia must completely do away with English Law and it must begin to enact its own laws to suit the needs of its people.

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<sup>145</sup> Section 2 of Chapter 11 of the Laws of Zambia



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