

EMMANUEL CHIROTO
versus
HEATHER HUNDA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 26 and 30 January, 13 February and 12 March 2015

Civil Trial

F Gijima, for the plaintiff
T Zhuwarara and S M Hashiti, for the defendant

UCHENAJ: The plaintiff and the defendant were customarily married in late 2009. On 10 April they appeared before a marriage officer who initially conducted a church blessing, marriage ceremony. The parties had published banns for a marriage in terms of the Marriages Act [*Chapter 5:11*]. They were to marry before a marriage officer who unfortunately had to attend to his Pastoral duties elsewhere on the date of the marriage. They had invited friends and relatives to their wedding

The original marriage officer requested Pastor Viniel Takavada Zhou the marriage officer who eventually conducted the ceremonies for the parties. Pastor Zhou invited the parties to a meeting with him so that he could prepare them for the wedding. On seeing the plaintiff's age he wondered if he was marrying for the first time. He asked him and was told that the plaintiff was a widower. He asked if he had a Master's certificate to confirm the death of his former wife. The plaintiff told him that he did not currently have such a document, but could obtain it later, leading to the marriage officer suggesting that he could in those circumstances only conduct a church blessing for them. The parties agreed with the marriage officer.

On the day of the ceremony Pastor Zhou conducted the church blessing. Thereafter the parties asked him to give them something which they could present to their guests and relatives as proof that they had married. Pastor Zhou, then conducted a marriage ceremony, observing the procedure followed when conducting a real and valid marriage. He asked the

parties to take marriage vows, which they did. He then declared them husband and wife. He filled in the parties' details on the first copy of the marriage register which provides for the completion of 3 copies for each marriage. He asked them to append their signatures on the first copy referred to earlier, which they did. He asked the parties' witnesses to sign on the first copy which they did. The marriage officer, who the Deputy Registrar of Marriages said was a qualified Marriage officer, also signed the first copy which he then gave to the parties to exhibit to their guests and relatives as proof that they were now married.

Pastor Zhou told the court that he told the parties that he would not complete the other two copies until the plaintiff brought the master's certificate. He at their request gave them the first copy which they wanted to use to apply for visas to enable them to travel out of the country for their honeymoon. He instructed them to bring it back on the understanding that he could not give them a marriage certificate until after the plaintiff had given him the master's certificate. The parties complied and brought back the first copy.

Thereafter it seems the plaintiff's love for the defendant grew cold. He did not bring the master's certificate to the marriage officer who had asked him to bring it to him before the expiry of 30 days from the date of the marriage as he was required by law to send documents of a solemnised marriage to the Registrar of Marriages within 30 days of the date of its solemnisation. The Marriage officer not being favoured with the document he required did not send the records of the parties' marriage to the Registrar. The defendant visited him several times enquiring as to whether the record of their marriage had been forwarded to the Registrar of Marriages. He on each occasion told her that he could not do anything further without the master's certificate. The plaintiff who must by then have lost interest in the marriage did not bring the required document. He has now sued for the nullification of the marriage, alleging that they did not enter into a valid marriage as they were issued with the first copy for purposes of merely showing off to their guests and families when in actual fact they had merely gone through a church blessing. The defendant opposed the plaintiff's claim for a declaration that their marriage was a nullity. It was submitted on her behalf that they entered into a valid marriage.

The Deputy Registrar of Marriages Mrs Spiwe Mutesva, who also testified for the plaintiff, told the court that the defendant approached their offices inquiring about the submission of the record of their marriage. She checked their records and found that no records of a marriage involving the defendant and the plaintiff had been submitted. She also checked as to whether there was evidence of the plaintiff's former wife Abigail Nyamuteya's

death. She established that the plaintiff's former wife's death had been recorded in their register against her marriage to the plaintiff. She told the court that it was therefore not an impediment to the plaintiff and defendant's marriage. Mutesva told the court that she took the issue to the Registrar General who said the marriage was not valid because its record had not been submitted to their office for registration.

Mutesva told the court that they instructed Pastor Zhou to bring the records of the defendant and plaintiff's marriage to their offices. She confirmed that the first copy which was completed is a record of the marriage by Pastor Zhou who she said was a qualified marriage officer. She confirmed that all the details of the parties which the marriage officer was required to record were recorded except that the plaintiff was recorded to be a bachelor when he is a widower, and the space on the left side of the certificate on which the date of the marriage was to be recorded was not completed. Exhibit 1 however clearly shows at the bottom that the marriage was solemnised on 10 April 2010.

The plaintiff closed his case after which Mr Zhuwarara for the defendant applied for absolution from the instance, submitting, that the plaintiff had not presented a *prima facie* case on which the court acting carefully might find for the plaintiff.

The issue which falls for consideration is whether or not the evidence led proves or might prove that what the parties did justifies a declaration, that the marriage the parties entered into was a nullity. Mr Zhuwarara relied on *South African Family Law* (Second Edition), by DSP Cronje and J Heaton for his submission that the plaintiff failed to prove that the marriage recorded on exh 1 is a nullity. He relied on p 41 para 4.1.2 which reads as follows;

“The court can declare a marriage null and void on the ground of non-compliance with the formal or material requirements for a civil marriage. The following are examples of situations in which the formal requirements are not met:

1. The marriage is solemnised by someone who is not a competent marriage officer,
2. A girl below 15 years of age or a boy below 18 years of age marries without having obtained the written consent of the Minister of Home Affairs.
3. No witnesses are present at the marriage.

The following are examples of situations in which the material requirements are not met

1. The parties are of the same sex
2. One of the parties is already married to someone else.
3. The parties are related to each other within the prohibited degrees of relationship.
4. One of the parties is below the age of puberty.

5. One of the parties is mentally ill.”

I agree, that some of these, circumstances, which are coincidentally also mentioned in the Marriage Act [*Chapter 5:11*] and in s 13 of the Matrimonial Causes Act [*Chapter 5:13*], are the circumstances which in our law, justifies a declaration of a marriage as a nullity.

Mr *Gijima* for the plaintiff in his response, relied on *Family Law Eighth Edition* by P M Bromly for his submission that the plaintiff has made out a prima facie case on which, a court, acting carefully might find for the plaintiff. He relied on p74 where the learned author said;

“Essentially a marriage will be void if either party lacks capacity to contract it or if the ceremony is formerly defective. Until the Nullity of Marriages Act it was doubtful whether lack of consent made a marriage voidable in the case of marriages contracted after 31st July 1971, the act specifically provides that this will make them voidable.

With the doubtful exception of lack of consent, the only ground on which a marriage could be voidable after 1929 was that one of the parties was impotent. The Matrimonial Causes Act of 1937 added four new grounds: the respondent’s wilful refusal to consummate the marriage, either party’s mental disorder, the respondent’s venereal disease, and the respondent wife’s pregnancy per alium. Impotence, the four statutory grounds (with some modifications) and lack of consent are the grounds on which a marriage will be voidable today.”

It is unfortunate that the parties’ counsels, on both sides decided to entirely, rely on South African and English law when our own statute law, which coincidentally, provides for similar but not identical requirements, for a valid marriage, do not justify total reliance on laws based on foreign statutes. Section 13 (2) of the Matrimonial Causes Act, reads as follows;

“13 (1) In addition to any other ground on which a marriage is by law voidable, a marriage shall be voidable on the ground—

(a) that the marriage has not been consummated owing to the wilful refusal of the defendant to consummate the marriage; or

(b) that either party to the marriage was at the time of the marriage mentally disordered or defective within the meaning of the Mental Health Act: [*Chapter 15:06*]

Provided that, in the case specified in paragraph (b), an appropriate court shall not grant a decree of nullity unless it is satisfied that—

(i) the plaintiff was at the time of the marriage ignorant of the facts alleged; and

(ii) the proceedings were instituted within a year from the date of marriage; and

(iii) marital intercourse with the consent of the plaintiff has not taken place since the discovery by the plaintiff of the existence of the ground for a decree.

(2) Nothing in subsection (1) shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.”

As already said, Counsel for both parties relied on text books written on the basis of the South African and English Marriages Acts. It should have occurred to them that we have our own Marriage Act [*Chapter 5:11*], which authoritatively deals with the issue at hand.

A reading of the Marriage Act [*Chapter 5:11*] reveals that,

1. Section 8 (1) of the Marriage Act, provides that;

“(1) A marriage may be solemnized by a marriage officer only.”

This means that a marriage solemnised by a person who is not a designated marriage officer is a nullity. Section 8 (2), makes it clear that a criminal offence will be committed if a person who is not a marriage officer purports to solemnise a marriage. It reads;

“Any person, not being a marriage officer, who purports to solemnize a marriage shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

2. Section 9 (1) of the Marriage Act provides that;

“Subject to subsection (2), no marriage officer shall solemnize any marriage unless in respect thereof and in terms of this Act or a prior law—

(a) each of the parties has caused banns of marriage to be published; or

(b) each of the parties has caused a notice of intention to marry to be published; or

(c) one of the parties has caused banns of marriage to be published and other has caused a notice of intention to marry to be published; or

(d) a marriage licence has been issued.”

This means a married solemnised without the publication of buns, notice of intention to marry or the issuance of a marriage licence, will be a nullity. Subsection (2) provides exceptions for parties who are subject to foreign marriage laws.

3. Section 17 (1) provides that, “no marriage shall be solemnised in pursuance” of lapsed buns, notice of intention to marry or marriage licence. This again means a marriage solemnised on the strength of such lapsed documents cannot be valid.

4. Sections 20 (2) as read with subsections (3) to (4), prohibits the marriage of minors except under the prescribed circumstances. Section 22 of the Marriage Act also prohibits marriages of boys below 18 and girls below 16 without the consent of the Minister, but gives exceptions. This means marriages of such persons outside the stated exceptions are a nullity. In terms of section 21 (1) and (2) marriages entered

into by minors without consent are voidable but not void, Section 21 provides as follows;

“(1) Where a marriage of a minor which requires the consent of his legal guardian or legal guardians or the consent of a judge under section *twenty* is contracted without such consent, the marriage shall not by reason of that fact be void, but may be set aside and declared to be void by the High Court in its discretion if his legal guardian or legal guardians, whose consent was required but not obtained, makes application therefore within a period of six weeks, calculated from the date on which he or they first had notice of such marriage, or within such further period as the court may allow: Provided that no such application shall be made against the wishes of the minor if, since the date of the marriage, he has attained the age of eighteen years.

(2) Where the marriage of a minor which requires the consent of his legal guardian or legal guardians or the consent of a judge under section *twenty* is contracted without such consent and is not set aside in terms of subsection (1), the marriage shall have effect in all respects as if it were a marriage contracted between persons both of whom were of full age.”

5. Section 24 of the Marriage Act prohibits marriages of persons related within specified degrees of relationships and the exceptions thereto. This means marriages of persons within specified relationships and outside the exceptions are void and in some circumstances voidable. Section 24 provides as follows;

“(1) For the avoidance of doubt it is declared that, on and after the date of commencement of the Criminal Law Code—

(a) no persons who are related to each other in any degree of relationship specified in subsection (2) of section 75 of the Criminal Law Code shall be capable of contracting a valid marriage, unless, in the case of persons who are related to each other as first or second cousins, they satisfy the marriage officer that they belong to a community referred to in subsection (3) of section 75 of the Criminal Law Code;

(b) persons who are related to each other by affinity shall be capable of contracting a valid marriage if the affinity relationship between them is not one described in paragraph (b) or (j) of subsection (2) of section 75 of the Criminal Law Code.

(2) If, on or after the date of commencement of the Criminal Law Code, a marriage is contracted or purports to be contracted between parties who are related to each other as first or second cousins without belonging to a community referred to in subsection (3) of section 75 of the Criminal Law Code, and at the time of the solemnisation of the marriage—

(a) the parties knew or realised that there was a real risk or possibility that they were related to each other as first or second cousins, such marriage shall be void;

(b) one of the parties knew or realised that there was a real risk or possibility that they were related to each other as first or second cousins, such marriage shall be voidable at the instance of the party who was not so aware within twelve months from the time when he or she became so aware;

(c) the parties did not know or realise that there was a real risk or possibility that they were related to each other as first or second cousins, such marriage shall not be void or voidable.

(3) For the avoidance of doubt it is declared that a marriage between persons who are related to each other as first or second cousins shall not be void or voidable if such marriage was contracted before the date of commencement of the Criminal Law Code.”

6. Section 25 (2) requires that a marriage be solemnised in the presence of the parties and a least two, witnesses, who should, be above the age of 18 years.
7. Section 25 (3) of the Marriage Act, prohibits a party from marrying through a proxy that is through the representation of a third party. If a party marries through such representation the marriage will be void. Section 25 (3) reads as follows;

“(3) No person shall, under this Act, be capable of contracting a valid marriage through any other person acting as his representative.”

8. Section 26 of the Marriage Act requires the marriage officer to cause each party to the marriage, to make specified vows of marriage if he is not a Minister of religion, or vows prescribed by his denomination if he is a Minister of religion. According to section 26 as read with section 31 that marks the end of the prerecording stage of a marriage ceremony. Parties will at that stage be married, but for the recording of their marriage. The vows of marriage other than those conducted by a minister of region will be worded as follows;

“I do solemnly declare that I know not of any lawful impediment why, I, A.B., may not be joined in matrimony to C.D., here present.” and each of the parties shall say to the other— “I call upon these persons here present to witness that I, A.B., do take C.D. to be my lawful wedded wife (or husband).”

The calling of those “here present to wittiness” the taking of the bride or groom as a lawfully weeded wife or husband indicates that a marriage comes into existence at that stage but for the recording thereof.

9. A reading of The Criminal Law (Codification and Reform) Act [*Chapter 9:23*], reveals that section103 defines a monogamous marriage as follows;

“Monogamous marriage” means

(a) **a marriage celebrated in terms of the Marriage Act [*Chapter 5:11*]** or any enactment repealed bythat Act; or

(b) any other marriage celebrated inside or outside Zimbabwe **under a law which prohibits the parties from marrying anyone else whilst they remain married to each other**” (emphasis added)

Section 104 of the Code makes it a criminal offence for a party married in terms of the Marriage Act to contract any other marriage during the subsistence of his or her marriage in terms of the Marriages Act [*Chapter 5:11*]. This means a marriage in terms of the Marriage Act cannot be validly contracted by a person who is already married to someone else.

The evidence led by the plaintiff does not establish the existence of grounds of nullity referred to in the Marriage Act, The Matrimonial Causes Act and the Code. All it establishes is that the marriage officer first conducted a church marriage blessing with the parties agreement. The parties later asked for proof of marriage which they were to show to their guests and families. That changed the original plan. The marriage officer then took steps to publicly solemnise a civil marriage in the presence of all present and witnesses. He caused the parties to take vows of marriage. He recorded in exhibit 1 that he had solemnised the parties’ marriage. He is a qualified marriage officer. According to his own testimony all he required was for the master’s certificate to be brought so that he could complete with the parties and their witnesses the remaining copies of the marriage register. He would then give them exhibit one and send the second copy to the Registrar of Marriages, for the marriage to be registered at the Registrar’s office. It is clear the marriage officer knew he had conducted a valid marriage which he was to complete by completing the copies he had left blank. He wanted the master’s certificate in time so that he could forward the records of the marriage to the Registrar within 30 days of its solemnisation.

The defects noted were the referring to the plaintiff as a bachelor and the omission to complete the left hand space for the date of marriage which was in fact endorsed at the bottom of the certificate. These are immaterial defects which do not affect the validity of a marriage. They can be corrected in terms of s 33 of the Marriages Act which provides as follows;

“(1) The Registrar **may correct any clerical error or error of fact or substance in any duplicate original register filed in his office or in possession of the parties to the marriage if there is produced to him such evidence as he may require, stating the nature of the error and the true facts of the matter, and he is satisfied that an error has been made.**

(2) If the Registrar makes any correction in terms of subsection (1), **he shall direct the marriage officer having the custody of the marriage register book in which the marriage in question is entered to make a like correction to the entry in that book.**”(emphasis added)

Mr Gijima submitted that the parties knew they were pretending to get married as demonstrated by their leaving the marriage certificate exhibit 1 with the marriage officer. That is rendered immaterial, by the marriage officer basing his submission of, the parties marriage to the Registrar of Marriages on what he had done and recorded in exhibit 1. According to his evidence he was not going to ask them to take further vows or complete another first copy. He was merely going to complete what he had started. What he had already done is all that is necessary to solemnise a valid marriage. The recording of the marriage in the marriage register by the marriage officer, in terms of s 31 and the registration of the marriage by the Registrar of Marriages in terms of s 32 of the Marriage Act though legally required and necessary, are after effects of a marriage which if not correctly done can be corrected, but do not render a marriage a nullity.

In my view the important stages towards the solemnisation of a valid marriage are;

- 1 The correct publication of bans, intention to marry or availability of a valid marriage licence. No issue arises from the parties' compliance with section 9.
- 2 The marriage was witnessed by competent witnesses.
- 3 They consummated their marriage. That is why they went on a honey moon.
- 4 The marriage is not afflicted by the grounds of nullity in ss 8 (1), 17 (1) 20 (2) to (4), 21 (1) and (2), 22, 24 (1) to (3) and 25 (2) and (3), mental illness, or a prior marriage by one of the parties,
- 5 The marriage officer was properly qualified.
- 6 The taking of marriage vows by the parties which is not in dispute. They took vows with a serious intent to marry as they were already customarily married. The taking of marriage vows is in my view the most important part of a marriage ceremony because any recording of a marriage depends on it. A marriage officer cannot record a marriage if the parties have not taken vows of marriage. It is in fact the last stage of the marriage ceremony, which justifies its being recorded in the marriage register. Section 31(1) of the Marriage Act confirms this by stating that the recording takes place immediately after the solemnisation of the marriage. It reads;;

“(1) **Immediately after the solemnization of a marriage, the marriage officer shall make an entry thereof in the marriage register book to be kept for that purpose** and shall complete two duplicate original registers of that entry, inserting therein the same particulars as appear in the entry. (emphasis added)

I am satisfied that the plaintiff did not establish a case on which a finding of nullity can or might be made.

The defendant's application for absolution from the instance is therefore justified. I therefore order as follows;

1. The defendant is absolved from the instance.
2. The plaintiff shall pay the defendant's costs.

Messrs Gijima & Associates, plaintiff's legal practitioners
Messrs Coglán Welsh & Guest, defendant's legal practitioners