

P
versus
D

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 29 May 2018 and 9 January 2019

Opposed Application-Special plea in bar

P. Dube for plaintiff
F Mahere for defendant

CHITAKUNYE J. The plaintiff and her husband are Zimbabwean nationals. They also acquired South African citizenship after moving to that country. They thus hold dual citizenship. On about 30th November 2015 the plaintiff and her husband contracted a civil marriage in terms of the South African laws. That marriage still subsists. The plaintiff and her husband have maintained their matrimonial house at X, Bulawayo.

The defendant is a Zimbabwean based in Bulawayo.

The plaintiff sued the defendant for adultery damages in a total sum of USD150 000.00. The plaintiff alleged that on diverse occasions the defendant committed acts of adultery with her husband at their matrimonial house in X, Bulawayo.

The defendant raised a plea in bar. The defendant pleaded that:

1. This court lacks jurisdiction to determine a claim for adultery damages of a marriage solemnised in a foreign jurisdiction, where that foreign jurisdiction does not recognise adultery damages. The marriage does not have the rights which plaintiff seeks to enforce in Zimbabwe.

Alternatively

2. The plaintiff's claim for adultery damages is inconsistent with the constitution of Zimbabwe, more specifically the rights to freedom of association, privacy, dignity and equality before the law.

The facts show that though plaintiff and her husband moved to South Africa they have maintained a home here described as their matrimonial home in X, Bulawayo. They have also retained their Zimbabwean citizenship. It is common cause that the cause of action arose in

Zimbabwe. The defendant's contention was that by marrying under the South African laws where adultery damages are no longer claimable, the plaintiff cannot sue defendant.

In determining whether this court has jurisdiction or not in a claim for adultery damages on events that occurred in Zimbabwe it is pertinent to consider the relevant principles affecting jurisdiction vis a vis the circumstances of this case.

The cardinal point is whether this court has jurisdiction to entertain the claim for adultery damages in the circumstances of this case.

Jurisdiction is generally the power vested in a court of law to adjudicate upon, determine and dispose of a matter.

It is trite that in order for a court to make an effective and binding decision on a case it must have both subject matter jurisdiction (the power to hear the type of case) and the personal matter jurisdiction (the power over the parties to the case)

In *Stander v Marais* 2015 (3) SA 424(WCC) the court cited Black's Law Dictionary, sixth edition, wherein jurisdiction is defined as follows:

"A term of comprehensive import embracing every kind of judicial action. It is the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgement. The legal right by which judges exercise their authority. It exists when court has cognisance of class of cases involved, proper parties are present, and point to be decided is within powers of court."

In *Katsande v Grant* 2012(2) ZLR231 (H) at 234G-235A ZHOU J aptly noted that:

"Three common law principles underpin the exercise by a court of its jurisdictional powers generally. These are the doctrine of effectiveness, the doctrine of submission and the *actor sequitur forum rei* rule.

See Herbstein & Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, p. 29-31. David Pistorius, *Pollak on Jurisdiction*, p. 3-8. The doctrine of effectiveness essentially means that jurisdiction depends upon the power of the court to give an effective judgment. In the case of *Steytler No v Fitzgerald* 1904 TH 108 at 111 De Villiers JP held that:

'A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgment.'

Then in *Morten v Van Zuilecom* (1907) 28 NLR 500 at 509 the court stated that the "great test of the jurisdiction of a court is its power to make its decree effective". See also *Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries* 1969 (2) SA 295(A) at 307; *Sonia (Pvt) Ltd v Wheeler* 1958 (1) SA 555(A) at 563; *Veneta Mineraria Spa v Carolina Collieries (Pvt) Ltd* 1987 (4) SA 883(A) at 893."

In *casu*, the plaintiff is a Zimbabwean citizen albeit also a citizen of South Africa. She apparently has homes in both countries. The defendant is not a peregrine but is resident in Zimbabwe. The plaintiff has not abandoned her domicile in Zimbabwe and by virtue of this action submitted to the jurisdiction of Zimbabwean court. In any case as aptly noted in the *Katsande v Grant* case (*supra*) domicile is not a ground of jurisdiction in a *delictual* claim for adultery damages.

In as far as the defendant is an *incola* it means this court can indeed give an effective judgement. The plaintiff has maintained her matrimonial home in Zimbabwe and is clearly not a *peregrinis*. This court can thus give a judgement it will be able to give effect to. In any case where a claim is in delict, the court of the area where the wrongful act was committed will generally have jurisdiction. In *casu*, the cause of action, that is the facts upon which the complaint is premised, arose in Zimbabwe and so this court has jurisdiction from that perspective as well.

It is further a general rule that under the *actor sequitur forum rei* rule, the plaintiff after ascertaining where the defendant resides, goes to his / her forum there with summons. The argument raised by the defendant suggesting that this court has no jurisdiction because the plaintiff's marriage was solemnised in South Africa is without merit.

The defendant argued that because the plaintiff's marriage was solemnised in South Africa, and as the South African Constitutional Court ruled that claims for adultery damages are no longer consonant with the South African Constitution, the Plaintiff cannot sue in Zimbabwe, for adultery that was committed in Zimbabwe. That argument in my view is misplaced. The reverse of it would be that had the plaintiff been married in terms of Zimbabwean Marriage Act [*Chapter 5:11*] and the adultery been committed in South Africa, the South African courts would have jurisdiction to award adultery damages in spite of the South African Constitutional court decision, on the basis that the marriage was solemnised in Zimbabwe where the delict for adultery damages is still recognised. That would certainly be absurd. The basis for court's jurisdiction must surely be based on where such cause of action arose and the applicable law in the territory where the cause of action arose. If court has jurisdiction over the particular class of action in that territory court should not shy away from exercising that jurisdiction on the basis that such cause of action has been outlawed in a neighbouring territorial jurisdiction, where, as in this case, the marriage was solemnised.

The defendant also argued that as court's jurisdiction on divorce matters is based on the domicile of the husband at the time the divorce action is instituted, this court has no jurisdiction

as plaintiff's husband is domiciled in South Africa. This argument is again misplaced. The issue here is not one of divorce but a claim for adultery damages out of the civil wrong perpetrated in this jurisdiction on plaintiff's marriage by defendant. Had the wrong complained of been perpetrated in South Africa, I would have indeed accepted that plaintiff should try her luck in South African courts.

I thus conclude that this court has jurisdiction in this matter.

Regarding the alternate argument that adultery damages are inconsistent with the constitution of Zimbabwe I am of the view that that is misplaced. Counsel relied on the South African court reasoning in arriving at its decision and urged this court to take that route.

It is pertinent to note that that in declaring the delict of adultery claim outdated and archaic in *DE v RH* 2015 (5) SA 83(CC), the South African Constitutional Court was dealing with the interpretation and application of the South African constitution which has its defined territorial limitations. Influences outside that territory are only persuasive and not binding.

As aptly noted by MWAYERA J in *Njodzi v Matione* HH 37/16 at p3 of the cyclostyled judgement: -

“The court in *DE v RH* considered the question for determination to be what are the consequences of adultery and thus only sought to highlight the quantum of damages. The **court considered the South African constitutional values** and also sought to rely on other foreign judgements. It then held that the award for *contumelia* had been rightly made but that the award for consortium was not justified. It held further that the **delict's continued existence in the South African context** was no longer justified.”

Outside the South African Constitutional values and South African context the South African court did not deprive its citizens or dual citizens from seeking recourse when their marriage is intruded upon in jurisdictions where the delict is still considered actionable.

Whilst the defendant's efforts in this regard is commendable, it is my view that Zimbabwe currently has not reached that stage where delictual claims for adultery can be abolished. This is an area where public education and 'enlightenment' is still required on the pros and cons of the delict. In my view there has not been enough changes in public policy and the community's general sense of justice to justify the abolishing of this delict. Without a buy in from the community in general, any attempt at abolishing the delict may be met with fierce resistance to an extent whereby court will be going diametrically opposed to the public policy and community's sense of justice in this regard. The Zimbabwean community still considers adultery as deserving of punishment to the paramour.

It is clear to me that the marriage institution in Zimbabwe is still held in sacrosanct and the need to provide some measure of protection is still considered necessary despite the high level of infidelity by those in such marriages; this being done for the sake of the innocent spouse for the loss of *consortium* and *contumelia*. If such protection is removed the innocent party would otherwise be tempted to take the law into his or her own hands as there would be no legal recourse to atone for the said loss of *consortium* and *contumelia*.

In *Njodzi v Matione (supra)* at p6 7 MWAYERA J whilst appreciating the role of courts in developing the law stated that:-

“To that extent therefore in deciding whether a delictual claim of adultery damages is constitutional or otherwise, while appreciating and respecting foreign jurisdictions’ decisions, the decision should be contextualised to reflect the legal convictions and societal values. Section 2 (1) of the Constitution of Zimbabwe is relevant and speaks volumes in respect of societal values. It reads:

‘This constitution is the supreme law of Zimbabwe and any law, practice, custom or contract inconsistent with it is invalid to the extent of the inconsistency. The obligation imposed by this constitution are binding on every person. Natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.’

Section 3 of the same Constitution, which is the supreme law of the country, outlines the values and principles on which the constitution is founded. A reading of the whole section clearly reveals that the constitution recognizes and accepts that the Zimbabwean moral fabric is engraved in the country’s culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution. The institution of marriage is entrenched deeply in the country’s culture, tradition and religion and its protection has been in unambiguous language propagated by the courts. See *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64. In both cases the courts frowned on the wrongfulness of adultery in so far as it is a threat to the marriage institution. Malaba J (as he then was) in the *Mungate* case held:

“Adultery is still prohibited by public opinion as an act of sexual incontinence.”

Later on, at p7, the learned judge stated that:

“This takes me to the purpose of adultery damages, being protection of the marriage institution. My reading of the case *DE v RH (supra)* reveals, to a great extent the court proceeded on the premise that the import of the delict is to restore a marriage or to prop it up. In my view, and with all due respect this is not the consideration. This marks a point of departure. The point which must be made is that the import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which our constitution is underpinned. Adultery damages are to compensate the innocent party to a marriage for their loss of *consortium* and *contumelia*. When an award for damages for adultery is made, the innocent party is not precluded from suing for divorce or condoning the wrong by the other spouse and forging ahead with the marriage.

At page 11 the learned judge aptly concluded that:-

“Any deliberate intrusion into the marriage institution is an attack on the dignity of an innocent spouse which ought to be sanctioned by the law. In my considered view the *bonis mores* or legal convictions of our society have not changed so much that adultery could objectively be regarded as reasonable and thus it remains unlawful. The legal and public policy in Zimbabwe, are still reflective of adultery as wrongful. This is more so given our legislative and constitutional provisions which are inclined towards protection of the marriage and family institution.

The marriage institution is founded upon morals and the constitution which is the supreme law of the country protects that very morally underpinned relationship. Intrusion in the marriage institution by adultery therefore remains wrongful and there is nothing unconstitutional about an adultery damages claim.”

The above conclusion depicts the current position of the law. There is nothing that has occurred to shift the scale in favour of abolishing the claim for adultery damages.

In associating myself with the above conclusion, I am mindful of the waning interest in the delict from some quarters of the community. It is my view that instead of court leading the crusade to abolish the delict, society through evolution must lead the process. As value systems change it is inevitable that claims for adultery damages may be abolished as archaic and no longer providing the intended protection for the marriage institution. It is only when public views have evolved to such level that courts may be called upon to pronounce the end of such a delict.

It is my view that the constitutional provisions that speak to the central position and importance of the marriage and family institutions are clearly in support of the protection of such institutions.

The freedom of association and privacy advocated by defendant where by a third party is allowed to intrude in marriage institutions under the guise of associating with whoever they want in any manner they want without issues of their rights to privacy being interrogated must give way to interests of the public policy on the sanctity of the marriage institution.

Accordingly, therefore, defendant’s special plea is hereby dismissed with costs.

Dube-Tachiona & Tsvangirai, plaintiff’s legal practitioners
Machekano Law practice, defendant’s legal practitioners