

MARYLOU PALACPAC MORTEN
versus
MARLENE DENISE KEMUI MORTEN
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 4, 6 September and 10 October 2013.

Civil trial

B Diza, for the Plaintiff.

C Chinyama, for the 1st Defendant.

UCHENA J. The plaintiff is a Philippino national resident in Zimbabwe. She on 1 June 1984 married Apolonio Ramos Dacany a Philipino in the Philippines. She thereafter on 16 February 2000 married the late Baker Eddy Morten an American who was resident in Zimbabwe. The later marriage was solemnised in Zimbabwe. She at the subsequent marriage presented herself as a divorcee. She apparently complied with the requirements for the marriage of a divorcee. The magistrate who conducted the marriage said she presented a divorce order which enabled him to issue them with a marriage certificate.

The 1st defendant is the late Baker Eddy Morten's daughter, who has been appointed the executrix dative of her late father's estate. She challenged the validity of the plaintiff's Zimbabwean marriage, to her late father. She alleged that the plaintiff was at the time of the Zimbabwean marriage still married to Apolonio Ramos Dacany.

The parties agreed on the issues to be determined at their trial. The issue of the validity of the plaintiff's marriage to the 1st defendant's father was agreed to be a determining issue and thus the parties agreed that it be determined first before the trial progresses into the other issues.

The 1st defendant who raised the challenge to the validity of the plaintiff's marriage led evidence, after which, Mr Chinyama the plaintiff's Counsel applied for absolution from the instance. Absolution from the instance is granted, when the party who has led evidence

fails to establish a *prima facie* case against the defending party on which a court might make a reasonable mistake and find for her.

In this case Mr Chinyama for the plaintiff submitted that the 1st defendant has not presented a *prima facie* case which justifies putting his client on her defence. He submitted that;

- (1) the plaintiff presented a decree of divorce to the marriage officer.
- (2) that Wendy Dias' search in the Supreme Court of Santo Domingo is not exhaustive and is thus not proof that the plaintiff did not divorce in the Dominican Republic.
- (3) that the late Baker Eddy Morten admitted in an e-mail message that he hired a con artist who obtained a decree of divorce for the plaintiff. Mr Chinyama further submitted that the 1st defendant in evidence admitted that this was merely the deceased's opinion on the validity of the decree of divorce.
- (4) that Apolonio Dacany deposed to an affidavit in which he says he is aware of the divorce which the plaintiff instituted
- (5) that the 1st defendant conceded that the search in the Dominican Republic was not exhaustive.
- (6) that the Philippines' law on divorce has not been properly ventilated, etc.

Mr Diza for the 1st defendant submitted that the 1st defendant has established that according to the Constitution of the Philippines Filipino national's are not allowed to divorce. He relied on the evidence of Marlene Denise Kemui Morten and a judgment of the Philippines Supreme Court in the case of *Van Dorn vs. Judge Romilo* G.R No L-68470 October 8, 1985. He further submitted that according to the records held by the Administrator and Civil Registrar General National Statistics' Office of The Republic of The Philippines Exhibit 2, the plaintiff is still married to Apolonio Ramos Dacany. This means the plaintiff has two co-existing marriages. That suggests that she was married when she entered into the Zimbabwean marriage, which could only have been validly entered into after the lawful dissolution of the Philippine marriage.

The real dispute is not on whether the plaintiff and the late Baker Eddy Morten performed the formalities which could have constituted a valid marriage in Zimbabwe. It is also not the production of a decree of divorce to the marriage officer which determines whether or not the

plaintiff was actually divorced. The searches by Wendy Dias and Apolonio Dacany's confirmation of the divorce are also not conclusive evidence of the existence of the divorce order. The ventilation of the Philippines' law on divorce is conclusive evidence on the existence of a subsisting marriage between the plaintiff and Dacany. That issue will be considered in detail in the Court's main judgment guided by the provisions of section 25 of the Civil Evidence Act [Cap 8: 01], which provides as follows;

- “(1) A court shall not take judicial notice of the law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe.
- (2) Any person who, in the opinion of the court, is suitably qualified to do so on account of his knowledge or experience shall be competent to give expert evidence as to the law of any foreign country or territory, whether or not he has acted or is entitled to act as a legal practitioner in that country or territory.
- (3) In considering any issue as to the law of any foreign country or territory, a court may have regard to—
 - (a) any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or recorded in citable form; and
 - (b) any written law of that country or territory; and
 - (c) any decision given by the High Court or the Supreme Court as to the law of that country or territory.
- (4) The law of any foreign country or territory shall be taken to be in accordance with a finding or decision mentioned in paragraph (a) of subsection (3), unless the finding or decision conflicts with another such finding or decision on the same question.
- (5) For the purposes of paragraph (a) of subsection (3), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe.”

This issue will depend on whether the 1st defendant qualifies to give expert evidence on the Philippines' law on divorce as provided by subsection 2 of section 25. She in her evidence said she is not an expert on Philippine law, and that concession settles the question whether or not expert evidence has been led on divorce laws of the Philippines. The issue will however further depend on the acceptability of the reported decision in the case of *Van Dorn vs. Judge Romilo* G.R No L-68470 October 8 , 1985, a decision of the Supreme Court of the Republic of the Philippines, where Melencio – Herrera J on page 3 said;

“What he is contending in this case is that the divorce is not valid and binding in this jurisdiction, the same being contrary to local law and public policy.

It is true that owing to the nationality principle, embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces the same being considered contrary to our concept of public policy and morality. However aliens may obtain divorces abroad, which may, be recognised in the Philippines, provided they are valid according to their national law.”

Without going into detail I am satisfied that this is a decision recorded and reported in citable form as required by section 25 (3) (a) of the Civil Evidence Act, which I can have regard to in considering the Philippines’ law on divorce and how it will affect the plaintiff’s purported divorce in the Dominican Republic. It meets the criteria set by section 25 (5) of the Civil Evidence Act. At this stage, I will however remain open to any evidence the plaintiff may lead to the contrary effect as envisaged by section 25 (4) of the Civil Evidence Act. This however means the plaintiff must open her case and lead evidence. Her application for absolution from the instance cannot therefore succeed.

The other real issue is whether what happened before the marriage officer in Zimbabwe, constitutes a valid marriage in view of authenticated documents from the Philippines, which clearly states that the plaintiff is still married to Apolonio Ramos Dacany. There is therefore evidence that the plaintiff is in two monogamous marriages. She has to prove that what these documents allege is not true and that her marriage to the late Baker Eddy Morten is valid. It can not be valid as long as the Phillipino records, indicates that she is still married to Apolonio Ramos Dacany. The Phillipino marriage which was registered on 1 June 1984 invalidates the latter marriage entered into by the plaintiff and the late Baker Eddy Morten on 16 February 2000.

In my view the official records from the Administrator and Civil Registrar General presents a serious challenge to the validity of the plaintiff’s marriage to the 1st defendant’s father. It is a certification of the existence of the marriage between the plaintiff and Dacany issued by the appropriate authority after a search of the Philippines’ National records of marriages solemnised between 1945 and 2013. According to exhibit 3 the search was to establish the existing and subsisting marriage between the plaintiff and Dacany. The search established that the plaintiff is still married to Apolonio Ramos Dacany. The plaintiff who should have better knowledge of the alleged divorce should give evidence, if she has such evidence. She should not be afraid of testifying on the validity of her marriage to the 1st defendant’s late father. She is the one who obtained the divorce order. She should know from which court she obtained it. She should be able to tell the court how such an order would be

registered in the Philippines to bring to an end her marriage to Dacanay. I would therefore lean in favour of proceeding with the trial. See the case of *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (HC) @ 554 A to B* where Smith J said;

‘In doing so, I was very conscious of BEADLE CJ's comments in the Supreme Service Station case, supra, that in case of doubt, a judicial officer should always lean on the side of allowing the case to proceed. In this case I had no doubt in the matter.’

In this case I do not do so because of any doubt but because the 1st defendant established the existence of two marriages which would have the effect of nullifying the Zimbabwean marriage.

In *Munhuwa v Mhukahuru Bus Services (PVT LTD 1994 (2) ZLR 382 (HC) Chatikobo J* at page 387 B-D said;

‘However, in the Supreme Service Station case supra at 5H-I BEADLE CJ said that:

"... rules of procedure are made to ensure that justice is done between the parties, and, so as far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what defendant has to say. A defendant who might be afraid to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance."

The bus was on the defendant's premises. It is the defendant's servants who are accused of removing the parts. The defendant is therefore particularly well placed to answer the accusations and this would in normal circumstances be sufficient evidence upon which I could make a reasonable mistake and find for the plaintiff.’

It is only fair that the plaintiff testify as to how she got the divorce order in the Dominican Republic, and its effect on the marriage registered in the Philippines. She has peculiar knowledge on how she got the divorce order she presented to the marriage officer, its validity and effect on her marriage to Apolonio Ramos Dacanay.

In the result, the plaintiff's application for absolution from the instance is dismissed with costs.

Messers Chinyama and Associates, Plaintiff's Legal Practitioners.

Messers Mutetwa & Nyambirai, Legal Practitioners for the 1st defendant.