

JILL CHAWAPIWA CHIKORE
versus
HELLEN MAWORERA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 27 February & 3 April 2024

Adultery Damages: Special Plea

Ms *T Mujaji*, for the plaintiff
Mr *M K Chigudu*, for the defendant

MUCHAWA J: The plaintiff issued out summons claiming adultery damages against the defendant who she alleges was engaged in an adulterous relationship with her husband, one Jabulani Tawanda Chikore since July 2020. They were married on 21 August 1998 in terms of the then Marriage Act [*Chapter 5 :11*] now the Marriages Act [*Chapter 5:17*]. There is one minor child born of the marriage. It is alleged that the plaintiff has suffered personal injury or contumelia and loss of her spouse's consortium. The inclusive amount of damages claimed is USD 50 000.00 being USD 25 000.00 a piece.

The defendant raised a special plea in bar by alleging that the court has no jurisdiction over this matter as both parties are British citizens who are permanently resident in the United Kingdom and the defendant has not consented to the jurisdiction of this court. It is further alleged that as no security has been offered in the court for plaintiff to be able to institute the present proceedings in this court as required by law the court has no jurisdiction. Additionally, it is pointed out that no order has been granted nor sought *ex facie* the summons and declaration granting leave to the plaintiff to sue the defendant in this court and the cause of action arose outside the jurisdiction of this court and cannot be adjudicated in this court which is the wrong forum.

It is prayed that the plaintiff's claim be dismissed as it has been brought before the wrong forum. In argument, Mr *Chigudu* submitted that the Honourable Court lacks the requisite jurisdiction to adjudicate over this matter as both parties are *peregrine* and the cause of action arose outside the jurisdiction of this court.

Reliance is placed on the case of *Hung Yuen Wong & ORS v Hsiao Cheng Liu & Anor* HH 380/13 wherein MATHONSI J (as he then was) stated that

“..... our civil practice and procedure is clear that a person domiciled and resident in a foreign country cannot be sued in this court as it does not have jurisdiction over that person. For that reason, there is need for an attachment *ad fundandam jurisdictionem* of that person or his property in order to make him amenable to the jurisdiction of the court. Such person or his property can only be attached while he/it is within the jurisdiction of the court and only after the attachment order has been issued by the court.”

The learned authors, Herbst and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th Ed Vol 1 p 96 are quoted in the case of *Wenzhou Enterprises v Chen Shaoling* HH 61-15 in which the object of attachment is set out as follows;

“The object of attachment was clearly stated by the above authors on p 97 when they stated

“Although the main object of the attachment is to find or confirm jurisdiction a further object of the attachment is to furnish an asset against which execution can be levied to satisfy the judgment which may be given so that the court’s sentence will not be rendered nugatory or, as it has been called a *brutum fulmen*.”

Mr *Chigudu* contended thus as no security has been offered or placed into the court at the institution of these proceedings, and no order has been granted or sought to sue the defendant in this court, the court has no jurisdiction.

The procedure to be followed in founding or confirming jurisdiction is laid out by stating that an application for attachment of property to confirm or found jurisdiction must be made before the issuance of summons against a *peregrinus*. In the case where it is established that a defendant is a *peregrinus* the procedure is that the summons must be withdrawn, and an application made for attachment. If the application is then granted, then new summons have to be issued.

In casu, it is averred that the plaintiff always knew as shown *ex facie* the summons and declaration, that the defendant’s address of service as cited is 1 Almond Walk Hatfield, At 10 8SY United Kingdom. It is pointed out that there was an attempt to sneak in an address which is not the defendants in an effort to mislead the court and solicit jurisdiction.

The declaration is impugned for failing to mention the nationalities of both parties in paragraphs 1 and 2. In paragraph 3 the plaintiff is alleged to have deliberately left out the place where the cause of action arose. It is averred that, in fact the cause of action arose outside the jurisdiction of this court and the court does not have jurisdiction. It is further submitted that the plaintiff should be saddled with punitive costs as this is abuse of court process. The case of *Mahembe v Matambo* is relied on.

The plaintiff's attempt to supplement the declaration through the answering affidavit after the special plea is said to be incompetent. The case of *Hunyenyeye v Kambani* HH 793/22 is relied on to argue that the court should not be left to wonder if it has jurisdiction.

It is prayed that the plaintiff's claim be dismissed with costs on a higher scale of attorney and client.

Ms *Mujaji* submitted that the replication before the court is responding to the special plea in bar and if the defendant had issues with the declaration, then she should have raised an exception. It is said that it is not an answering affidavit.

Ms *Mujaji* further submitted that it is in fact the defendant who wants to mislead the court by saying that both parties are foreigners to this jurisdiction and cannot consent to the jurisdiction of the court. It is averred that the plaintiff does not know where the defendant is based but only that she is a Zimbabwean. It is pointed out that the defendant is blowing hot and cold by saying on the one hand that no security for costs has been tendered, implying she is an *incola* of this country and claiming while she is permanently resident in the United Kingdom so a *peregrinus*. The case of *Hung Yuen Wong & Ors supra* was referred to, to argue that security of costs is only available to an *incola* of this country. It is argued that by such submissions, the defendant has consented to the jurisdiction of this court.

It is furthermore submitted that though the plaintiff and her husband moved to the United Kingdom, they have maintained their matrimonial home here in Zimbabwe and retained their Zimbabwean citizenship.

The case of *Katsande v Grant* 2012 (2) ZLR 231 (H) is cited as one laying the three common law principles underpinning the exercise by a court of its jurisdictional power,

“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 DA VID Pristorius 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.’”

It is argued that in this case, the plaintiff and her husband solemnized their marriage in Zimbabwe which means the court has the power to give an effective judgment. It is stated that the adultery was also committed in Harare Zimbabwe at the plaintiff's matrimonial home. It is averred that the defendant is not a *peregrine* but is a Zimbabwean citizen.

The case of *Katsande v Grants supra* is relied on to argue that domicile is not a ground of jurisdiction in a delictual claim for adultery damages.

The issue of dispensing with security for costs by a *peregrinus* is said to be within the discretion of the court in exceptional cases.

MATHONSI J (as he then was)'s remarks in *Bowes & Ors v Manolakakis* HB 103/11 is relied on as laying out the object of the rule of requiring security for costs being to ensure that an *incola* will not suffer any loss if he is awarded the costs of the proceedings. The rule is said to exist to primarily protect the interests of an *incola* who is sued by a *peregrinus*.

Jurisdiction is also argued to be based on where the cause of action arose by reference to the case of *P v D* [redacted]HH 3/19 where CHITAKUNYE J noted that where a claim is in delict the court of the area where the wrongful act was committed will generally have jurisdiction. *In casu* it is argued that such wrongful act occurred in Zimbabwe.

It is prayed that the special plea be dismissed with costs on a higher scale. The first ground on which the plaintiff justifies that this court has jurisdiction is that the cause of action arose within Zimbabwe. This averment does not however appear from the declaration. In paragraph 3 of the declaration, all the plaintiff says is:

“3. In July 2020 the defendant started having an adulterous relationship with my husband known as Jabulani Tawanda Chikore.”

She is silent on where such adultery occurred. It is only in the plaintiff's replication that the plaintiff then says

“The defendant and the plaintiff's husband engaged in their adulterous relationship in Harare Zimbabwe (sic)”

In the case of *Katsande v Grant supra* it was noted that at the time the summons was issued and served there was no averment that the cause of action had arisen in this jurisdiction. By reference to the case of *Ewing McDonald & Co Ltd v M & M Products* 1991 (1) SA 252 (A) it was held that the time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action. Such action is said to commence when the summons has been issued and duly served. See *Terblanche No v Damji & Anor* 2003 (5) SA 489 C AT 498 C at 498 D-E.

This means that *in casu* the belated replication cannot cure the jurisdiction on the basis of where the cause of action arose. The plaintiff also advances the argument of domicile of the plaintiff and her husband and that of the defendant as a basis on which this court has jurisdiction. It is averred that through the plaintiff and her husband moved to the United

Kingdom, they have maintained their matrimonial home here in Zimbabwe as well as their Zimbabwean citizenship. In oral submissions Ms *Mujaji* however said the plaintiff does not know where the defendant is based and all she knows is that she is a Zimbabwean.

This case appears to be an all fours with that of *Katsande v Grant* on the facts. In that case the defendant was resident in the United Kingdom as was the plaintiff. The plaintiff submitted that he had not abandoned his domicile in Zimbabwe. It was held that domicile is not a ground of jurisdiction in a delictual claim for adultery damages as the court cannot give effect to a judgment given in favour of the plaintiff and against the defendant where there has not been an attachment of the defendant's person or his property as such judgment would be illusory and unenforceable.

In *P v D supra* it was held as follows;

“It is trite that in order for a court to make an effective and binding decision on a case, it has to 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 casu through this court has jurisdiction over the subject matter, it is unclear if it has the power over the parties to the matter. The summons give the defendant's address as I Almond Walk Hatfield AL 10 8SY United Kingdom whilst the declaration has a Zimbabwean address of 33 Teviotdale Road, Borrowdale North, Harare. This is where summons were served on one Mrs Mudare, a tenant.

On the other hand, the defendant claims the parties are both British citizens and she has not consented to the jurisdiction of this court.

In this case, it is clear that the court may very well be unable to give effect to its judgment without an attachment of the defendant's person or her property.

It is clear from the summons and declaration that the plaintiff has not made adequate averments to establish jurisdiction.

There is an attempt to latch on to the defendant's special plea issue raised that the plaintiff has not tendered any security for costs, to then say only an *incola* of this country would be entitled to security for costs. It is alleged that she cannot in one breath say she is a resident of the United Kingdom and at the same time is an *incola* by claiming security for costs.

Security for costs are said to be only available to an *incola* of this country and by so pleading she has consented to the jurisdiction of this court.

In the case of *Hung Yuen Wong & ORS v Hsiao Cheng Liu & Anor supra* it was indeed held that a party seeking the remedy of security for costs must satisfy the court that it is *incola* before the protection can flow to it. *Incola* is said to connote the element of residence not temporary residents but it constitutes domicile of a country. The rule exists to protect the interests of an *incola* who is sued by a *peregrinus*.

In this case the defendant merely raises the shortcoming that the plaintiff has not offered any security whilst stating that both parties are British citizens permanently resident in the United Kingdom.

In the circumstances it cannot be said that the defendant has satisfied the court that she is an *incola*. She actually questions that in her special plea. The raising of this point cannot be said to equate to a consent to the jurisdiction of the court in such circumstances.

Given the facts and circumstances of this case, it is clear that this court does not have jurisdiction to entertain this action.

Costs

The defendant has prayed for costs on a higher scale as this process is an abuse of court process which has resulted in the defendant being unnecessarily put out of pocket defending an action which the plaintiff knew from the outset was a nullity. Persisting with the claim in the face of the special plea in bar is said to have unnecessarily detained the court. The case of *Mahembe v Matambo* HB 13/03 was referred to in support of this contention.

The plaintiff contended that the defendant has not established the basis why she is seeking costs on a higher scale.

The case of *Mahembe v Matambo supra* makes clear that awarding of costs on a higher scale is a drastic award which will not be resorted to lightly as a person has a right to obtain judicial decision against a genuine complaint. Some of the grounds on which costs on a higher scale will be awarded are dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings, malicious conduct, vexatious proceedings, reckless proceedings or frivolous proceedings.

In the *Mahembe v Matambo* case the respondent who was not a party to the contract giving rise to the proceedings opposed the application and provided fake documentary evidence in support of his false averments in his affidavits. This was seen as a brazen abuse of the legal system and in order to show its disapproval, the court awarded costs on a higher scale.

In *Faust Products (Pvt) Ltd v Continental Fashions (Pvt) Ltd* 1987 (1) ZLR 45 (HC) it was held that although the plaintiff's application was ill conceived and doomed to failure, an award of costs on an attorney and client scale would be justified only if the circumstances specially demanded such a course for instance if the application had been an attempt to harass the defendant or if the plaintiff had been guilty of opprobrious conduct.

In casu the defendant simply says the summons and declaration were ill conceived and doomed to failure due to the failure to plead jurisdiction properly. This cannot be enough to invite the censure of the court and to show disapproval. It is enough to make a finding that the court has no jurisdiction without costs on a higher scale.

In the result the plaintiff's claim is dismissed with costs on the ordinary scale.

Chimwamurombe Legal Practice plaintiff's legal practitioners
Zinyengere Rupapa, defendant's legal practitioners