

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA.**

CASE NO: 12415/22

In the matter between:

S[...] H[...]

PLAINTIFF

And

S[...] H[...]

DEFENDANT

JUDGMENT

MALATSI-TEFFO AJ

INTRODUCTION

[1] This is an uncontested divorce action in respect of a foreign marriage concluded in Zimbabwe. The defendants brought an Application from the Bar which was declined by the Court. As a result, the Court heard the matter on the 24th of November 2023 as uncontested.

[2] The Court requested Plaintiff to file Heads, more peculiarly addressing: the identity of the Parties, as the Marriage Certificate copy handed up was feint and did not record the identity numbers of the Parties. This case is twofold, firstly leave to pursue Exception by the Defendant and secondly the uncontested divorce action.

FACTUAL BACKGROUND

Application to pursue the strikeout.

[3] On 4 September 2023, my brother Swanepoel J struck out the defense application for exception, granting the plaintiff an order to approach the registrar of the court to seek a date for a hearing on an unopposed roll. On the date of the hearing of the divorce, the defendant's counsel appeared before me intending to viva voce seek leave to pursue the Defendant's Exception. There was no application filed on record for uplifting the struck-out order. Incidentally, the defendant had already filed the notice of Withdrawal of Intention to Defend on 19 September 2022, together with the signed settlement agreement which they later wanted to withdraw.

[4] As the matter has been dragging for quite some time, in the interest of justice I suggested that the matter be stood down for two days for the parties to discuss and come to a consensus, and/or for the defendant to bring proper papers for the lifting of the bar and the variation of the court order.

[5] The matter resumed on 24 November 2023, and the defence had not brought any paper whatsoever as directed by the court on the previous sitting and had refused as indicated by the plaintiff's counsel to discuss the settlement of the divorce matter. I enquired from the bench as to why they failed to come to court on the 4th of September 2022, he said that he had inherited the matter from a colleague however from his presentation it was clear that he had been dealing with the file for a reasonable time now. On the procedural issue, considering that I have allowed him

the opportunity to rectify the situation, he just could not explain, all he wanted was for the court to get into the divorce proceedings which was on another note unopposed.

[5.1] Notably, the defence counsel did not even place himself properly on record. The court adjourned the matter again from 11:15 until 2:00 pm to give him the last chance to sort his matter out. Upon resumption of court at 2:00 pm, counsel was not in court, and we had to wait for him for approximately 15 minutes and he did not have the decency to apologize for keeping the court waiting. They were not ready to proceed and wanted the matter to be postponed.

[6] Having listened to the counsel and having considered the papers, I then declined an application and allowed the plaintiff to proceed on an unopposed basis.

The divorce application

[7] The court then proceeded to hear the matter and the Plaintiff led evidence and prayed for relief in terms of the draft order filed on the case line seeking a decree of divorce as well as Redistribution of the Patrimonial Consequence of the marriage in accordance with the Zimbabwean Matrimonial Causes Act.

[8] Evidence led is such that on the 7th of May 1993 in Zimbabwe (Chitungwiza), parties were married in terms of the Zimbabwean Marriage Act, which marriage still subsists.

[9] The plaintiff is domiciled in the Republic of South Africa, Sunnyside, Pretoria, Gauteng, and has been so for a period exceeding 1 (one) year from the date of issuance of summons (1 March 2022).

[10] The plaintiff is domiciled in the Republic of South Africa, Sunnyside, Pretoria, Gauteng, and has been so for a period exceeding 1 (one) year from the date of issuance of summons (1 March 2022).

[11] There are no minor children born in the marriage.

[12] Before adjournment, I indicated that I needed to be satisfied on whether a proper case had been made out for relief sought, with special attention being given to the issue of Authenticity of the Marriage between the parties and the Identity of the Parties.

[13] Following the adjournment, the plaintiff's counsel filed the Identity Documents simultaneously with the heads of argument

[13.1] Plaintiff: Full name – S[...] (née D[...]) H[...]; Zim Identity Number: [...].

[13.2] Plaintiff SA Identity Number: [...].

[13.3] Defendant: Full name- S[...] H[...]; Zim Identity Number: [...].

[13.4] Defendant SA Identity Number: [...].

[14] To address the issue of Authenticity of the Marriage and the Identity of the parties as raised, the plaintiff said they took the following steps;

They engaged the office of the Zimbabwean Registrar of Marriages and explained the aforesaid issues raised. The Registrar of Marriages explained the procedures involved in proving legitimacy of A Zimbabwean marriage in a foreign jurisdiction. The Registrar of Marriages in Zimbabwe explained that in the event of disputation, a Zimbabwean Marriage was proved in a Foreign jurisdiction by adducing an Authenticated certified copy accompanied by certified copies of the parties' Identity

[15] Furthermore, Plaintiff then made certified copies of the Authenticated Marriage Certificate as well as all the Zimbabwean Identity documents as well as South African Identity documents to attach them to the Authenticated certified copy of the Marriage Certificate in dispute. A copy of the Certified Authenticated Certified Copy of the Marriage Certificate in dispute as well as all Identity Documents of the parties both documents for Zimbabwe and South Africa have been simultaneously filed with the head of Argument.

[16] **The issues** to be considered are whether the defendant can lead the viva voce evidence to pursue the exception without uplifting the bar. And whether a proper case had been made out for relief sought, with special attention being given to the issue of the authenticity of the Marriage between the parties. And Identity of the Parties

LEGAL PRINCIPLE AND ANALYSIS

[17] The Constitution of South Africa¹ provides that “an order or decision issued by a court binds all persons to whom it applies”.

[18] The court held that *the striking out of a defendant’s defence constitutes a bar to the defendant tendering evidence which had or could have been pleaded in its plea. However, the defendant’s legal representatives are still entitled to represent the defendant in the matter, despite the defendant’s defence being struck out*². In this regard, the court may on good cause shown condone any non-compliance with the rules³

[19] In this case, the defendant was absent from court, The striking-out order was necessary in this case to confine the defendants who as it is clear from how they conducted the matter(his legal representative in particular) have instituted proceedings as a mere delay tactic. He was thus precluded from pursuing the matter without bringing in a substantive application. Defendants failed to bring a substantive application, despite being allowed to do so.

[20] The constitution commands, that orders and decisions issued by the court bind all the persons to whom they apply. It follows from this that disobedience toward court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. If the conduct of the defense was to be sanctioned by this court, effectively the order granted on 4 September 2023 would be rendered nugatory and meaningless, and this would not be in the interest of justice.

[21] The Divorce Act⁴ provides in Section 2 (1)(a) that:

(1) “A court shall have jurisdiction in a divorce action if the parties are or either of the parties is-

(a) *Domiciled in the area of jurisdiction of the court on the date on which the action is instituted*

¹ S165(5)

² Motala NO obo K W v Road Accident Fund (42353/2019) [2023] ZAGPJHC 1428 (15 November 2023)

³ Rule 27 of the Uniform Rules of court⁷

⁴ Act 70 of 1979.

[22] **Furthermore**, the Divorce Act stipulates in terms of Section 4:

(1) “A court may grant a decree of divorce on the ground of irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.”

[23] The plaintiff resides in the Republic of South Africa, and has stayed in the country for more than a year, thus in terms of the Divorce Act this court has jurisdiction

[24] In terms of the Zimbabwean Marriage Act;

All the Zimbabwean marriages are by default out of community of property upon dissolution thereof by divorce, the Court is thus empowered to make a redistribution order as to the patrimonial consequences thereof in terms of the Zimbabwean Matrimonial Causes Act⁵ .

[25] Sections 7(1), and 7(4) of the Zimbabwean Matrimonial Causes Act reads as follows:

"7(1) Subject to the provisions of this section, in granting a decree of divorce, j u d i c i a l separation or nullity of marriage, or at any time thereafter, the Court may make an order with regard to: -

a). the division, apportionment, or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other ..."

[26] Counsel referred me to the Unreported Case of this Division to **R vs R**⁶, a matter in which the Court dealt with and disposed of a marriage concluded in a foreign jurisdiction, namely Zimbabwe in terms of the Zimbabwean marriage laws. Importantly, my brother *Justice Davis*

⁵ No: 33 of 1985 (as amended) of Zimbabwe

⁶ Case No: 37229/2015 GPTA

dealt with the applicable principles that are considered by the Court in granting a redistribution order in light of the dissolution, which similar relief Plaintiff also seeks in this matter before me

CONCLUSION

[27] The defendant has been precluded from pursuing the matter without bringing in a substantive application. When he came to court to present his matter, he failed despite numerous requests to assist the court by complying with the rules of substantive compliance, on that note his application failed.

[28] I am satisfied that the parties were married in terms of the Zimbabwean marriage and that the marriage still exists. Furthermore, the marriage has irretrievably broken down and there are no prospects of restoration.

ORDER

[29] **HAVING said that, I therefore make the following order:**

[29.1] The bonds of marriage existing between the Plaintiff and the Defendant are hereby dissolved.

[29.2] In terms of Section 7(1) of the Matrimonial Causes Act of Zimbabwe, Act No: 33 of 1985 (as amended):

[29.2.1] The Plaintiff shall retain as her sole property in a full and undivided share the following immovable properties:

[29.2.2]. The property known as or with description to wit No: [...] S[...] Road, Hatfield, Harare, Republic of Zimbabwe.

[29.2.3] .The property known as or with description to wit Unit [...] Helene, No: [...] L[...] Street, Sunnyside, Pretoria, Gauteng Province, Republic of South Africa.

[29.2.4] The Defendant shall retain as his sole property in a full and undivided share the following immovable properties:

[29.2.5.] The property known as or with description Erf [...] H[...] Park, Bulawayo, Republic of

Zimbabwe.

[29.2.6] The property known as or with description, a certain erf in Domboshava, Republic of Zimbabwe of which full and further particulars are to the Plaintiff unknown.

[29.2.7] The property known as or with description stand No: [...] Section 4, Suurman Location, Hammanskraal, Gauteng Province, Republic of South Africa

[29.2.8] The Plaintiff shall retain as her sole property in a full and undivided share, the movable property to wit:

[29.2.9] All household movables and personal effects at No: [...] L[...] Street, Sunnyside, Pretoria, Gauteng Province, Republic of South Africa as at the date of divorce.

[29.2.10] All household movables and personal effects at No: [...] S[...] Road, Hatfield, Harare, Republic of Zimbabwe as at the date of divorce.

[29.2.11] The motor vehicle with registration letter number XJB[...]GP, a BMW E90.

[29.2.12] The Plaintiff shall retain as her sole property in a full and undivided share her pension funds contribution under GEPF No: [...].

[29.2.13] Defendant shall retain as his sole property in a full and undivided share, the movable property to wit:

[29.2.14] All household movables and personal effects at No: [...] Section 4, Suurman Location, Hammanskraal, Gauteng Province, Republic of South Africa as at the date of divorce.

[29.2.19] All household movables and personal effects at No Erf [...] H[...] Park, Bulawayo, Republic of Zimbabwe as of the date of divorce.

[29.2.20] Each party shall pay any debt in his/her name as of the date of divorce.

[3] No order as to cost

MALATSI-TEFFO LM
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA.

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Date of hearing: 24 November 2023

Date of judgment: 17 April 2024