WENDY PATRICA PARTRIDGE v JOSEPH TITUS PARTRIDGE (1985) Z.R. 223 (H.C.)

HIGH COURT
(E.L.SAKALA, J.)
3RD DECEMBER, 1985
(CASE NO.1985/HP/D48)

Flynote
Family Law - Marriage - Non-consummation of marriage of convenience- Effect of.

Headnote
For the purpose of obtaining residential status in Zimbabwe the petitioner contracted a marriage of convenience with a Zimbabwean citizen. The parties did not consummate the marriage and had no intention

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of doing so. Upon her return to Zambia, the petitioner applied to the High Court for a decree of nullity, basing her petition on the fact that the marriage had not been consummated.

Held:
To constitute a basis for decree of nullity, failure to consummate a marriage must be due to wilful refusal by one of the parties, or it must be due to an incapacity which was not known to the other party at the time of the marriage.

Cases cited:
(1) Kumra v Kumra (1958) Times, April 30.
(2) Sheldon v Sheldon (1964) Times, July 8.
(3) Silver v Silver [1955] 2 All E.R .614.
(4) Morgan v Morgan [1959] p.92.

For the petitioner: R. M. A. Chongwe, SC, of Chongwe and Co.
For the Respondent: Undefended.

Judgment
E.L.SAKALA, J.:

This is an undefended divorce petition by the petitioner's wife for a decree of nullity on the ground that the marriage has never been consummated. The parties were married on 17th June, 1983, at the Registry of marriage at Bulawayo in Zimbabwe. The petitioner has pleaded that since then they have never cohabited together. She has continuously for a period of 12 months immediately preceding the presentation of the petition resided at 1 Eucalyptus Avenue, Chelston at Lusaka while the respondent is domiciled in Zimbabwe. There are no children of the family living.

The petitioner in her oral evidence told the court that after the ceremony on 17th June, 1983, she did not live together with the respondent. She explained that the marriage has never been consummated because it was purely a marriage of convenience to enable her obtain residential status In Zimbabwe because the respondent was a Zimbabwean citizen and through marriage with him she had no problems. She explained that before the ceremony of marriage she made attempts to secure residential status in Zimbabwe by applying through the normal procedure but she was rejected. But after the ceremony of marriage she was allowed to stay in Zimbabwe. She further told the court that she left Zimbabwe at the beginning of December, 1983. She explained that originally she had left Zambia because she was having problems and it is for this reason that she had gone through a marriage of convenience. She stated that previously she was with a boy friend who she resided with for 30 years. She returned to Zambia because this boy friend called her back. The petitioner also testified that since she left Zimbabwe, the only communication she had from the respondent is a form of a letter stating that he would like to marry and requested her for a divorce. She stated that

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this is why she has brought these proceedings so that she can be free. The petitioner also told the court that she was herself living with a boy friend.

In answer to questions by court as to what she understood of the ceremony, she explained that the whole thing was quite funny. She was picked up. They went to the Central Registry with two witnesses and got married. She said that her understanding was that neither of them would hold anything against each other. She said she appreciated right from the start that there was going to be no consummation of the marriage.

At the close of the petitioner's case, Mr Chongwe made brief submissions in which he cited a number of cases. I will be referring to these cases later in this judgment.

It must also be mentioned that the non-consummation of the marriage in the original petition was based on the refusal on the part of the respondent to consummate the same. Before Mr Chongwe closed his case, the court queried whether the particulars by alleging wilful refusal did not raise a contradiction in the evidence adduced by the petitioner. The query influenced counsel to amend the particulars in the petition by deleting the words alleging that non-consummation of the marriage was based on wilful refusal by the respondent.

I have very carefully considered the petition and the oral evidence by the petitioner in court. I am greatly indebted to counsel for the authorities cited. The fact that the parties went through a ceremony of marriage is common cause. It is also common cause that this marriage has not been consummated. There is no allegation of wilful refusal of either spouse to consummate the marriage. There is no evidence that attempts were made to consummate the marriage. As a matter of fact the evidence is that the parties never cohabited together after going through the ceremony of marriage. The reason for the non-consummation as pleaded and testified to by the petitioner is that this was a marriage of convenience to enable her to obtain Zimbabwean residential status which she had failed to obtain through the normal channel. She obtained this status through this marriage of convenience and now asks this court to declare this marriage null and void. In other words she wants this court to pronounce that although she obtained the Zimbabwean status through that ceremony of marriage

the marriage was non-existent as it was only for convenience to obtain the status.

At this juncture it is convenient to look at some of the cases where the question of the nullity of marriage on the basis of non-consummation of marriage has been decided. I must observe that the record of the case of *Kumra v Kumra* (1) cited to me by counsel was not available. In *Sheldon v Sheldon* (2), a case referred to by Mr Chongwe, was a marriage in name only. The wife was an Italian by nationality. She worked in a factory although she had a permit to work as a nurse. Fearing that she would be sent back to Italy if this was discovered by the Immigration

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Authorities, she went through a ceremony of marriage with the husband. A month after the ceremony the husband was sentenced to a long term of imprisonment which he was still serving. Although the parties met after the ceremony there was no attempt at consummation and no sexual affection. The wife petitioned for nullity on ground of incapacity of her husband to consummate the marriage, in the alternative, prayed for decree on the ground of her own incapacity. Karminski J., in dismissing the petition said:

> "The burden of satisfying the Court that either the husband or wife was incapable of consummating the marriage was wholly on the wife. She had failed to discharge this burden. It was clear that the question of capacity had never been put to the test. The marriage might well have been consummated had the parties come together as husband and wife. Counsel for the wife had urged that if the court found incapacity on the wife's part, it was desirable on grounds of public policy to dissolve marriage which has never existed. Against that it could be said that public policy demanded that the course after wards should not be made too easy for those who went through a ceremony of marriage in order to defeat the immigration laws. The petition would be dismissed."

In the case of *Silver* (*Orse Krraf*) *v Silver* (3) the parties went through a ceremony of marriage but did not cohabit with each other. The petitioner and respondent agreed to go through the said ceremony only for the purpose of representing themselves as married to the United Kingdom Immigration Authorities and without any intention of living together as husband and wife. The petitioner prayed (i) that the purported marriage be declared null and void, alternatively (ii) that the court would exercise its discretion in her favour and decree that the marriage be dissolved. On the question of nullity, Collingwood J.at page 614 had this to say. "...the parties here intended that they should become man and wife and went through the ceremony with that object, and that there being no element of duress the prayer for a decree of nullity must be rejected." In that case the prayer for dissolution was granted but on different grounds.*Morgan v Morgan* (4) was an undefended petition for nullity where the parties went through a ceremony of marriage in pursuance of an agreement that they should live together on the basis of companionship only. They never lived together. The husband afterwards obtained medical advice that at the time of the ceremony of marriage he was impotent. He filed a petition on the ground of his own incapacity. The court held:

> "The husband's incapacity was not a factor in the marriage at all, and it would be contrary to justice and public policy to permit him to plead his own impotence, having regard to the companionship agreement; the petition should be dismissed."

From the foregoing authorities it is quite clear that non consummation must be based on certain grounds; common of these are wilful refusal not by the petitioner but by the respondent; incapacity not that known by the petitioner at the time of marriage. In the instant case the petitioner has told me that the marriage was not consummated. No good reason has been advanced apart from convenience on her part to obtain Zimbabwean residential status. It will be against justice, public policy and morality to permit a petitioner to plead her own failure to consummate the marriage as a basis for a decree of nullity when she was well aware that the marriage by their arrangement was not to be consummated. The capacity to consummate the marriage was not put to test. I hold that the marriage was valid notwithstanding the motives of the parties. The petition's remedy in my view rests on divorce for "two years separation" since the respondent consents.

But since there is no alternative prayer based on that ground I order that the petition be dismissed. I make no order as to costs.

Petition dismissed
