

## HAIZ AUYUB DURGA v NAJMUNNISA ISMAEL DURGA (1990 - 1992) Z.R. 189 (H.C.)

HIGH COURT  
W.M. MUZYAMBA, J.  
14TH JULY, 1992  
(1992/HP/D 28)

### Flynote

Family law - Nullity - Marriage void for consanguinity - Evidence of non-consummation - Relevance of.

### Headnote

The parties went through a marriage ceremony at Lusaka on 12<sup>th</sup> October, 1990. They never cohabited or consummated their marriage because they discovered immediately after the ceremony that they were consanguineous. The petitioner sought a declaration of nullity.

### Held:

A marriage contracted within the prohibited degree of consanguinity is void *ab initio* whether or not it is consummated.

### Legislation referred:

1. Matrimonial Causes Act, 1973 (UK) ss.11(1)(a)(i) and 12(a) and (b).

For the petitioner: M. Sikatana, of Veritas Chambers.

For the respondent: No appearance.

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### Judgment

#### MUZYAMBA, J.:

This is an undefended petition for nullification of marriage between the parties. The evidence in support of the petition is that on 12<sup>th</sup> October, 1990 the parties secretly went through a ceremony of marriage at the office of the Registrar of Marriages at Lusaka. After marriage they discovered that they were blood cousins. As a result they never cohabited and the marriage was never consummated.

Paragraph 8 of the petition reads:

"8. Such non-consummation is due to the fact that immediately after the said ceremony both the petitioner and the respondent discovered that their biological relationship forbade them for ever getting married as they are under the Marriage Act 1949 of England which is applicable to Zambia under s.32 of the Marriage Act Cap.211 of the Laws of Zambia, both the petitioner and the respondent are within the prohibited degree of consanguinity."

It would appear from this paragraph that the ground relied upon for nullification of the marriage is non-consummation of the marriage due to the fact that the parties are related by blood.

Sections 11 ss.(1)(a)(i) and s.12 ss.(a) and (b) of the Matrimonial Causes Act, 1973 provide:

"11.1 A marriage celebrated after 31<sup>st</sup> July, 1971 shall be void on the following grounds only, that is to say -  
(a) that it is not a valid marriage under the provisions of the Marriages Acts 1949 to 1970 that is to say where -  
(i) the parties are within the prohibited degrees of relationship.

12. A marriage celebrated after 31<sup>st</sup> July, 1971 shall be voidable on the following grounds only, that is to say -

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- (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
- (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it.'

It is quite clear from the above sections that marriage within the prohibited degrees of relationship and non-consummation of marriage are two distinct grounds for nullification of marriage. Marriage within the prohibited degrees of relationship renders the marriage void *ab initio* while non-consummation renders the marriage voidable. It would therefore appear to me that where marriage takes place within the prohibited degrees of relationship, it is immaterial whether or not the marriage was consummated. It is nevertheless void *ab initio* and there is no need therefore, as in the instant case, to plead non-consummation as well.

Turning to the evidence, the Court is satisfied that the parties are blood cousins and therefore fall within the prohibited degrees of relationship and should not have contracted the marriage. In the event the marriage is declared null and void *ab initio*.

For the purposes of making the decree of nullity absolute the Court makes a declaration under s.41 ss.(1)(a) of the said Matrimonial Causes Act, that it is satisfied that there are no children of the family to whom this section applies.

There will be no order for costs.  
Marriage declared null and void.