MVIPLW-A

SANTOS v SANTOS 1987 (4) SA 150 (W)

Citation	1987 (4) SA 150 (W)
Court	Witwatersrand Local Division
Annotations	None

GROSSKOPF J

1985 September 11 1986 January 21

Flynote : Sleutelwoorde

Husband and wife - Marriage - Validity of - Marriage Act 25 of 1961 makes no provision for the recognition of foreign embassy or consular marriages celebrated in South Africa - Marriage celebrated by vice-consul, who is not a marriage officer in terms of the Act, at a consulate in South Africa is accordingly invalid.

Headnote : Kopnota

There is no provision for recognition of foreign embassy or consular marriages in South Africa in terms of the Marriage Act 25 of 1961. Accordingly a marriage celebrated by a vice-consul, who is not a marriage officer in terms of the Act, at a consulate in South Africa is invalid.

GROSSKOPF

Case Information

Argument on a point *in limine* in an action for divorce. The nature of the point *in limine* and the facts appear from the reasons for judgment.

Mrs *N A Cassim* for the plaintiff.

S Georgiou for the defendant.

Cur adv vult.

Postea (21 January 1986).

Judgment

Grosskopf J: The plaintiff has instituted an action against the defendant in which the plaintiff claims a decree of divorce and ancillary relief. The defendant in his amended plea avers that the marriage between the parties was solemnized by a person not authorised to solemnize marriages in South Africa, and the defendant consequently denies that the parties were lawfully married.

By agreement between the parties the Court was asked to decide *in limine* whether the

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marriage is a valid marriage according to South African law.

Under South African law the formal validity of a marriage is determined by the law of the place where the marriage is solemnized, ie the *lex loci celebrationis*. That is in accordance with the general principle of *locus regit actum*. See *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307; *Friedman v Friedman's Executors* (1922) 43 NLR 259; Pretorius v Pretorius 1948 (4) SA 144 (O) at 147; Kahn 'Jurisdiction and Conflict of Laws in the South African Law of Husband and Wife' (an appendix to Hahlo *The South African Law of Husband and Wife* 4th ed (1975) at 589); Forsyth *Private International Law* (1981) at 232; Schmidt 'Conflict of Laws' in *Law of South Africa* vol 2 para 537.

As a general rule the formalities of marriage under English law are also governed by the *lex loci celebrationis*. See Morris *The Conflict of Laws* 2nd ed (1980) at 98 *et seq* ; Dicey *The Conflict of Laws* vol 1 10th ed (1980) at 261 *et seq*.

In the leading case of *Berthiaume v Dastous* 1930 AC 79, the Privy Council held that the marriage of two Roman Catholics domiciled in Quebec was void where they had been married in a Roman Catholic church in France, but without civil ceremony as required by French law. Lord Dunedin said (at 83):

'If there is one question better settled than any other in international law, it is that as regards marriage - putting aside the question of capacity - *locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage.'

It is common cause that on 3 October 1979 and at a marriage ceremony in the Portuguese Consulate in Johannesburg, the vice-consul of Portugal in Johannesburg purported to solemnize the marriage between the parties to this action who were both domiciled in the Republic of South Africa at the time. It is further common cause that the vice-consul

who solemnized the marriage was not a marriage officer in terms of the provisions of the Marriage Act 25 of 1961.

Section 11(1) of the Marriage Act provides that

'a marriage may be solemnized by a marriage officer only'.

A marriage which is solemnized in South Africa by a person who is not a marriage officer is, generally speaking, not a valid marriage under our law. See *Camel v Dlamini* 1903 TH 258 at 261; *Ex parte L (also known as A)* 1947 (3) SA 50 (C) at 57; *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1019H and 1020C.

Mrs Cassim, who appeared for the plaintiff in this case, submitted that the provisions of the

Act would not apply to a marriage celebrated in an embassy or a consulate of a foreign country in South Africa inasmuch as such place ought to be regarded as an extension of that foreign country's area of jurisdiction. Mrs *Cassim* contended that it should make no difference, therefore, whether the marriage was celebrated in the Portuguese consulate in Johannesburg or in Portugal itself.

The rule of diplomatic immunity had, in the past, been based on the notion of extraterritoriality, ie that the premises of a diplomatic mission in the receiving State represented an extension of the territory of the sending State. See *Forsyth* at 144; Booysen *Volkereg* (1980) at 220. According to modern writers on international law the fiction of extraterritoriality has been discarded.

'It was recognised that diplomatic immunity formed an exception to the principle of territorial jurisdiction, and that this exception rested on a rule of international customary law.'

Schwarzenberger *A Manual of International Law* 6th ed (1976) at 81. See further *Forsyth* at 144; *Booysen* (*op cit* at 220). Akehurst A *Modern Introduction to International Law* 4th ed (1982) at 115 is of the view that

'diplomatic premises are not extraterritorial; acts occurring there are regarded as taking place on the territory of the receiving State, not on that of the sending State'.

The fiction of extraterritoriality originally gave rise to the rule that an embassy marriage is valid if concluded within the precincts of a foreign embassy between two subjects of that foreign State, and according to the forms held valid by such State. Graveson *The Conflict of Laws* 5th ed (1965) at 237 explains the legal position with regard to marriages celebrated in foreign embassies as follows:

'By a long-standing custom of international law the principle of extraterritoriality is applied to foreign embassies, which are regarded for most legal purposes as part of the territory of the foreign sovereign whom the embassador represents. Within the embassy the law of the country which it represents prevails, and a marriage of nationals of such foreign country would be valid as to form if celebrated according to the form of their *lex patriae*.'

Dicey *The Conflict of Laws* 6th ed (1949) at 768 also expresses the view that the principle of extraterritoriality applies to marriages celebrated at the mansion of an ambassador between subjects of the State he represents, and that such marriages are valid if celebrated according to forms held valid by its laws. According to *Dicey* at 768, such a marriage is valid

GROSSKOPF J

'though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnized'.

Martin Wolff *Private International Law* 2nd ed (reprint 1977) at 346 writes that

'this rule was originally derived from the conception that the ambassador's mansion

is to be treated as if it were part of the country which he represents'.

Wolff at 346 then concluded that

'though modern writers recognize the exaggeration implied by this fiction, the rule based on it stands'.

This rule of English law was applied not only to marriages celebrated abroad under the British Foreign Marriage Act 1892 between British subjects in British embassies and consulates in the forms prescribed by English law, but generally to any marriage between subjects of a foreign State concluded within the precincts of the embassy or consulate of that State, and according to the laws of that State. In the case of *Bailet v Bailet* [1901] 17 TLR 317, a marriage between two French subjects celebrated at the consulate-general of France in London according to the forms required by French law was held to be a valid marriage in England.

Section 10 of our Marriage Act 25 of 1961 also allows the solemnization of a marriage in accordance with the provisions of the Act in a country outside the Republic of South Africa between South African citizens who are domiciled in the Republic. Such a marriage may be solemnized by a diplomatic or consular officer in the service of the Republic of South Africa who has been designated as a marriage officer in terms of the Act. The Marriage Act 1961, however, has no corresponding provision enabling a foreign diplomatic or consular officer to solemnize a marriage between subjects of that foreign State in accordance with the laws of that State in its embassy or consulate in South Africa.

Mr *Georgiou*, who appeared for the defendant, referred me to the following conclusion of Kahn in his treatise on 'Jurisdiction and Conflict of Laws' in *Hahlo* (*op cit* 4th ed at 592) with regard to the validity of foreign embassy marriages in South Africa:

'Thus for the first time, though it be in a restricted form, our law has provided for the so-called embassy marriage, which the laws of so many countries permit. Though there is no assurance that such a union will enjoy recognition in the law of the place of celebration, it is not to be expected that the executive will lightly grant extraterritorial capacity to solemnize marriages which will be invalid by the *lex loci celebrationis* and so be denied international validity.

There is no corresponding provision at common law or by statute enabling foreign officials to solemnize marriages in South Africa, whether within the precincts of an embassy or elsewhere. Nor should our Courts recognize the validity of a marriage celebrated in country A in the embassy of country B, even though the marriage would be recognized by the law of country B: it must be recognized by the law of country A.'

P†lsson *Marriage and Divorce in Comparative Conflict of Laws* (1974) at 274 points out that South Africa and Switzerland are among the few countries which provide for the authorisation of consular marriages by their own representatives abroad, but are opposed to the exercise of any

GROSSKOPF J

such authority by foreign consuls in their own territory. *P†lsson* relies on *Kahn* as authority

for the legal position which applies in South Africa.

According to *P†lsson* at 273, countries such as Austria, certain Latin American countries and the United States of America preclude foreign consuls from solemnizing marriages in their territory and deny validity to any marriage celebrated in defiance of the prohibition. Those countries usually do not authorise their own consular officers to perform marriages abroad. This appears to be the general approach in the United States of America. According to Rabel *The Conflict of Laws: A Comparative Study* vol 1 2nd ed (1958) at 237, the position is as follows:

'Where a consular or diplomatic agent is endowed by the State represented by him - the sending State - with the power of officiating at marriages, a marriage performed before him is valid in the receiving State only if the latter State has agreed to his acting in this capacity.'

P†lsson at 274 concludes, however, that consular marriages are, to a varying extent, allowed and recognised by most receiving States, thereby admitting an exception to the *locus regit actum* rule.

'In most countries recognising consular marriages such recognition is granted *by operation of law* in the sense that it does not presuppose a previous permission by the receiving State. This system prevails in *France*. It is also accepted in most other countries in Western Europe and elsewhere whose own consuls are empowered by law to perform marriages abroad. To that extent the recognition involves a "bilateralisation" of the approach adopted by the receiving State *qua* sending State. The same system is followed, however, by certain countries which only provide for individual authorisations of their own consuls abroad, for example *West Germany*, the *Netherlands* and the *United Kingdom*, or which do not provide for such authorisation at all, for example *Colombia*. The recognition thus afforded, it may be noted, rests very largely on customary law, as deducible from State practice and/or judicial decisions, rather than on statutory law which is relatively scarce on this matter.'

Had the Legislature intended to accord recognition to foreign embassy or consular marriages in South Africa it would undoubtedly have made provision for it in the Marriage Act 25 of 1961. Equally, there is no indication that South African law has followed the practice of the United Kingdom and other countries in Western Europe of according recognition to foreign embassy or consular marriages by custom. In coming to this conclusion I have preferred the approach adopted by *Kahn* (*supra*).

The view that embassy or consular marriages solemnized by foreign officials in South Africa are invalid, could, however, lead to the anomalous result that the marriage between the parties may be completely valid according to Portuguese law, and a valid judgment of a Portuguese Court may consequently be transmitted to South Africa for enforcement, despite the fact that the marriage is regarded as invalid according to South African law. The Reciprocal Enforcement of Civil judgment Act 9 of 1966 is not yet in force, but the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 is in operation and may present problems for the defendant in this regard. Despite this possible anomaly I am not prepared to declare the marriage between the parties a valid marriage.

In my judgment the marriage between the parties is invalid. The plaintiff's case is accordingly dismissed with costs.

Plantiff's Attorney: *Mrs E Salagado*. Defendant's Attorney: *R G D Roxo*

1987 (4) SA p155