

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1464/2007

In the matter between:-

LYDIA MPHOKO HILLARD

Plaintiff

and

JULIAN ALEXANDER HILLARD

Defendant

HEARD ON: 11, 12 NOVEMBER 2008

JUDGMENT BY: CILLIÉ, J

DELIVERED ON: 4 DECEMBER 2008

JUDGMENT

[1] On application before Van der Merwe J separation of issues as envisaged in Rule 33(4) of the Uniform Rules of Court was ordered and it was directed:

1.1 That the following issues in the abovementioned action be decided first and separately from any other issues, namely:

1.1.1 Where was the respondent/defendant (herein referred to as the “the respondent”), who is the husband, domiciled at date of the marriage of the parties?

1.1.2. Do the matrimonial property laws of South Africa or those of Lesotho or those of the United Kingdom govern the patrimonial consequences of the marriage of the parties and more particularly upon dissolution of their marriage by divorce?

This Court was therefore requested by the parties to adjudicate on these two questions only.

[2] **BACKGROUND:**

This is a divorce action in which the plaintiff instituted action against defendant. She claims amongst other relief that the accrual system in terms of section 2 of the Matrimonial Property Act No. 88 of 1984 of this country is applicable to the marriage between the parties as the ante nuptial contract entered into between the parties does not exclude the accrual system.

[3] The parties married in Lesotho by ante nuptial contract. The plaintiff says that at that time defendant was domiciled in South Africa. Defendant pleaded that at the time of the marriage both parties were domiciled in Maseru, Lesotho. Therefore so he says the marriage is out of community of property and out of community of profit and loss according to the laws applicable in Lesotho which laws incidentally do not provide for an accrual system.

[4] **DISPUTE:**

If the defendant's domicilium was in fact in South Africa, then the said Matrimonial Property Act will find application. Defendant however avers that his domicile was in Lesotho. This triggered the dispute set out in paragraph 1 and referred to this Court for decision.

[5] **LEGAL POSITION AS TO DOMICILE:**

5.1 The proprietary consequences of a marriage are governed by the *lex domicilii matrimonii*, that is the laws of the place where the husband was domiciled when the marriage was concluded.¹

¹ Frankel's Estate v The Master 1950(1) SA 220 (A) on 244: Sperling v Sperling 1975 (3) SA 707 (A) on 716F

Due to the fact that the wife follows the domicile of the husband, it is important to establish in this case where the defendant was domiciled at the time of the marriage.

The law of the husband's domicile at the time of the marriage governs the matrimonial property regime of the spouses even if the husband subsequently acquires a new domicile.

5.2 Domicile of choice:

The acquisition of a domicile of choice demands the satisfaction of three requirements:

- 1) A physical element i.e. lawful presence;
- 2) A mental element (*animus manendi*)
- 3) Freedom of volition.

The onus is on the *de cuius* to proof that he had a domicilium of choice and that he was physically present there as well as that

“he had... a fixed and deliberate intention to abandon his previous domicile and to settle permanently in the country of choice”.²

In acquiring a domicile of choice at another place (country) the elements of physical presence (an objective fact) and intention to remain there for an indefinite period (test of subjective nature) must concur in the *propositus*. As to the element of presence, it must denote presence as an inhabitant and not presence as a mere visitor or a sojourner.³

As to the element of the *animus manendi*, it indicates the intention of the *propositus* to settle at a place indefinitely, which is taken to mean something less than “permanently”.

In applying the test of intention a domicile of choice is acquired if it is affirmatively shown that the person’s state of mind is consistent with the intention to remain

² Eilon v Eilon 1965(1)SA 703(A)

³ Compare Ex Parte Minister of Native Affairs 1941 AD 53 on 59

indefinitely. However the intention does not have to be irrevocable.

A determination of the *popositus* to settle indefinitely in another country coupled with actual physical presence there will result in the acquisition of a new domicile of choice. In such a case given the principle of unitary domicile, the acquisition of a new domicile must necessarily involve the abandonment of the former.

5.3 Domicile of origin:

The importance of the domicile of origin is founded in the fact that a person's domicile of origin revives if he has abandoned his domicile of choice without acquiring a new domicile.

This doctrine formed part of the South African law but was abolished with the Domicile Act No. 3 of 1992 which came into operation only after the parties in this case got married. The Act is therefore not applicable in this case.

The defendant however testified that he was domiciled in South Africa earlier but later changed it to be Lesotho by free choice. This being so there is no need to consider the doctrine of domicile of origin (the United Kingdom), as there is no doubt that his domicile is either South African or Lesotho.

[6] **EVIDENCE: DEFENDANT:**

The relevant evidence laid before the court was as follows:

According to the defendant he was a young British citizen when in 1976 he immigrated to South Africa under an immigration scheme with the benefit of immediate South African residence. He worked in South Africa and later acquired South African citizenship. Later he obtained employment in Maseru, Lesotho but resided with his wife and children in Ladybrand, South Africa. Later he bought fixed property in Ladybrand as well as several other fixed properties elsewhere in South Africa. He worked across the border but his home at the time was at Joubert Street, Ladybrand, South Africa.

In 1983 defendant and his first wife got divorced. During the period of marital problems he stayed in Maseru. After the divorce his wife returned to England. He shared a house with a friend. Shortly thereafter he met Me Masunyane and they moved in together. They stayed in a flat from early 1984 until 1987 in Maseru. On weekends, however, he returned to his Ladybrand house which he retained. When the relationship with me Masunyane came to an end he shared rented accommodation with the plaintiff. Later he moved to her house in Ha Tsosane, Lesotho but returned to Ladybrand over weekends. This was the position until he was attacked in Lesotho by unknown people on the 8th of November 1991. He returned to his house in Joubert Street, Ladybrand South Africa, pending the outcome of the investigation of the attack on him in Lesotho. Before the marriage defendant bought a farm in South Africa with the intention to relocate there with plaintiff after the wedding.

The defendant's evidence discloses that if he was not attacked the evening of the 8th of November 1991, he would have preferred to stay in Ha Tsosane, Lesotho until the

farmhouse in South Africa was restored to a habitable condition.

He never had the intention to relocate his business to South Africa. The marriage was concluded in Maseru on the 29th of November 1991. The celebrations took place during lunch hour in Maseru with a few friends, but a big party was held at the farm in South Africa the next day. At that time defendant had a residence permit for Lesotho. The parties moved to the farm early in 1992 when renovations were completed and moved all the furniture from the Joubert Street house where it was kept all the years to the farm in South Africa.

[7] **EVIDENCE - PLAINTIFF:**

The plaintiff testified that defendant moved in with her after they started a relationship in 1987. He always returned to his house in Joubert Street in Ladybrand over weekends. It was convenient for defendant to do it like this.

Defendant does not own any property in Lesotho. He only kept the necessary clothing at her place in Lesotho

whenever he stayed there. They used her house and furniture.

They got married in Maseru because it was closer to their offices. The celebrations was at the farm in South Africa the next day. She insisted that defendant's status at the time of the marriage was that of a South African citizen and that he was also domiciled in South Africa.

[8] **DISCUSSION:**

The important issue in this matter is to decide where the defendant was domiciled at the time of the conclusion of the marriage. The question is whether the defendant ever formed such firm intention to remain in Lesotho that would convert that residence into domicile.

Domicile, however, is a legal concept that implies more permanence than mere residence in a dwelling place.⁴

[9] In **Eilon v Eilon**, *supra*, on 705 B-C Rumff JA said in his minority judgment:

⁴ LAWSA Vol 2 par 297 p314

“I’m also influenced by another consideration in this case. When a man has been living in the jurisdiction of a Court for a number of years in such a manner that it might reasonably be inferred that he has an intention to stay there indefinitely and an action is brought against him which, on the face of it, he resents, then that Court in order to decide what intention he has will rely more on his past conduct and way of life than on his verbal protestation.”

In the majority judgment, Potgieter AJA held that a person to discharge the onus of proving domicile has to prove

“... the two requirements namely resident ... and an intention of settling there permanently”

(Page 720 A)

He continued thus on page 721 A:

“A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, exclude such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is

likewise excluded. That appears to be in accordance with our common law.”

When the above is applied to this particular case it is clear that the defendant’s intention and his way of living was such that one cannot come to the conclusion that he intended to abandon his house and his farm in South Africa.

An important factor which weighs heavily against respondent is the fact that he invested fairly large sums of money in property in South Africa, whereas no fixed property was acquired in Lesotho. Nor did he make any long term investments in Lesotho. He invested his surplus capital in South Africa. Even his bank accounts (private and business) were in South Africa. It was also only after the marriage, for the first time since 1979, that defendant moved his furniture from Joubert Street Ladybrand and then he moved it to the farmhouse near the border post on the South African side. That was also the first time that he rented out the property in Joubert Street. The only obvious reason why he did not rent it out before was that he retained it as his residence.

The conclusion is inevitable that the defendant never abandoned his residence in Joubert Street, Ladybrand for a new residence in Lesotho. That abandonment is a prerequisite for a new domicilium of choice.

The defendant's stay in Maseru was limited to the periods when he had relations with me Masenyane and later with plaintiff. That makes it improbable that he ever had the intention to abandon his residence in Ladybrand. Taking in consideration that all his furniture and even employees were still at the premises in Joubert Street, and the fact that he returned there regularly on weekends speaks against any intention to abandon his Ladybrand domicile. The defendant also testified that when he came to South Africa in 1976 his intention was to settle in South Africa permanently.

[10] **CONCLUSION:**

For these reasons I have come to the conclusion that the plaintiff established that at the time of the marriage the defendant was domiciled in South Africa.

1. It is therefore found that

1.1 the *domicilium* of the defendant at the time of the marriage concluded between the parties was Ladybrand, South Africa;

1.2 the Matrimonial Property Laws of South Africa is applicable in the divorce action between the parties.

2. The costs in this matter is costs in the divorce action.

C.B. CILLIé, J

On behalf of plaintiff:

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Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of defendant:

Adv. Grobler
Instructed by:
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