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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Case no: 2025-0539959

In the matter between:

M[...] S[...] S[...]

Plaintiff

And

R[...] A[...]

Defendant

Coram: Miller AJ
Heard: 17, 18, 29 and 30 September 2025
Delivered: 10 November 2025

JUDGMENT

Miller, AJ

Introduction

- [1] The plaintiff met the defendant in 2016 in the Western Cape. They lived together with the plaintiff's parents in Cape Town from March 2017 to June 2020. They then moved into a home together in Constantia, Cape Town. They married on 9 April 2022. Their daughter was born on 19 May 2023 in Cape Town.

- [2] The parties lived in Cape Town until they moved to the Netherlands on 18 January 2025.

- [3] The plaintiff moved out of the parties' rented accommodation in the Netherlands on 14 April 2025.

- [4] The plaintiff wants to return to live in Cape Town with the parties' daughter. The defendant has refused to allow the plaintiff to do so. There are proceedings pending in the Netherlands to determine this issue.

- [5] The plaintiff instituted divorce proceedings against the defendant in this Court in mid-April 2025 (*"the divorce proceedings"*).

- [6] In order to establish that this Court has jurisdiction in the divorce proceedings, the plaintiff alleges that she is domiciled within the area of this Court's jurisdiction.
- [7] The defendant has defended the action. He has, *inter alia*, raised a special plea in abatement that this Court lacks jurisdiction in the divorce proceedings on the basis that the plaintiff, the defendant and their daughter have, since January 2025, been domiciled in the Netherlands.
- [8] Section 2(1)(a) of the Divorce Act, 70 of 1979 provides that this Court has jurisdiction "*if the parties or either of the parties is domiciled within the area of jurisdiction of the court on the date on which the action is instituted*".
- [9] Accordingly, the plaintiff need only establish that she was domiciled within this Court's jurisdiction at the relevant date to establish that this Court has jurisdiction in the divorce proceedings.
- [10] It was common cause that the plaintiff's domicile of origin was within the area of this Court's jurisdiction.
- [11] On the present facts, the plaintiff cannot in law lose her domicile of origin until she acquired another domicile by choice.¹ Accordingly, the special plea turns on whether the plaintiff acquired a domicile of choice in the Netherlands in January 2025 (or at any date prior to the institution of the divorce proceedings).
- [12] Section 1(2) of the Domicile Act, 3 of 1992 ("*the Domicile Act*") provides that:

¹ Section 3(1) of the Domicile Act, 3 of 1992.

“A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period”.

- [13] In order to establish a domicile of choice, it is necessary to prove residence within the jurisdiction in question (which is tested objectively²) and an intention to settle within that jurisdiction indefinitely (which is tested subjectively³).
- [14] It is common cause that the plaintiff and the defendant resided in the Netherlands when the divorce proceedings were instituted.
- [15] Accordingly, the question whether the plaintiff acquired a domicile of choice in the Netherlands turns on whether she intended to settle there for an “*indefinite period*” when she moved there on 18 January 2025.
- [16] The defendant contends that she did and the plaintiff contends that she did not.
- [17] The onus of proving that the plaintiff acquired a domicile of choice in the Netherlands is on the defendant. This is because it is the defendant that asserts that the plaintiff acquired a domicile of choice in the Netherlands when she moved there.⁴ The defendant must discharge this onus on a balance of probabilities.⁵
- [18] By agreement between the parties, the special plea is to be determined separately from the remainder of the divorce action in terms Rule 33(4).

² *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) at 1093J – 1094C, which was cited with approval in *OB v LBDS* 2021 (6) SA 215 (WCC) at para [35].

³ *Chinatex* supra at 1093J-1094A.

⁴ *Eilon v Eilon* 1965 (1) (SA) 703 (A) at p719H.

⁵ Section 5 of the Domicile Act 3 of 1992.

The evidence

- [19] I heard evidence from four witnesses. The plaintiff, Ms. Lemkus (the plaintiff's long-time friend), Mr S[...] (the plaintiff's father) and the defendant.
- [20] As set out in paragraph [1], the plaintiff met the defendant in 2016. They lived together with the plaintiff's parents in Cape Town from March 2017 to June 2020. They then moved into a house in Constantia, Cape Town. The house is owned by a company of which the plaintiff is a director. The shares in the company are owned by a trust of which the plaintiff is a beneficiary.
- [21] The parties married on 9 April 2022.
- [22] The parties discussed and agreed both before and during the marriage that they wanted to live abroad after they had a child. This is common cause.
- [23] There is a factual dispute between the parties whether this agreement meant that they would live abroad temporarily (as the plaintiff contends) or would "emigrate" and therefore live abroad permanently (as the defendant contends) after they had a child or children.
- [24] The plaintiff was cross-examined extensively on this issue. She consistently denied that there was ever an agreement to leave South Africa permanently. Her evidence under cross-examination was that the defendant's use of the word "emigrate" was used loosely to mean "live abroad".

- [25] The defendant testified that the agreement between the parties was that they would leave South Africa permanently after having a child or children. The defendant was not cross-examined at all on his evidence in this regard.
- [26] I return to this issue and the consequences of the plaintiff's failure to cross-examine the defendant on this evidence in due course.
- [27] One of the central issues that bedevilled the parties' relationship was the defendant's relationship with the plaintiff's extended family. This issue came to a head on a family holiday to Mauritius in 2022. The plaintiff was pregnant at the time.
- [28] After the holiday to Mauritius the defendant wrote a number of letters to the plaintiff's extended family. The plaintiff's uncontested evidence was that the defendant said things in these letters that the plaintiff described as "*vile*", "*vicious*" and "*hideous*".
- [29] Mr S[...]’s uncontested evidence was that the contents of these letters were "*indescribable*" and contained "*disgusting stuff*". Mr S[...] said that what people had been called by the defendant "*was just beyond*".
- [30] This caused a complete breakdown in the relationship between the defendant and the plaintiff's extended family. As a result, there was no contact between them in the direct aftermath of the abovementioned letters.
- [31] Mr. S[...] attempted to patch things up with the defendant in order to reconcile the defendant and the plaintiff's family. He suggested getting the family members and the defendant into a room to "*sort this out because it is not insurmountable*". Mr S[...]’s uncontested evidence was that the defendant refused to do so and that matters escalated from there.

- [32] As a result of the abovementioned fallout, Mr S[...] made what he described as a “*difficult decision*” to exclude the defendant from their family holiday over the December 2023 Christmas period. This was a difficult decision because the family was a close-knit one.
- [33] The unfortunate upshot was that the defendant was not prepared to allow the plaintiff and the parties’ daughter to attend the family holiday.
- [34] The parties also attempted what was described by the plaintiff as a “*reunification mediation*”. This process ended when the defendant walked out of a session attended by the plaintiff, the defendant and the plaintiff’s parents. This was in February 2024.
- [35] The parties travelled overseas in June 2024 to Italy, Portugal and the Netherlands. One of the purposes of the trip was to decide whether to move to the Netherlands or to Portugal.
- [36] The defendant, with the plaintiff’s knowledge and consent, attended a job interview in the Netherlands and in Portugal.
- [37] The defendant was ultimately offered a job in the Netherlands, which he, with the plaintiff’s agreement, accepted. The job commenced on 1 September 2024. The defendant initially worked remotely from Cape Town.
- [38] The parties decided on a move to the Netherlands.
- [39] There is a dispute of fact between the parties as to whether there was a discussion about whether this move was temporary (as the plaintiff contends) or to emigrate (as the defendant contends). I return to this issue below.

- [40] The uncontested evidence of the plaintiff, Ms Lemkus and Mr S[...] was that the defendant had, by this time, become increasingly controlling in the relationship, particularly regarding the family's access to the parties' daughter and the plaintiff's ability to socialize freely with her friends.
- [41] By August 2024, the marriage had become, in the plaintiff's words, "*really rocky*".
- [42] As a result, the plaintiff started to consider leaving the marriage. The plaintiff spoke to her sister-in-law about doing so. Her sister-in-law gave her some practical advice about what to do if she decided to leave.
- [43] The plaintiff and her daughter did in fact leave the common home on 1 August 2024.
- [44] The defendant pleaded with the plaintiff not to leave him and to return to the common home. He said that he was in "*such a dark place*".
- [45] The plaintiff then returned to the common home after two nights. She did so because she was scared for the defendant and was concerned that he might try and kill himself.
- [46] The plaintiff's concern was based on the fact that the defendant had previously engaged in acts of self-harm, including drinking bleach, stabbing himself, hitting himself in the head with a frying pan and threatening to commit suicide if the plaintiff left him.
- [47] The plaintiff also testified that she wanted to try and make the marriage work for the sake of her daughter.

[48] In a letter dated 6 August 2024 to the defendant, the plaintiff set out, on the advice of her sister-in-law, certain non-negotiable and negotiable aspects of their relationship.

[49] The list of the plaintiff's "non-negotiables" included her being able to visit her parents with the parties' daughter no matter who was present; being able to visit her mother "*without feeling like I can't breathe and need to rush home*"; and being able to join family events no matter who was present.

[50] This letter resulted in a very lengthy conversation between the plaintiff and the defendant on the same day. The move to live in the Netherlands was the focus of the conversation. The transcript of this conversation was adduced in evidence.

[51] The following evidence from this conversation is relevant for present purposes:

51.1 Although the plaintiff was reluctant to move to the Netherlands, she ultimately agreed to do so. Her primary motivation was that she loved the defendant, wanted to keep their (immediate) family together and wanted their daughter to have her father.

51.2 One of the plaintiff's concerns about moving to the Netherlands was that if the parties' relationship ended then she would be stuck there and would not be free to return to South Africa with her daughter.

51.3 The defendant assured her in terms that she would be free to do so. As he stated, if "*we break up or whatever, you will come back with the dogs... and you will live here*" with our daughter.

- [52] The plaintiff testified that her intention was to move to the Netherlands for a “*trial*” period to see if the marriage could be saved. She was cross-examined extensively by the defendant’s counsel on this issue.
- [53] The plaintiff fairly admitted under cross-examination that she did not expressly tell the defendant that she was moving to Amsterdam for a trial period or for a set period. This is consistent with the absence of any reference to a trial period in the transcript of the conversation between the plaintiff and the defendant on 6 August 2024.
- [54] The plaintiff’s explanation for not doing so was that she wanted to avoid a serious confrontation with the defendant that might have arisen had she done so.
- [55] The plaintiff did, however, tell her father in October 2024 that the plan in her mind was to give the move to the Netherlands a trial period. Although the plaintiff said that she had a trial period of 6 months in her mind, she said could not recall whether she told her father that she had a 6-month period in mind.
- [56] The reason she told her father that her move to the Netherlands was for a trial period was to allay his concerns about her moving to the Netherlands in circumstances where her marriage was under pressure; the defendant’s relationship with her family had broken down and that she could end up stuck in the Netherlands and isolated.
- [57] Mr S[...] concluded this aspect of his evidence by stating that his conversation with his daughter ended his understanding that if the trial did not work then she would, in one, two or three months, come back to South Africa. Mr S[...] did not state that the plaintiff told him about the length of the trial period.

- [58] Mr S[...] was not cross-examined at all. His evidence is therefore uncontested. I must and do accept it.
- [59] Ms Lemkus testified that the plaintiff told her that her move to the Netherlands was *“to test it out, see what the Netherlands was like, give it six months, and then make a call, reassess and make a call.”*
- [60] This is corroborated by the fact that Ms Lemkus told the plaintiff’s mother in a contemporaneous WhatsApp message in early January 2025 (i.e. shortly before the parties’ move to the Netherlands) that the plaintiff had *“a timeline to reassess how things are going on that side”*.
- [61] Ms Lemkus also testified that one of the plaintiff’s friends had suggested that she get the defendant to sign a document that would enable her to come back to South Africa if she wanted to come back.
- [62] Ms Lemkus asked the plaintiff the day before she left for the Netherlands whether she had the suggested document. The plaintiff’s response was that she was working on it.
- [63] No such document was ever signed.
- [64] The parties left for the Netherlands on 17 January 2025.
- [65] In cross-examination, the defendant’s counsel repeatedly put it to the plaintiff that the fact that she left for the Netherlands despite the issues between the parties was to give effect to the parties’ agreement that they would leave South Africa permanently after they had a child.
- [66] The plaintiff consistently denied this on two grounds. First, that she left South Africa for the Netherlands on a trial basis in order to see whether the parties could make their relationship work. Second, even if the relationship survived the trial period, she intended to return to South Africa after being in the Netherlands for two years.

- [67] The plaintiff's uncontested evidence was that she did not alter her affairs in South Africa in any manner consistent with an intention to leave South Africa permanently or indefinitely. Thus, the former common home was rented out rather than sold, the plaintiff retained her South Africa tax residency, the plaintiff retained and continued to use her South African bank accounts, the plaintiff retained her South African-based medical practitioners, the plaintiff retained her Vodacom account and South African mobile telephone number, and the plaintiff retained her supermarket loyalty cards and pharmacy accounts.
- [68] The plaintiff also testified that even if the trial period had been successful, the maximum period that she would have stayed in the Netherlands was for a period of 2 years. This, the plaintiff said, was to mirror the happy 2-year period she had spent abroad as a 9-year-old child. This is in dispute between the parties. I return to this issue below.
- [69] The defendant's uncontested evidence was that he arranged his affairs in a manner consistent with his decision that his move to the Netherlands was permanent or indefinite. This included resigning from his employment in South Africa, stopping his contributions to his medical aid and retirement annuity and cashing out his investments.
- [70] The plaintiff accepted under cross-examination that the defendant intended to leave South Africa for the Netherlands permanently.
- [71] Once they had moved to the Netherlands, the parties took out medical insurance in the Netherlands, rented a property in the Netherlands, attended a "Moms and Tots Group" together with their daughter and enrolled their daughter in a play school and in a primary school.

[72] The parties were happy in the Netherlands for the first few months after their arrival.

[73] The previous issues that caused the conflict between the parties resurfaced after the plaintiff's mother visited them in the Netherlands towards the end of March 2025. This was the point of no return.

[74] The plaintiff left the parties' rented accommodation on 14 April 2025 and instituted the divorce proceedings.

The parties' submissions

The plaintiff's submissions

[75] In respect of the test to be applied to determine whether the plaintiff intended to settle in the Netherlands for an indefinite period (i.e. with the requisite *animus manendi*), the plaintiff's counsel cited the following *dictum* in *Eilon v Eilon*⁶

*"... the onus of proving a domicile of choice is discharged once ... it is proved that the de cujus had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle in the country of choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded".*⁷

[76] The plaintiff's counsel also refer to the authorities which have held that the following factors are relevant to considering whether a person has acquired a new domicile of choice: the period of residence at the alleged domicile (the longer the residence the greater the probative

⁶ *Eilon supra*.

⁷ *Eilon supra* at 721A.

value in regard to the element of *animus*)⁸; the motive for residing there⁹; the ownership of property there (or the sale of property in the previous domicile)¹⁰; any circumstantial evidence indicating the presence or absence of an *animus mandendi*; direct evidence about the subjective intention to be domiciled in a certain area¹¹; and evidence of past expressions of intention.¹²

[77] The plaintiff's counsel then submitted that the defendant has not discharged the onus of establishing that the plaintiff acquired a domicile of choice in the Netherlands for the following main reasons:

77.1 The plaintiff did not sell the property in Cape Town in which she had an indirect interest.

77.2 The parties resided in the Netherlands for less than three months.

77.3 When the parties separated, the plaintiff indicated that she wanted to return to South Africa.

77.4 The plaintiff's presence in the Netherlands was affected in some way by compulsion and was effectively involuntary as the plaintiff went to Netherlands to try and save her marriage and to keep her family together.

77.5 The plaintiff went to the Netherlands because the defendant accepted a job offer there.

⁸ *Smith v Smith* 1952 (4) SA 750 (0) at 750 C-D.

⁹ *Holland v Holland* 1973 (1) SA 897 (T) at 904D-F.

¹⁰ *Smith* supra at 755H-756A and *Eilon* supra at 722C-D.

¹¹ *Webber v Webber* 1915 AD 239 at 250.

¹² See also *H.G.W v M.W ZACHC* 65 (26 March 2025) at para 35, which cited the helpful summary of the factors set out in *Joubert et al*, LAWSA vol. 7(1) 3 edn at para 328.

- 77.6 The plaintiff never intended to emigrate but only to return to Cape Town after a few months to establish whether the marriage could be saved or, even if it could, after two years.
- 77.7 The plaintiff contemporaneously expressed her clear intention not to leave Cape Town permanently.
- 77.8 The marriage was a troubled one. There was a conflictual relationship between the defendant and the plaintiff's extended family. The defendant pressurised the plaintiff to choose between him and her family.
- 77.9 Prior to the defendant accepting employment in the Netherlands, the plaintiff indicated in numerous discussions with the defendant that she did not want to go to the Netherlands at all, alternatively later and in any event for a limited period of time.
- 77.10 The only reason that the plaintiff is not presently residing in Cape Town is because the defendant refused to give her their daughter's passport when she left their rented accommodation and refuses to give his permission for their daughter to return to Cape Town with the plaintiff.

The defendant's submissions

- [78] For reasons that are not difficult to discern, the defendant's counsel focused on the *dicta* in the authorities which state, in essence, that the *animus manendi* requirement is satisfied where a person intends to settle in a country for an open-ended or unlimited time period even if

that intention is not absolute, irrevocable or excludes all contemplation of a move if circumstances change.¹³

[79] In particular, the defendant's counsel placed much store on the dictum in *OB v LBDS*, citing CF Forsyth *Private International Law* (5 ed) at 141, that "*the most apt description of an intention to reside in a particular place for an indefinite period is 'until and unless something, the happening of which is uncertain, occurs to induce the person to leave'*".¹⁴

[80] Like the plaintiff's counsel, the defendant's counsel also referred to various factors set out above that should be considered in determining whether a person has acquired a new domicile of choice.

[81] With reference to the above, the defendant's counsel submitted that the defendant has discharged the onus of establishing that the plaintiff acquired a domicile of choice in the Netherlands when she moved there on 18 January 2025. This was for the following main reasons:

81.1 The parties had discussed and agreed both before and during the marriage (in 2022 whilst in Mauritius, in 2024 whilst overseas and in the discussion on 6 August 2024) that they would emigrate. The defendant's counsel submitted that I must accept this evidence as the defendant was not cross-examined on this issue by the plaintiff's counsel.¹⁵

¹³ *V v V* (ZAGPPHC) 324 (6 July 2017) at para 14, quoting *Udny v Udny* (1869) LR 1 Sc &C Div 44 (one of the leading older cases on domicile of choice in English law); *Chinatex supra* at 1093J-1094C; *Ley v Ley's Executors and Others* 1951 (3) SA 186 (A); and *Eilon v Eilon* 1965 (1) SA 703 (A) at 721A.

¹⁴ At para 36.

¹⁵ As authority for this proposition, the defendant's counsel relied on the principle in *Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paras 61 to 63 to the effect that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.

- 81.2 Despite the plaintiff's concerns and misgivings about going to the Netherlands, she ultimately decided to and did go to the Netherlands. In so doing, she was doing no more or less than giving effect to the parties' agreement that they would emigrate. It was therefore her actions and not her protestations that demonstrate her intention to move indefinitely to the Netherlands.
- 81.3 Although her stated motive in going to the Netherlands was to try and save her marriage, she did not indicate with any certainty that she placed a fixed time limit on her attempt to do so. As a result, the decision to move to the Netherlands was for an open-ended period. The defendant submitted that the evidence of Mr S[...] was not relevant and that I should therefore ignore it.
- 81.4 The plaintiff's evidence that she in any event would move back to South Africa after two years with or without the defendant was unconvincing as she also said that she did not want to break up her immediate family unit.
- 81.5 If the plaintiff's true intention was to move to the Netherlands temporarily, it is inconceivable that she would not tell her husband that this was the case in circumstances where it was clear that he was packing up his life in Cape Town and leaving permanently.

Animus mandendi: the law

The common law

- [82] The *animus* requirement to establish a domicile of choice has a long and rich history in our law.
- [83] Prior to the enactment of the Domicile Act the question that exercised the minds of the Roman-Dutch writers, scholars and our courts was the degree of permanence required to establish the necessary *animus* to acquire a domicile of choice.
- [84] Schoeman has usefully summarised this history in her article titled “*Domicile of choice and animus: How definite is indefinite?*”¹⁶ It is not necessary for present purposes to recount this history and the lively debates that divided the scholars and judges in full. I highlight only those steps in the development of our law on the *animus manendi* requirement relevant to the determination of the case before me.
- [85] In *Johnson v Johnson*¹⁷ De Villiers CJ (who delivered the majority judgment) held, adopting the views of Westlake, an English academic, that the “*all contemplation of any event on the occurrence of which the residence would cease*” excludes intention required to acquire a domicile of choice.¹⁸
- [86] In *Ley v Ley’s Executors*¹⁹ Centlivres CJ held that “*excludes all contemplation*” in *Johnson v Johnson* meant the following:

“As I understand the expression, it means that if the state of mind of the de cujus is something like this, ‘I may settle here permanently, and anyhow I’ll stay for a time; but perhaps I’ll move to another country’ the intention required to establish a domicile is not present. But if his state

¹⁶ (1999) *THRHR* 62 at 272-284.

¹⁷ 1931 AD 391

¹⁸ At 398. De Villiers CJ held that Westlake’s view accorded with Voet’s *propositum illic perpetuo morandi* and thus our common law.

¹⁹ 1951 (3) SA 187 (A).

of mind is like this, 'I shall settle here', that is enough, even though it is not proved that if he had been asked, 'Will you never move elsewhere?' he might not have said something like, 'Well, never is a long day. Who knows? I might move if I change my mind or if circumstances were to change.' Any doubt actually present to his mind as to whether he will move or not will according to Westlake's statement exclude the intention to settle permanently, but the possibility that, if the idea of a move in the future had been suggested to him, he might not at once have scouted it does not amount to contemplation of an event on which the residence would cease. It is only the former that has to be disproved by the person alleging a change of domicile."

[87] This dictum thus distinguishes between contemplation of a change of residence and mere speculation about such a change.

[88] As Schoeman states, the dictum meant that the required *animus* would only be defeated by genuine doubt about the permanence of a person's stay in the country in question. This therefore qualified what constituted "any event" in the Westlake test adopted in *Johnson v Johnson* in the sense that it includes the contemplation of an event that will not necessarily occur but which was definitely contemplated.²⁰

[89] In *Eilon v Eilon*²¹ Potgieter AJA (writing the majority judgment), held that it seemed quite clear that the words "*excludes all contemplation*" in *Johnson v Johnson* could never mean and were never intended to mean that the person in question has excluded from his (or her) mind all possibility that in future he (or she) might leave the country.²² In other words, the intention of permanent residence was not excluded if it was contingent on an unforeseen event.

[90] Potgieter AJA then held that:

²⁰ Schoeman *supra* at 280.

²¹ *Eilon supra*.

²² At 720 C-E.

“... the onus of proving a domicile of choice is discharged once ... it is proved that the de cujus had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle in the country of choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded”.²³

- [91] *Eilon v Eilon* marked the end of the development of the common law development of the *animus* requirement.

The Domicile Act

- [92] The enactment of the Domicile Act was preceded by a report on domicile by the South African Law Commission.²⁴
- [93] After considering the cases referred to above, the views of the leading academic writers, including Kahn, Forsyth and Pollak, and the position under English law and other foreign jurisdictions, the Commission recommended that the legislature adopt the third meaning ascribed to the *animus* requirement by Pollak, namely “*the intention to reside in a country for an indefinite period*”.²⁵
- [94] Pollak’s views emanate from his article titled “*Domicile*” in the 1933 *South African Law Journal*. As part of his analysis of the *animus manendi* requirement, he stated that the intention of a person regarding his or her future residence in a country may be one of the following four types:

²³ *Eilon* supra at 721A.

²⁴ March 1990 (Project 60).

²⁵ Para 3.44.

- 94.1 An intention to reside in the country for a definite period (e.g. for the next 6 months, and then to leave).
- 94.2 An intention to reside in a country until a definite purpose is achieved (e.g. until a particular piece of work is completed, and then to leave).
- 94.3 An intention to reside in a country for an indefinite period (i.e. until and unless something, the happening of which is uncertain, occurs to induce the person to leave).
- 94.4 An intention to reside in a country forever.²⁶

[95] Pollak states that it is perfectly clear that neither the first nor the second type of intention is sufficient to constitute the *animus manendi* and that the fourth type of intention is obviously sufficient. It is, as Pollak correctly stated, in respect of the third type that differences of opinion exist.²⁷

[96] The legislature accepted the Law Commission's recommendation and incorporated the first part of Pollak's third meaning of "intention" in section 1(2) of the Domicile Act, 3 of 1992. Thus section 1(2) of the Domicile Act, in relevant part, provides that the test for the requisite intentions is having "...the intention to settle there for an indefinite period".

[97] The legislature did not, however, include Pollak's tag in section 1(2).

²⁶ 1933 SALJ (vol 50) 449 at 465.

²⁷ Pollak, *loc. cit.*

- [98] After setting out all four types of intention in full, Forsyth in *Private International Law (5th edn)* describes the adoption of Pollak's third type of intention in section 1(2) of the Domicile Act as a "*great advance*".
- [99] The version of Pollak's third type of intention, including the tag, received judicial support in *OB v LBDS* which, as I have set out above, stated that the most apt description of an "*intention to reside in a particular place for an indefinite period*" for the purposes of section 1(2) of the Domicile Act is "*until and unless something, the happening of which is uncertain, occurs to induce the person to leave*".
- [100] The question that arises is how, if at all, does the tag to Pollak's third type of intention square with the test for the requisite intention as per Potgieter AJA's dictum in *Eilon*.
- [101] Although section 1(2) of the Domicile Act requires an intention to settle "*indefinitely*" rather than "*permanently*" as per *Eilon*, the remainder of the dictum in *Eilon* referred to above remains applicable and good law to determine whether a person has met the requirements of section 1(2) of the Domicile Act.
- [102] The trigger for the abovementioned question is the fact that the tag does not contain any reference to the foreseeability of the uncertain event.
- [103] The answer to this question is important to the present case. On the assumption that the plaintiff's trial move to the Netherlands was not for a fixed period (an issue to which I will return below), then the plaintiff moved to the Netherlands for an open-ended or indefinite period. The success or failure of the trial period to try and save the parties' marriage is an uncertain event. On this test, it would appear that the plaintiff has the requisite intention in terms of section 1(2) to acquire a domicile of choice in the Netherlands.

[104] As a result of the precarious state of the relationship, it is fair to assume that the plaintiff had doubts about whether the trial period would succeed or fail. On the assumption that the plaintiff intended to return to Cape Town if the trial failed (an issue to which I shall also return below), then it would appear that she would not, on the test in *Eilon*, have the requisite intention to have acquired a domicile of choice in the Netherlands.

[105] The point is that the absence of any element on foreseeability regarding the uncertain event in the Pollak test means that it is at odds with *Eilon* and matters.

[106] In the footnote to the third type of intention Pollak refers to and quotes the following test for requisite intention set out in the old English law case of *Lord v Colvin*²⁸:

“That place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which uncertain) shall occur to induce him to adopt some other permanent home.”

[107] Pollak does not explain why he omitted to include “*unexpected*” in his definition of the third type of intention. Regardless of whether this omission was intentional or in error, there does not seem to me to be any cogent reason in principle for the omission.

[108] Including “*unexpected*” in the definition is material. If a person’s intention is that he or she would be induced to leave a country on the occurrence of an expected event, the requisite intention to acquire a domicile of choice would be absent.

²⁸ S.C 28 L.J Ch 361. Pollak incorrectly cites the case as *Lord v Cobvin*.

[109] The inclusion of “*unexpected*” would also align Pollak’s test with the test in *Eilon* as an expected event is necessarily foreseeable.

[110] For these reasons, I do not consider that *OB v LBDS* intended to, or did, alter the law in respect of the test to be applied to determine whether a person has acquired a domicile of choice in terms of section 1(2) of the Domicile Act.

English law

[111] Our courts have a long history of drawing on the helpful learning from English law on the test to be applied to determine whether someone has acquired of a domicile of choice. I intend to follow suit.

[112] *Re Fuld (No 3)* held that “... a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.”²⁹

[113] *IRC v Bullock* held that the expression “*unlimited time*” required some further definition. Buckley LJ did so with reference to the following example. A man might move to another country because he had obtained employment there without knowing how long that employment would last but without intending to reside there after he had ceased to be so employed. Buckley LJ held that whilst his prospective residence in that country would be “*indefinite*” it would not be “*unlimited*” in the relevant sense.

[114] Regarding the intention to return to one’s domicile of origin on the happening of an event or a contingency, *Re Fuld (No 3)* held that

"(1) The domicile of origin adheres-unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice;

²⁹ [1968] P 675 at 682D-E.

*(2) a domicile of choice is acquired only if it is affirmatively shown that the propositus is resident in a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g., the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn; the ultimate decision in each case is one of fact-of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities. (3) It follows that, though a man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, yet if his mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres...."*³⁰

[115] In a similar vein, Buckley LJ in *IDC v Bullock* held that where the contingency is not itself of a doubtful or indefinite character (bearing in mind that it is the characteristic of a contingency that it is doubtful whether that event will or will not occur), the question is this: is there a "*sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so on the contingency occurring rather than a vague hope or aspiration?*"

[116] Dicey, Morris & Collins, *The Conflict of Laws* (16th edn) summarise the position under English law regarding the acquisition of a domicile of choice and contingencies as follows:

"A person who determines to spend the rest of their life in a country clearly has the necessary intention even though he or she does not consider that determination to be irrevocable. It is, however, rare for the animus manendi to exist in this positive form: more frequently a person simply resides in a country without any intention of leaving it,

³⁰ [1968] P 675 at 684F-685D. This statement of law was approved in *Agulian & Anor v Cyganik* [2006] EWCA Civ 129 (24 February 2006) at para 6.

*and such a state of mind may suffice for the acquisition of a domicile of choice. The fact that a person contemplates that he or she might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he or she envisages the possibility of returning one day to their native country. If they have in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague and indefinite, for example making a fortune or suffering some ill-defined deterioration in health; but if it is a clearly foreseen and reasonably anticipated contingency, for example the termination of employment, or the offer of an attractive post in the country of origin, succession to entailed property, a change in the relative levels of taxation as between two countries, or the death of one's spouse, it may prevent the acquisition of a domicile of choice. If a person intends to reside in a country for a fixed period only, they lack the animus manendi, however long that period may be. The same is true where a person intends to reside in a country for an indefinite time but clearly intends to leave the country at some time."*³¹

- [117] There are three important points to draw from English law relevant to the determination of the present case.
- [118] First, if a person moves to another country for an indefinite or open-ended period this does not mean that the person acquires a domicile of choice in that country in circumstances where he or she intends to return to his or her country on the happening of an event.
- [119] Second, foreseeability of an event or a contingency that would cause a person to leave a country plays a central role in determining whether a person intends to reside in that country indefinitely and thereby acquires a domicile of choice in that country.
- [120] Third, where a person says that he or she intend to return to his or her domicile of origin on the occurrence of a contingency, this will be ignored where the contingency itself is vague and indefinite. It will, however, be taken into account (along with other relevant facts) where

³¹ At para 6-043 and the authorities cited in the footnotes to this paragraph.

the contingency is clearly foreseen and reasonably anticipated or there is a sufficiently substantial possibility of the contingency happening to justify the intention to return.

[121] In my view, these three points are consistent with Potgieter AJA's dictum in *Eilon* and with Pollak's third type of intention, subject to the rider that it includes the word "*unexpected*" in the tag.

[122] As a result, one can apply them to determine this case.

Contingency cases in South African law

[123] The Domicile Act is silent about contingencies. This, Schoeman says, raises the question whether they are relevant to the *animus* requirement at all. With reference to the cases of *Ricketts v Ricketts*³² and *Quayle v Quayle*³³ she concludes that there seem to be very few contingencies, if any, which should be considered seriously.³⁴

[124] The question in *Ricketts* was whether the defendant had acquired a domicile of choice in Cape Town or whether he was domiciled in Port Elizabeth. The defendant lived in Port Elizabeth for some years before his marriage and intended to live with his wife in Port Elizabeth after his marriage. The defendant was itinerant after his marriage. He left his wife and ultimately took up employment in Cape Town, where he remained for a number of years. He considered Cape Town to be his permanent home.

[125] On the back of an admission by the defendant that he would have no hesitation of moving to Port Elizabeth or elsewhere if he was offered

³² 1929 EDL 221

³³ 1949 SR 203

³⁴ Schoeman, *op cit* at p333.

more lucrative employment, the court found that the defendant was domiciled in Port Elizabeth.

[126] The case pre-dated both *Ley* and *Eilon* and does not apply the principles regarding contingencies I have set out above. In my view, no relevant conclusions about contingencies in our law can be drawn from *Ricketts*.

[127] The question in *Quayle* was whether the defendant retained his domicile of origin in England or acquired a domicile of choice in Southern Rhodesia. The parties' marriage was a troubled one. After they moved to England, the plaintiff and the parties' child moved back to Southern Rhodesia.

[128] The defendant then joined his wife and child in Southern Rhodesia. The marriage broke down relatively shortly thereafter. The defendant remained in Southern Rhodesia after the breakdown of the marriage and continued to work there.

[129] The defendant's evidence was that when he moved back to Southern Rhodesia he had mental reservations that he only intended to settle permanently in Southern Rhodesia provided the marriage was successful and that he always contemplated the possibility that the marriage might break down, in which case he would return to England.³⁵

[130] Based on various objective contemporaneous facts, including the contents of letters and an application for assistance premised on entering Southern Rhodesia on a permanent basis, the court rejected the defendant's evidence on the facts.

³⁵ At 206.

[131] The enquiry and analysis of the evidence in *Quayle* is consistent with the position that contingencies have a role to play in determining whether a person had the requisite intention to acquire a domicile of choice.

[132] The fact that the Domicile Act does not deal expressly with contingencies does not render them irrelevant in the enquiry into the *animus* requirement. It is evident from the legal principles set out above that they can and do, in appropriate cases, form part of the inquiry into whether a person intended to settle in a country indefinitely.

[133] As a general proposition, I do not think that Schoeman is correct to conclude that there seem to be very few contingencies, if any, which should be considered seriously. Each case must be decided on its own facts with reference to the governing principles set out above.

Applying the law to the present case

[134] I turn now to apply the legal principles set out above to the present case.

[135] On the facts, I accept the plaintiff's evidence that she moved to the Netherlands on a trial basis in an attempt to save her marriage. This is for reasons set out directly below.

[136] The plaintiff's evidence was supported by other cogent contemporaneous evidence, being the fact that she told her father and long-term friend that she was moving to the Netherlands on a trial basis. She also made it clear to the defendant in the conversation on 6 August 2024 that if their relationship ended she did not want to be stuck in the Netherlands and not be free to come back to South Africa. Although not stated in express terms, this, in the context of the issues

in the parties' relationship and the fact that the plaintiff had recently moved out of the common home, does imply a trial period.

[137] A move to the Netherlands on a trial basis in circumstances where the parties' relationship was, at best, in a very precarious state, accords overwhelmingly with common sense from the plaintiff's perspective and therefore with the probabilities.

[138] This conclusion is not gainsaid by any prior discussion or agreement that the parties would "emigrate" after they had children. Although it is perhaps unfortunate that the defendant was not cross-examined on this issue, I do have both parties' versions before me. The plaintiff's version is that "emigrate" in this context meant live abroad temporarily rather than permanently and the defendant's version was that it meant to live abroad permanently. Both versions are logical and tenable. In my view, it is not necessary to resolve this issue in order to decide this case. Regardless of the content of the parties' prior agreement, it is clear on the facts that when the plaintiff left for the Netherlands on 17 January 2025 she did so on a trial basis for the reasons I have set out above.

[139] Nor is the conclusion gainsaid by the fact that the plaintiff did in fact move to the Netherlands. That she did so does not itself erase the fact that she did so on a trial basis.

[140] The Cambridge Dictionary defines "trial" as "*a test, usually over a limited period of time, to discover how effective or suitable something or someone is*".³⁶

³⁶ <https://dictionary.cambridge.org/dictionary/english/trial>

[141] This is precisely what the plaintiff did when she moved to the Netherlands.

[142] Although the plaintiff did not have a clear and fixed time period for the trial period in mind, I accept her evidence that it was for a relatively short period measured in months. The trial was therefore for a limited time period, albeit not a fixed one. As per the definition, the move to the Netherlands nevertheless remains for a trial period in these circumstances.

[143] The conclusion that I have reached is that the fact that the plaintiff moved to the Netherlands for a trial period means that she did not do so with the intention of settling there for an indefinite period in terms section 1(2) of the Domicile Act. Expressed differently, she lacked the required *animus manendi* to acquire a domicile of choice in the Netherlands when she moved there (or at any time prior to the institution of the divorce proceedings). This is for the reasons set out directly below.

[144] In the context of the precarious state of the parties' relationship, the fact that it might end and that the plaintiff would return to South Africa was unquestionably a "*foreseeable future event on the occurrence of which residence in that country would cease*" as per *Eilon* or, in the language of *Re Fuld (No 3)*, "*a clearly foreseen and reasonably anticipated contingency*" rather than a "*vague possibility*". On Pollak's test, as revised, this event was not "*unexpected*".

[145] There was therefore, in the language of *IDC v Bullock*, a "*sufficiently substantial possibility of the contingency happening*" to justify regarding the plaintiff's intention of returning to South Africa as a "*real determination to do so on the contingency occurring rather than a vague hope or aspiration*".

[146] It also follows that the plaintiff had “*doubts*” as per *Eilon* whether she would remain in the Netherlands.

[147] On the facts of this case, my conclusion that the plaintiff lacked the requisite *animus manendi* is not, as per *IDC v Bullock*, undermined by the mere fact that the trial period was not fixed. In essence, this is because the plaintiff nevertheless intended to return to South Africa if the relationship ended regardless of the fact that the trial period was an open-ended one.

[148] My conclusion that the plaintiff lacked the requisite *animus manendi* is also supported by other facts in this case, such as the plaintiff’s very close ties to her family in the Western Cape; the fact that she did not arrange her affairs on departure in a way that suggests that the move to the Netherlands was a permanent or indefinite one; the plaintiff has no other ties or connections to the Netherlands; and the fact that when the relationship did end, the plaintiff wanted to return to South Africa and did not do so because of the defendant’s refusal to permit their daughter to return with the plaintiff.

[149] For the sake of completeness, I reject the submission by the plaintiff’s counsel that the plaintiff’s move to the Netherlands was affected by compulsion and was effectively involuntary. This was never put to the defendant and the facts do not support it.

[150] Although it is not necessary for me to decide this issue in light of the conclusions I have reached, I would have rejected the plaintiff’s evidence that she in any event intended to return to Cape Town after two years even if the relationship had not ended. There is no contemporaneous evidence to support this evidence. The plaintiff’s

evidence that this was to recreate for her daughter the happy two-year period that she spent abroad as a 9 year old does not ring true given that the parties' daughter was just over one and a half years only when they moved to the Netherlands and would have little, if any, memory of the experience.

[151] For these reasons, I find that defendant has not discharged the onus of establishing that the plaintiff acquired a domicile of choice in the Netherlands when the divorce proceedings in this Court were instituted.

[152] It follows that the plaintiff retained her domicile of origin in the Western Cape, that this Court therefore has jurisdiction in the divorce proceedings and that the special plea fails.

Costs

[153] The costs in this matter must follow the result.

[154] The parties both submitted that these costs should be awarded on scale C. I agree.

[155] The plaintiff employed two counsel, including a senior counsel. The defendant employed one counsel.

[156] This case was argued in very short order after the conclusion of the evidence. The parties' heads of argument were, by agreement and with my permission, submitted to me on the day of the argument. This timetable was set in an attempt to accommodate the request from the Dutch Court that a copy of this judgment be placed before them prior

to the hearing scheduled for 16 October 2025. When this case was argued, I did not fully appreciate the complexity of the legal issues that I have traversed in this judgment. Nor did counsel. These issues were therefore not covered in either parties' heads of argument. I am sure that this was because the heads of argument were prepared under time pressure.

[157] Given the nature of the matter and the manner in which the case was conducted and presented, my view is that it is fair to the parties that I award the plaintiff the costs of her senior counsel only rather than the costs of two counsel.

[158] The plaintiff's counsel requested the matter to stand down at the conclusion of the defendant's evidence in chief on 18 September 2025. At the resumption of the hearing on 29 September 2025, the plaintiff's counsel cross-examined the defendant in a very limited manner. There was more than sufficient time on 18 September 2025 to complete that cross-examination. The hearing on 29 September 2025 was therefore not necessary. I therefore disallow the plaintiff all her costs relating to the hearing on 29 September 2025.

Order

[159] In the circumstances, I make the following Order:

1. The defendant's special plea in abatement is dismissed.
2. The defendant is ordered to pay the costs of the special plea on scale C, including the costs of the plaintiff's senior counsel only and excluding all costs relating to the hearing on 29 September 2025.

3. The Office of the Family Advocate is directed to open a file and commence an enquiry into the parental responsibilities and rights in respect of the parties' minor child G[...], including regarding the residence, care and contact arrangements which will be in her best interests.
4. The parties are directed to cooperate with the enquiry of the Office of the Family Advocate.

MILLER AJ

Acting Judge of the High Court, Cape Town

APPEARANCES

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