IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) NOT REPORTABLE

(2) REVISED.

CASE NUMBER: 35304/2015

25/1/2018

In the matter between:

T M S M **PLAINTIFF**

And

P T M **DEFENDANT**

JUDGMENT

TLHAPI J

[1] The plaintiff instituted a divorce action on 19 May 2015, which action is defended and the defendant also filed a counter claim. Initially three issues were identified by the parties to be determined separately being : (a) jurisdiction, (b) applicable law, and (c) forfeiture. It was finally agreed at this trial that there shall be a separation. In terms of Rule 33(4) of the Rules of Court and that the issue to be determined was whether the plaintiff was domiciled within the area of jurisdiction of this court as at the date of the institution of the action. The separation was then ordered and the evidence that was led was that of the plaintiff and her witnesses and was confined to the issue to be determined.

[2] The plaintiff issued summons on 19 May 2016 and these were served on

the defendant on 29 May 2015 . The defendant filed his special plea and plea. In the special plea he raised the issue of jurisdiction. During June 2015 the defendant launched an application in the High Court of Botswana being an application to bring a divorce action on grounds of exceptional hardship. This application was struck out with costs on points *in limine* raised by the plaintiff. The plaintiff launched a Rule 43 application for maintenance *pendente lite* during September 2015 which was opposed and an order for interim maintenance was granted in the amount of R10,000.00 per month.

BACKGROUND

[3] The parties were married to each other in Botswana on 10 April 2014 and according to the Laws of Botswana. They proceeded to the defendant· parental home in Swartruggens on the 12 April 2014 for wedding celebrations and, thereafter the plaintiff joined the defendant at his residence [….] North West Province. When she moved to Rustenburg she brought along all her belongings, her clothes,·TV set and catering equipment. They lived together till 30 January 2015 when the defendant travelled to Botswana to arrange for her mother and sister to travel to Rustenburg and she was returned to her parental home in 6ot&wana. Although plaintiff had promised to fetch her after three days, he never did and he denied her permission to return to his home.

[4] She testified that after she separated from the defendant she used to visit her sickly maternal grandmother who lived in the outskirts of Rustenburg. During February 2016 she decided to go and live at [….] (Gauteng Province) which was the home of one P H, whose brother was married to her sister. She referred to P H as her brother. She was invited to live with him because at the time she was stressing over a lot of issues. In addition, her mother who lived in Botswana was gravely ill. She had also decided to be based in South Africa where she was lawfully entitled to be because of her marriage and she wished to develop her career, find employment and she had no intention of returning to Botswana permanently.

[7] Ms Ngubevela, the plaintiffs sister, who lived in Francistown Botswana, was present at the wedding and wedding celebrations of the parties. She also

accompanied her mother and the defendant on 30 January 2015, to fetch the plaintiff from the marital home in Rustenburg. She testified that the plaintiff moved to Pretoria in February 2015. The plaintiff lived in Pretoria to attend to her case and she used to travel to Botswana mostly to visit their ailing mother. She confirmed that the plaintiff was not employed at the time.

[8] Professor Hadebe testified that the plaintiff had been permanently living at his house in Eastwood Pretoria since February 2015 and that she contributed an amount of R3000.00 towards groceries. He testified that the plaintiff was not employed while living with him and that he introduced her to her attorneys and assisted plaintiff with legal expenses. He conceded that during her stay she came for short periods. During cross examination he was confronted with information by Home Affairs disputing his evidence that the plaintiff lived with him from February 2015 and he did not concede.

THE LAW

[9] It Is trite that in a divorce addition in addition to a decree of divorce being sought and other ancillary relief, also may include an application *pendante lite.* In this instance was a Rule 43 application for interim maintenance, which order was granted. It does seem to me that the issue of jurisdiction though raised, was dealt with in the application because no argument or judgment on this aspect was addressed expect that the order was granted. This therefore does not mean that the issue raised relating to jurisdiction in the main action was resolved by the grant of the interim relief, since the issue of jurisdiction was one to be determined at trial.

[10] In their heads of argument counsel for the parties have addressed the issue of domicile as provided for in Section 1 and section6(a) of the Domicile Act 3 of 1992.

Section 1 of the Domicile Act dealing with domicile of choice requires:

(a) legal capacity and the plaintiff qualifies because of her majority;

(b) lawful presence at a particular place of choice; and

(c) with the intention to settle there for an indefinite period.

[11] In this instance a court has jurisdiction in a divorce action if it is satisfied that the requirements in the Divorce Act read with Section 6(a) of the Domicile Act 3 of 1992 ('Domicile A ') have been complied with. Section 2 of the Divorce Act 70 of 1979 was substituted by section 6(a) of the Domicile Act which provides that :

"2(1) A Court shall have jurisdiction in a divorce action if the parties are - or either of the parties is:-

(a) Domiciled in the area of jurisdiction of the Court on the date on which the action is instituted, or

(b) Ordinarily resident in the area of jurisdiction of the Court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date."

[12] It is common cause that the plaintiff is a major and that her entry into the Republic South Africa was first as result of her marriage to the defendant. Testimony on how she maintained presence in Rustenburg before her departure on 30 January 2015 is not relevant because the divorce action was not instituted in the area of jurisdiction the marital home. After her departure to Botswana her stay In South African was by way of a visitor's permit. It was argued for the plaintiff that she regarded Pretoria as her permanent place of residence since February 2015 and that the visitor's permit satisfied the requirement of lawful presence; and that. coupled with her intention to reside permanently in South Africa in order to further her studies and exploring work opportunities fulfilled the requirements of a domicile of choice. It was argued further that the Domicile Act did not stipulate a minimum number of days to fulfil the requirements of lawful presence in claiming a domicile of choice.

[13] It was submitted per the defendant that the plaintiff by not relying on section 2 (1)(b) that she was ordinarily resident in the Republic for a period of not less than one year immediately prior to the date of institution of the action,

accepted the fact that she was not resident in the Republic at the date of issue of the summons. It was submitted that the plaintiff chose not to follow the defendant's domicile in the North West Province to institute action. It was contended that the parties could either institute action in the Republic of Botswana or in the North West Province, depending on where domicile was found to be present.

[14] The issue to determine is where the plaintiff was domiciled when the action was instituted and it is not in dispute that the plaintiff is not relying on section 2(1)(b) of the Divorce Act. This is a complex matter because after her marriage to the defendant in April 2014 it became apparent that the marriage had broken down on her return to Botswana nine months later. At that time she had not acquired a spousal permit or permanent residence in South Africa, which would mean that she would have retained her Botswana domicile until she had acquired one in this country by virtue of her marriage to the defendant and the fact that she following him to Rustenburg and b fulfilling all the other requirements to establish domicile. This aspect shall be revisited later. This state of affairs should not have been an impediment to her instituting divorce proceedings even after she had returned to Botswana in January 2015. In my view It was net necessary for har to seek residence first in Pretoria in order to institute divorce proceedings.

[15] The question is whether on the facts before the court the plaintiff has discharged the onus of proving on a balance of probabilities that she had acquired a domicile of choice subsequent to the break-up, competent to establish jurisdiction of this Court. Has she established lawful physical presence In Pretoria and an intention to remain there indefinitely or permanently. Counsel for the plaintiff argued that since there was no requirement for a specific time or place of physical presence, the plaintiff had satisfied the requirements of the Domicile Act. Reference was made to the application brought by the defendant in the Botswana Court which ,application was dismissed on the points *limine* raised one of which was that of the lack of jurisdiction of the Botswana Courts. Counsel relied on the facts in Green v Green 1987 (3) SA 131 (SE). The facts are in my view distinguishable in that there the issue of domicile of the parties was not dealt with. The Issue to determine was whether ·a Court of one Division had the

competence to make preliminary interim orders in connection with litigation in the Court of another Division.' It was therefore about the interpretation of section 2 and the meaning of 'divorce action' as defined in section 1, that such meaning also included applications *pendente lite.*

[16] The facts in Grindal v Grinda! 1987 (4) SA 137 (C) are distinguishable. The issue related to the revival of the applicant's domicile of origin. The applicant sought leave to sue by edictal citation in a South African court for a divorce and who was at the launch of such application not present or domiciled in South Africa. The applicant was domiciled in South Africa prior to her marriage to her husband who was domiciled in Australia. They got married in Cape Town and she emigrated to Australia to live with him. After a few months they moved to England where the marriage broke up and where they had agreed to get divorced. It was decided that the doctrine of revival was no longer part of our law in view of section 3 of the Domicile Act which provided that 'no person shall lose his domicile until he has acquired another domicile whether by choice or by operation of law.' It was determined that on the facts the applicant was still domiciled in Australia where she had emigrated to and that her application was premature.

[17] The plaintiff does not rely on the domicile of the defendant in South Africa as at the time when the action was instituted and further, that in order to found jurisdiction, that she was also ordinarily resident in the area of jurisdiction of the court as provided in section 2(1)(b) of the Divorce Act. In order to prove physical presence in South Africa, the plaintiff, Ms N and P H were adamant in their testimony that the plaintiff was resident in Pretoria from February 2015. This is Improbable because of the objective facts stated in the records from the Department of Home Affairs, which facts have not been disputed. The records show that between the 21 March 2015 and the date on which the action was instituted the plaintiff had been in South Africa on a visitors permit for not more than 12 days, and her stay in South Africa is recorded as follows:

(a) the plaintiff entered South Africa after her departure on 30 January 2015, on 21 March 2015 and left for Botswana on 2;3 March 2015;

(b) On 7 April 2015 she travelled to Mahikeng and returned to Botswana

the following day 8 April 2015;

(c) On 10 April 2015 she entered South Africa and returned to Botswana on 13 April 2015;

(d) On 25 April 2015 she entered South Africa and returned to Botswana the same day;

(e) On 4 May 2015 she entered South Africa and returned to Botswana on 8 May 2015;

(f) , On 14 May she entered South Africa and returned to Botswana the following day;

(g) On 16 May 2015 she entered South Africa and returned to Botswana the same day;

(h) On 25 June 2015 she entered South Africa and returned to Botswana the following day;

[18] It is correct that the Domicile Act does not prescribe a period within which physical presence is satisfied, and the plaintiff was given lawful entry and stay in South Africa for the few day before institution of the action, it Is my view that it cannot be said that a visitor's permit used In the above manner satisfies the requirement of physical presence in order to acquire a domicile of choice. I am also of the view that the demeanour end credibility of the witnesses was compromised when despite objective evidence there was insistence that the plaintiff was resident within the jurisdiction of this court from February 2015. According to P H the plaintiff had her own room 'and he assisted her financially when the plaintiff could not afford her monthly contribution of R3000.00 towards groceries. I find his evidence relating to the monthly contribution not to be credible and was consequently improbable. It is probable that the plaintiff stayed with him during her brief stay in South Africa which is evidenced by his admission that he introduced her to her local attorneys. She also testified that she used to visit her gravely ill grandmother in Rustenburg. It is not clear therefore when these visits occurred during her brief visits and the duration thereof.

[19] I also find that the plaintiff failed to give a satisfactory explanation regarding the use of nor bank card in Botswana. The activities on her bank

account in Botswana are indication that there was not a continued indefinite physical presence in the area of jurisdiction of this court. The plaintiff's evidence that her card was used by relatives in Botswana should be rejected. Furthermore, if there was intention to permanently regard Pretoria as a domicile of choice for study or employment purposes or even for entitling the plaintiff to the jurisdiction on this court. such intention to stay indefinitely or permanently for the purposes mentioned must be manifested by positive objective evidence and not just the say so of witnesses. No institution was identified for advancing her studies, no document being an application for admission, or application for study or work permit for these purposes was disclosed. I am therefore of the view that domicile of choice has not been proved on a balance of probabilities for the purpose of entitling the plaintiff to institute action within the jurisdiction of this court.

[20] In the result the following order is given:]

1. The plaintiff was not domiciled within the jurisdiction on this court when the divorce action was instituted.
2. The action is dismissed with costs which include the costs of two counsel.

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TLHAPI W
(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	**:**	**14 AUGUST 2017**
JUDGMENT RESERVED ON	**:**	**7 SEPTEMBER 2017**
ATTORNEYS FOR THR PLAINTIFF	**:**	**VAN DER MERWE INC.**
ATTORNEYS FOR THE DEFENDANT	**:**	**ROOTH & WESSELS ATT.**