HH 150/02
HC 5246/2002

REPORTABLE - 8

HALIMA LATIF
versus
MUHAMMED FEROZ LATIF

HIGH COURT OF ZIMBABWE
ADAM J,
HARARE, 7 August and 16 October, 2002

Mr *Ali Ebrahim* for the applicant
Respondent IN DEFAULT

ADAM J: The plaintiff sought a decree of divorce and ancillary relief. At the hearing on the unopposed roll I ruled that the plaintiff had not established that this Court had jurisdiction in this divorce matter. These are my reasons.

In her Declaration she averred that :

> "4. The Defendant was born in Pakistan and came to Zimbabwe in August 2001, and has since been residing in Zimbabwe and he now regarded Zimbabwe as his permanent home. The Defendant is domiciled in Zimbabwe and presently lives and works in Zimbabwe".

The Matrimonial Causes Act (Chapter 5:13) in section 3 provides:

> "(1) Without prejudice to any other basis of jurisdiction which the High Court has, the High Court shall have jurisdiction to entertain an action for divorce, judicial separation or nullity of marriage, where the wife is the plaintiff or applicant -
> (a) if the wife has been deserted by her husband and, immediately before the desertion, the husband was domiciled in Zimbabwe, notwithstanding that the husband has changed his domicile since, this desertion; or
> (b) if the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of the commencement of the action and is still so residing, notwithstanding that the husband has never been domiciled in Zimbabwe;
> (c) if at the date of commencement of the action the wife is a citizen of Zimbabwe and, immediately before that date, she has ordinarily been resident in Zimbabwe for a period of not less than two years and is still so residing."

It is clear from the foregoing that the above statutory provision gives additional jurisdiction to the High Court. In *Foord* v *Foord* 1924 WLD81 MASON JP at 82 observed:

> "The Privy Council has in the case of *Le Mesurier* v *Le Mesurier* (1895 AC517), laid down in clear terms the general rule that the domicile of the husband at the time the action is instituted is the necessary foundation of the Court's jurisdiction in a claim for divorce, and the South African courts have followed that decision".

See also *Hooper* v *Hooper* 1908 EDC 474 at 476-7 and *Van Zyl* v *Van Zyl* 1928 WLD 195 at 197. The High Court in this country has also followed this decision in matrimonial matters - *Thompson* v *Thompson* 1940 SR 187, *Evans* v *Evans* 1942 SR 12 and *Howard* v *Howard* 1966 RLR 182.

In *Mason* v *Mason* (1825) 4 EDC 330 BARRY JP said at 337 :

> "Domicil means the place or country which is considered by law to be a person or permanent home. The law also says that no person can at any time be without a domicil." (My emphasis).

In *Evans* v *Evans, supra,* the plaintiff, an officer in the Royal Air force and an instructor originally domiciled in England was drafted to this country in 1940 at his own request, leaving his wife and child in England. About a month after his arrival he formed the intention of remaining in this country and settling here after the war so he wrote to his wife to that effect. In 1941 he was left a legacy and had it transferred to this country. He rented a house in Gweru and sent for his wife and child to join him. After being here the wife deserted him. The plaintiff was still on duty in the Royal Air Force at that time. It was accepted that the plaintiff had no free choice in the matter since he was under orders. It was stated that the presumption was against the plaintiff having her domicile in this country but he could rebut. This Court was entitled to assume jurisdiction on his action for restitution of conjugal rights it would appear on the basis that the plaintiff had rebutted the presumption.

It is pertinent to mention that the Immigrants Regulation Act (Chapter 60) of the Revised Edition of the Statute Law of Southern Rhodesia in force on l January 1939 defined at that time "domicile" as meaning the place in which a person has his present home or in which he resides, or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose. It also had a proviso that no person shall be deemed to have a domicile in this country unless he resided in this country for 3 years otherwise than under terms of conditional or temporary residence issued under that Act.

In *Fenner* v *Fenner* 1943 SR 188, the plaintiff was born in England but had gone to South Africa in 1920 and came to this country in 1941 with the fixed intention of making this country his permanent home. He came to seek employment although this terminated because of the closing down of the firm, he had reasonable expectation of other employment. He had a small military pension and sons of his by a former marriage were here to assist him. The plaintiff was a prohibited immigrant upon a temporary permit in terms of the Immigration Regulation Act under an order of the Governor made as a war measure until normal conditions were restored. The plaintiff was a British subject of a type that would not ordinarily be denied entry to this country and there was every probability that when the order of the Governor was cancelled he would be prevented to stay. TREDGOLD J held that he could not acquire a domicile within the meaning of that Act but the requisites for the acquisition of domicile were actual residence coupled with the intention to remain permanently in the country concerned and so the plaintiff had established a matrimonial domicile in this country for purposes of his action for the restoration of conjugal rights failing which a decree of divorce against his wife.

In *Webber* v *Webber* 1915 AD 239 INNES CJ said at 242:

> "The Roman-Dutch law recognised that any person, being *sui generi,s* could acquire domicile of choice in a new country by establishing his actual residence in that country with the intention of making it his permanent home : *Cens.For*. 7 Pt. 1, 2, 125);; *Voet*, *Ad. Pand.* (S.I. 98, *etc*). Both elements (*factum et animus*) were essential; intention without residence, and residence without intention were alike ineffective. And it also adopted the rule that the burden of proving a change of domicile lay upon the person alleging it; in case of doubt the domicile of origin was presumed to have continued : see *Voet* (5, 1, pars. 97 and 99)…The choice of a new domicile, therefore, involves the abandonment of the old one; and the prominence given to this aspect of the matter by the Courts has resulted in a demand for strict proof of intention to give up the old home and to acquire the new."

In *Howard* v *Howard*, *supra*, the parties were married in 1962, the plaintiff returned to this country, her place of birth in October 1963. In December 1963 the defendant joined her and a child was born in 1965. The defendant came to this country with intention to make it his permanent home. He was a prohibited immigrant with a temporary residence permit to be validated at three-monthly intervals for a period of 2 years after which consideration would be

given allowing him to take up permanent residence in this country. In January 1966 his lawyers wrote to the Chief Immigration Officer that the defendant had acquired a sincere affection for and love of this country, that his son was born here and that he had acquired a farm here with a definite financial stake in this country. GOLDIN J said at 186:

> "For the plaintiff to succeed, she must prove that the defendant had acquired a domicile of choice in Rhodesia. It has been held that it is more difficult to prove a change from a person's domicile of origin than a change from his domicile of choice (See *Bowie or Ramsey* v *Liverpool Royal Infirmary*, 1930 AC 588, and RAYDEN ON DIVORCE, 9th EDN., pp 27-33). The use of the words that proof is required 'with perfect clearness and satisfaction' (see *Johnson* v *Johnson*, 1931 AD 391 at 398 and *Winans* v *Attorney-General* 1904 AC 291) must not be taken that the standard of proof of this type of case forms an exception to the requirement in civil cases, of proof on preponderance of probability."

Further, it is also clear that mere consent of the parties does not confer jurisdiction in matrimonial proceedings. In *Weatherley* v *Weatherly* (1879) Kotze 66 it was stated by KOTZE J at 71:

> "Now, although the law of domestic relations is treated as a portion of *Jus privatum*, the institution of a tribunal to decide on questions relating to status, arising out of domestic relations, and the exercise of jurisdiction in such cases, is a matter which pertains *ad statum publicum* - to the public welfare of the whole community (*Cf. Huber, Jus Hodiernum* 1V., 14, 529). Marriage is not a mere ordinary private contract between the parties. It is a contract creating a status, and gives rise to important consequences directly affecting society at large. It lies, indeed, at the root of civilized society. If, then, in a matter of divorce the bare consent of the parties can be held sufficient to give jurisdiction, there is no protection, no safeguard, against the parties acting *fraudem legis;* but this, it is policy, as well as the duty of every Court of Justice to discourage and prevent."

See also *Carter* v *Carter* 1953 (1) SA 202 (A) at 205.

Presently the Immigration Act (Chapter 4:02) provides in section 2(1) that subject to this section, a person shall be regarded as being domiciled in a country, if (a) he resides permanently in that country or (b) that country is the country to which he returns as a permanent resident. Section 3(3) states that no person shall, for purposes of this Act, have domicile in Zimbabwe unless he has lawfully ordinarily resided therein for a continuous period of 10 years. Section 3(4)(a) provides that a person shall, for the purposes of this Act, lose his domicile in Zimbabwe if he (i) has voluntarily departed from and resides outside Zimbabwe with the intention of making

his home outside Zimbabwe, or (ii) is absent from Zimbabwe for a continuous period of 5 years or such longer period fixed by the Minister of Home Affairs. Section 3(4)(b) stipulates that the fact one has taken up residence outside shall be *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise is on him. The National Registration Act (Chapter 10:17) in section 2 defines a "resident" as any inhabitant of Zimbabwe over 16 years of age who has resided in Zimbabwe for a continuous period of not less than 6 months. This Act makes provision for the issuance of identity discs to various persons including residents. Under the National Registration Regulations, 1977 (G N 47 of 1977) the classification code of the Second Schedule the identity disc for citizens is CIT; for non-citizen residents who are permanent residents or deemed permanent residence is NCR and for others not covered by the above it is ALIEN.

In *Medeiros* v *Rebello* 1924 SR 167 the applicant had entered into a 3 year contract of employment with the respondent whereby he undertook to repatriate the respondent to Goa. The respondent sued the applicant on the contract. The applicant sought security for costs from him. RUSSELL J indicated that the respondent was a stranger, i.e. a person domiciled in India but resident in this country. As a resident for some lengthy period (an *incola*) he did not fall in the category of persons who had to provide security for costs. He was not a permanent resident.

In *Ex parte Minister of Native Affairs* 1941 AD 53 CENTLIVRES JA (as he then was) summarised three general principles as follows:

(i) The question to be considered is not one of domicile but of residence; a person may have his domicile in one place and his residence for the time being in another place.
(ii) A person may have more than one residence.
(iii) A person cannot be said to reside at a place where he is temporarily visiting, nor does he cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods.

The learned Judge of Appeal then said at 59:

> "Apart from the above general principles which have been enunciated by the Courts, the Courts have studiously refrained from attempting the impossible task of giving a precise and exhaustive definition of the word 'resides'.
> …

> To put the matter in another way, the question whether a person resides at a particular place at any given time depends upon all the circumstances of the case read in light of the general principles referred to above".

In *Van Rensburg* v *Ballinger* 1950 (4) SA 427 the respondent's election as a Senator was challenged on the basis that he did not have the required qualifications in that he had not acquired South African nationality by domicile as a British subject. The respondent arrived in South Africa in 1928 and by an order made by the Minster of Home Affairs he was deemed to be a prohibited immigrant on a temporary permit. Thereafter temporary permits were issued authorising his continued residence in South Africa. The respondent prior to 1925 was a British subject by birth domiciled in Scotland. He came to South Africa with the intention of taking permanent residence in South Africa. The respondent had resided in South Africa continuously for approximately 22 years; he married a lady who was a South African national by birth; he at times was owner of immovable property in South Africa; he was registered as a Parliamentary Voter; he was issued with a South African passport in 1934 replacing his British passport and in 1946 he was given another South African passport; he was in 1945 appointed a Commissioner of Oaths by the Minister of Justice. The case of *Joosub* v *Suleman* 1940 TPD 177 was cited where the respondent was a prohibited immigrant under a temporary permit that had been renewed from time to time. It was his intention to continue to reside in South Africa and it was likely that he would be allowed to remain in South Africa permanently. The issue arose as to whether his rights or status were affected by the position that he really was not the person who had the last word on the subject; the order declaring him a prohibited immigrant may be put into effect and the possibility existed that he might be deported. GREENBERG J considered that fact as not operating against the acquisition of a domicile. MURRAY J in the *Van Rensburg* case, *supra*, observed at 441 :

> "In the present case, as in the alien cases, residence persists and is lawful, the only difficulty is the possibility of the right of termination and, as the alien cases show, domicile is lost only when the higher authority has actually invoked the right of termination. The individual is, in fact, to quote the phrase used, the master of his own

> destiny. He can decide to have his home in a particular place and he can carry that decision into effect.
>
> Those were the authorities quoted to us and it seems to me that they are directly in point here. Apart from authority, I have come to the conclusion on general principles that the power of the higher-authority to terminate a person' residence in a particular area cannot *per se* affect the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised, then naturally with the disappearance of physical residence the domicile thus acquired is brought to an end. Until such termination the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may (I do not say he must) be taken to realise the precarious character of his residence and consequently may not be held to have formed the intention of making his permanent home in such area."

It is clear from the foregoing that cujus in every case had had his place of abode in this country for a period of time in excess of a year and had manifested the idea of some permanence by what each of them had done. In the present case the defendant arrived in August 2001 and on 30 August 2001 married the defendant and from that date there has been persistent antagonism between the parties. The defendant is being employed but there is nothing on the papers before me to show that he has some financial stake in this country. The facts in *Evans* v *Evans*, *supra*, *Fenner* v *Fenner*, *supra*, *Howard* v *Howard*, *supra*, and *Van Rensburg* v *Ballinger*, *supra*, can be distinguished from this case. In *Howard* v *Howard, supra,* GOLDIN J said that it is more difficult to prove a change from a person's domicile of origin. In *Bowie of Ramsay* v *Liverpool Royal Infirmary, supra,* the deceased George Bowie was born in Scotland in 1845, worked as a commercial traveller but ceased work in 1882. In 1892 he went to join the other members of his family who had moved to Liverpool so that he could be closely attached to his mother and sister. His mother died in 1905 and was buried in Glasgow but he did not go for his mother's funeral. He had lived in some lodgings in Liverpool for 20 years. He died in 1927 leaving a holograph will that was valid under Scottish law but invalid under English law. LORD BUCKMASTER said at 593 -

> "It was proved that he refused to go to Scotland when his sister remained there in 1915. He was reported to have said that he never wished to set foot in Glasgow again, and he arranged for his burial in Liverpool beside his brother and sister. On the other hand he referred to himself as a Glasgow man both during his life and in his will. As evidence of definite intention upon the question of domicile this evidence is fragmentary and insufficient".

The House of Lords concluded that he cannot be said to have had any real attachment to Liverpool. George Bowie was held not to have abandoned his domicile of origin in Scotland.

The defendant has been in this country for one year and his residence status in terms of the Immigration Act has not been revealed to this Court. As pointed out by MURRAY J the only effect of the possibility of use of the power by the Minister of Home Affairs is that the defendant may be taken to have realised the precarious character of his residence and may not be held to have formed the *animus* of making his permanent home in Zimbabwe. I am not satisfied that the defendant has met the requisites of domicile of choice.

This does not preclude the plaintiff from continuing with these proceedings should section3 of the Matrimonial Causes Act apply to her. In which case she is at liberty to apply to amend her Declaration.

Ali Ebrahim, legal practitioner for plaintiff
Muhammed Feroz Latif, legal practitioner for defendant