REPORTABLE IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: **1694/08**

DATE: **14 SEPTEMBER 2009**

In the matter between:

H S-W **Plaintiff**

and

H S W **Defendant**

JUDGMENT

DAVIS. J

Defendant has raised a defence by way of a special plea in a divorce action, in which he alleges that this Court lacks the necessary jurisdiction to enter into the divorce proceedings instituted by plaintiff.

The parties have agreed to proceed by way of a stated case which was filed in this Court in which the salient applicable facts have been summarised. It is important to emphasize that, when parties agree to proceed by way of a stated case, this Court is bound by that evidence and cannot traverse issues which go beyond the evidence agreed upon in terms of the stated case.

The essence of the special plea can be summarised thus;

1) Despite plaintiff's allegations in the particulars of claim and the stated case that this Court has jurisdiction to entertain a divorce action by virtue of the fact that she was ordinarily resident within the jurisdiction of this Court at the time of instituting the divorce action and was so ordinarily resident in the Republic of South Africa for a period exceeding one year immediately prior to the institution of the divorce action, this fact is not in itself the decisive issue.

2) The objective facts demonstrate that, as at the date of the institution of the

divorce action, plaintiff never held a *bona fide* intention to be ordinarily resident in South Africa.

3) At all material times, she intended to move back to Namibia and reside there on an indefinite basis. That is what occurred.

4) The requirements for establishing jurisdiction in terms of the Divorce Act 70 of 1979 have thus not been met.

5) In any event, as neither the parties nor the affected minor child, nor any of the likely witnesses reside within the jurisdiction of this Court, this is a forum *non conveniens,* alternatively not the most appropriate forum to determine this dispute. 6) The Court should not entertain the matter even if the jurisdictional requirements have been met in as much as a doctrine of effectiveness requires that, even if the Court has the necessary power to hear the proceedings, it must be satisfied that it can give effect to its own judgment in due course.

Plaintiff justifies her contention that this Court has jurisdiction to hear the divorce for the following reasons;

1) She was previously a South African citizen and retained her right to residence in South Africa, notwithstanding that she is a Namibian citizen and the holder of a Namibian passport.

2) She resided in Cape Town from October 2005 to March 2006 when she was in rehabilitation at Stepping Stones in Kommetjie in the Western Cape. She was in Namibia from March to May 2006 when she again entered Stepping Stones until November 2006, whereafter she returned to Namibia for one month prior to returning again to Cape Town.

3) Plaintiff and defendant separated permanently in December 2006, a fact that is common cause between parties. She contends that during this time she had formed the intention to remain permanently in Cape Town and that her intention was to not return to Namibia to reside there on a permanent basis. Accordingly, she states, that when the divorce action was instituted, she was ordinarily resident within this Court's jurisdiction and had been so resident for a period of at least one year prior to the institution of proceedings. It is common cause that she resided in Cape Town from December 2006 until March 2008 in a flat in Wynberg which is registered in her name.

4) In 2007 she returned to university in order to complete a Masters degree at the University of Cape Town. Thereafter she sought employment in Cape Town in 2008 and applied for over 30 positions, a fact which is also not denied by defendant.

5) As a result of not being able to obtain employment in Cape Town, she sought employment in Windhoek. She states that this was a last resort in order to obtained remunerative employment as defendant "ceased paying maintenance to me and I was reliant on my father to support me". She also avers that she was willing to take up a contract position in Namibia for the duration of the school year in order that the parties son, Heinrich, could reside with her. It is common cause that Heinrich would then attend Woodridge College outside Port Elizabeth as from 2009, and this has indeed proved to be the case.

6) Plaintiff's offer of employment in Namibia fell through and as she had signed a lease with regard to her accommodation and arranged for Heinrich to reside with her, she sought alternative employment which when this proved fruitless, she then enrolled with the Society of Advocates of Namibia in June 2008.

I turn briefly to deal with the legal position.

The Legal Position

Section 2 of the Divorce Act which was substituted by section 6(a) of the Domicile Act 3 of 1992 provides as follows, insofar as jurisdiction in divorce matters is concerned:

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.

In this case the dispute turns on the meaning of the phrase "ordinarily resident". In Zwvssig v Zwvssia 1997(2) SA 467 at 470F the Court citing Dicev: The Conflict of Laws savs:

"It is possible to be resident in a country despite a temporary

absence and at least in some context to have two or more residences."

The Court also approved of the earlier *dictum* in Robinson v Commissioner of Taxes 1917 TPD 542 at 547-548;

"There are ..... certain considerations which may afford a guide to its interpretation. In the first place it is not synonymous with domicile, nor is it necessarily permanent, nor is it exclusive, but on the other hand a mere passer by or a casual visitor is not resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best general description of what is imported by residence is that it means a man's home or one of his homes for the time being; for exactly what period and what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule .... Again the maintenance of an establishment coupled with intermittent or occasional dwellings is sufficient to constitute residence .... It appears therefore that if a man sets up an establishment in a country and lives there at intervals he is resident in that country, however many similar residences he may have elsewhere." 470F.

The obviously sexist language employed by this dictum should not disturb its importance as a clear articulation of ordinary residence.

This concept was most exhaustively analysed by Goldstone. JA (as he then was) in CIR v Kuttel 1992(3) SA 242(A).

The importance of this case necessitates that I canvas both the facts and the reasoning of the judgment. The taxpayer was an 85% shareholder in Atlantic Fishing Enterprises ("Atlantic") which conducted a fishery business. As the company's export business had increased, the taxpayer decided to proceed to New York to open an office of the company

from which he could supervise its American business. On 29 July 1983 he and his wife left South Africa to take up residence in the United States. Prior to this move, the taxpayer realised a large number of his assets and invested the proceeds in Eskom stock in order to secure the maximum personal income transmissible to America. The taxpayer also owned shares in other private companies and together with his wife the shares in a private company which owned a house. Soon after arriving in America, the taxpayer decided to establish a home, whereupon he rented a house, established church membership, opened bank accounts, acquired an office, bought a car and registered with social security.

Subsequent to his departure from South Africa he lived continuously in the United States, other than when he visited South Africa. From the time of his arrival in America in July 1983 until 28 February 1986, the taxpayer returned to South Africa on ten occasions, each for short periods of less than two months. During two of these visits the taxpayer attended directors meetings of Atlantic. During all of these visits he stayed in the house owned by the company of which he and his wife were the sole shareholders.

Subsequent to the tax years in question, the taxpayer bought immoveable property in America, made his permanent home in

Santiago and acquired citizenship of the United States. The question before the Court concerned the exemption from tax on interest and dividends in terms of the then Section 10(1)(h) of the Income Tax Act 58 of 1962, which exempted persons who were neither ordinary resident of the Republic, nor carried on business in the Republic from such tax. (My emphasis)

Howie. J (as he then was) in the court a *quo* (ITC 1501; 53 SATC 314) held that the taxpayer was not ordinarily resident in the Republic at the relevant times, nor did he carry on business in the Republic. The issue of carrying on business in the Republic was abandoned on appeal and the Court was required only to determine the meaning of the word "ordinarily resident". Goldstone. JA at 247 drew a distinction between resident and ordinarily resident. As he stated, "in the present case we are concerned with the words 'ordinarily resident', that is something different and in my opinion narrower than just resident". He then confirmed the accuracy of the *dictum* of Schreiner. JA in Cohen v CIR 1946 AD 174 at 185, H:

> **"His ordinary residence would be the country to which he would naturally as a matter of course return from his wanderings; as contrasted with other lands that might be called his usual principal residence and it would be described more aptly than other countries as his real home."**

The Court confirmed that the policy of the legislature in providing exemptions from tax in terms of Section 10 was to encourage investors from outside the Republic to invest their money in the Republic. Given this policy the Court found that there was no justification for giving an extended meaning to the words "ordinarily resident".

Applying these principles to the facts, Goldstone JA found that, upon his departure, the taxpayer decided to set up his permanent home in the United States of America, although he continued to own assets in South Africa. The Court found, but for the provisions of the Exchange Control Regulations, that he would have taken all of his South African assets to the United States, but he could not legally do so. Hence he had no choice but to make the most advantageous arrangements in the circumstances with the substantial assets he retained in this country. The Court also observed that the lengthy visits of the taxpayer to South Africa after his departure to the United States became less frequent and for shorter duration as the years went by. His retention of a house in South Africa was based on sound financial reasons for "retaining an interest in immovable property and he required a place to live when he visited Cape Town." There was thus no inconsistency between retaining a house in Cape Town and being ordinarily resident in the United States.

The question which confronts this Court is the following; on the evidence placed before this Court in the stated case: did plaintiff regard the Western Cape as a "real home" at the time of launching divorce proceedings in this Court on 30 January 2008 and, more so, had she regarded the Western Cape as her permanent home for a year preceding the launching of proceedings which is the mandated requirement in terms of the Divorce Act.

On the agreed facts plaintiff, a Namibian citizen who holds South African residence, lived in Namibia from March 1992 to October 2005. During 2006 she resided between Namibia and

Stepping Stones Rehabilitation Clinic, until December 2006 when, on the basis of the stated case, she returned to Cape Town to commence her studies at the University of Cape Town in February 2007, a course which concluded at the end of 2007.

The evidence also indicates that there was some e-mail correspondence which has a material affect on the examination of these facts. On the 18th of November 2007 defendant generated an e-mail to plaintiff in which he stated the following;

> **"You have indicated your wish to come to Windhoek in 2008, find a job, a place big enough for both you and Heinz to live and resume your duties as a mother for him. In order to make that wish possible certain infrastructure (home) has to be established especially if one plans to have a place to live, get to school, sport etcetera".**

In January 2008 plaintiff wrote to her friend, Michaela Clayton, in which she said the following;

> **"I have decided to return to Namibia (Windhoek) at the latest March 2008. My son needs me and my social infrastructure is in Windhoek, no doubt about that. My son is currently enrolled as a student at DHPS and he is boarder there, and he HATES it - mostly the boarding but also the school with their rather limited outlook on life. I promised that I shall return to Windhoek to enable him to live with me not later than March 2008."**

There can be no doubt, on the facts, that plaintiff lived in Cape Town from December 2006 to early 2008. At the time that she launched the proceedings, she had lived in Cape Town for more than a calendar year. Can it thus be said, on the basis of all this evidence, that on 30 January 2008, when divorce proceedings were launched by plaintiff, that she was ordinarily resident in Cape Town within the meaning given to that term by Goldstone. JA in Kuttel, supra, and, which is in my view, the authoritative exposition of the concept.

Expressed differently was Cape Town the place of residence to which the plaintiff would

return after her wanderings? I accept that events that took place after 30 January 2008, including plaintiff's return to Namibia in April 2008 and her continuous stay thereafter in Windhoek are not relevant to the determination of this question of whether she was ordinarily resident in Cape Town as at 30 January 2008, as tempting as the use of those facts may be for the defendant to bolster its case. They are not of relevance.

Forsyth Private International Law (4th Edition) at 193 writes thus of the concept of residence;

> **"It has been argued that residence does not include an *animus residendi* although in certain cases the contrary view is taken. [The author cites authority at footnote 279.] The acquisition of residence is certainly not dependant on the legal capacity of the *de cujus;* there is nothing to prevent a minor or an insane person for example from residing in an area. It is probably quite correct to say that residence does not embrace an *animus* in the sense of a specific intention to remain in an area. From physical presence of a certain duration and from the nature of a person's activities in the area an interest or attachment may be inferred; and this is the crucial factor**
>
> **- the reason for being in a particular place. If the facts of the case show that the *de cujus* was at some time present in a particular area for a person requiring some fair degree of attachment this will suffice to establish residence."**

While I agree with Prof Forsyth that an *animus residendi* may not be required for residence on the basis of the authority of Kuttel. supra, far greater weight is given in the concept of ordinary residence to some measure of intention. The central basis of the finding in Kuttel was to conclude that the intention of the taxpayer in that case was to return to the United States which he regarded as his permanent home, notwithstanding his frequent visits to South Africa, the country in which he had resided for so long.

On the plaintiff's evidence, it may well be that she had formed an intention to reside permanently in Cape Town by January 2008. As proof thereof, she refers to 30 applications for employment. However, there are two contrary pieces of evidence, of which I am entitled

to take account; that is defendant's e-mail regarding plaintiff's intention, as at late 2007, and her own e-mail to Michaela Clayton in January 2008.

In my view, plaintiff may have contemplated staying in Cape Town if a suitable job was forthcoming, but, at best for her, she was uncertain as to her location. The short period of one month, January 2008, cannot be the basis, on the probabilities, of a fiding that she had formed the intention that Cape Town was now her permanent home as opposed to a temporary sojourn.

Even if she had shown proof of the requisite ordinary residence at January 2008, most certainly this had not been established for a year prior to the application having been launched. Indeed, on her own version, it appears that the final determination as to her staying in Cape Town on a permanent basis was formulated somewhere in early 2008. It can certainly not, on this evidence, be concluded that for a year prior to the launching of the proceedings, that is from 30 January 2007 to 30 January 2008, she had, exhibited the requisite requirement for ordinary residence in the Western Cape, or indeed in South Africa, as the test therefore is established in the Kuttel case.

On the basis of the particular finding to which I have come, it is not necessary to deal with the argument relating to the forum *non conveniens.*

For these reasons, the special plea is upheld. This Court has no jurisdiction in the divorce proceedings which were instituted by plaintiff on 30 January 2008. Accordingly, the action dismissed together with costs.

DAVIS, J