REPORTABLE ZLR (59)

Judgment No. SC 75/06
Civil Appeal No. 391/05

GEORGE CHIKWENENGERE v JULIET CHIKWENENGERE

SUPREME COURT OF ZIMBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, SEPTEMBER 19, 2006 & APRIL 3, 2007

J C Andersen SC, for the appellant

C Warara, for the respondent

GARWE JA: The respondent in this matter instituted an action in the High Court on 15 February 2005 against the appellant seeking a decree of divorce and other ancillary relief. In April 2005 the appellant filed his plea and counter-claim. The matter was subsequently set down on the continuous roll before the High Court. On the date of hearing the respondent withdrew her claim as well as her plea and defence to the appellant's counter-claim. The appellant elected to proceed with his counter-claim and urged the court to dispose of the matter on an uncontested basis. The court *a quo mero motu* raised the issue of jurisdiction and directed both parties to file heads of argument on the question whether or not the Court had jurisdiction to entertain the matter. The court *a quo* reached the conclusion that the appellant was no longer domiciled in Zimbabwe and for that reason the court lacked jurisdiction to hear the matter. Dissatisfied with this ruling, the appellant appealed to this Court seeking an order setting aside this finding and a further order granting a decree of divorce and other ancillary relief.

That the court *a quo* was correct in *mero motu* raising the issue of jurisdiction there can be no doubt. In *Boswinkel v Boswinkel* 1995 (2) ZLR 58 (H) CHATIKOBO J remarked at p 60 C-D:

> "Indeed, if it were to appear to the court either from the pleadings or from evidence led that the question of domicile was in doubt, then in such event the court itself would *mero motu* raise the question of domicile in order to satisfy itself that the basis of jurisdiction relied upon has been established. See *Smith v Smith* 1962 R & N 469 (FS) 470 G."

See also *De Jager v De Jager* 1998 (2) ZLR 419 (H).

The issue that falls for determination is whether the court *a quo* was correct in coming to the conclusion that the appellant was no longer domiciled in Zimbabwe and that consequently the courts in Zimbabwe lacked jurisdiction to deal with the matter.

The facts of this case are to a large extent common cause or at least not seriously in dispute. The appellant in this matter is a Zimbabwean citizen by birth. He went to the United Kingdom in 2002 after securing a *visa* for that country. He was accompanied by his minor children and they all joined the respondent who had earlier entered the United Kingdom. His *visa* was valid until the year 2007 but in terms of the law in that country he was eligible to apply for indefinite leave to remain in the country. It was common cause in the court *a quo* that after establishing a presence in that country for a period of forty seven (47) months, he would have been entitled to apply for citizenship. There appears to be some dispute as to whether in his evidence he said he had already made such an application. Since he had not spent

forty seven months in the United Kingdom at the time he gave evidence, the suggestion in his heads of argument that he did not say he had already applied for such citizenship appears to be more likely. It was also his evidence in the court *a quo* that he was employed in the United Kingdom and that he had purchased an immovable property to accommodate himself and the minor children who are attending school in the United Kingdom. He further told the court that he and the respondent are the joint owners of an undeveloped stand in Waterfalls, Harare.

In coming to the conclusion that the court did not have jurisdiction, the trial judge found that the appellant's circumstances were such that, taken singly or collectively, the only inference to be drawn from those circumstances was that he had decided to abandon his Zimbabwean domicile and settle in the United Kingdom indefinitely.

The common law position in this country is that the jurisdiction of the court in divorce matters depends on the domicile of the husband *at the time* when the action is instituted. There are various authorities to the effect – see for example *De Jager v De Jager* 1998(2) ZLR 419 (H) at 420E.

The position appears now settled that it is the date of service of the summons and not simply the date of issue which is relevant – *Boswinkel v Boswinkel supra* p 66 B-C. In this case, however, nothing turns on this as appearance to defend was entered on the same day the summons was issued.

The position is also settled that even if the husband were to change his domicile after the commencement of divorce proceedings, the court would still have jurisdiction because the operative date is the date when the action was instituted – *Boswinkel v Boswinkel supra* p 66 B-D.

The question that arises for determination before this Court therefore is whether as at 15 February 2005 the appellant (as husband) was domiciled in Zimbabwe or as the court *a quo* found, he had formed an intention to permanently settle in the United Kingdom. In order to resolve this question, it is necessary to look at the law on domicile.

There are three varieties of domicile. These are domicile of origin, domicile of dependence and domicile of choice. The issue before this court concerns the latter. Domicile of choice is acquired by a person who, having the necessary legal capacity, in the exercise of his free will establishes residence in a place with the intention of remaining there permanently. To acquire this domicile, three requirements must be satisfied. These are –

(a) the *factum* of residence;

(b) the *animus manendi* or intention of remaining permanently; and

(c) freedom of volition.

See Boberg, *The Law of Persons and the Family* p 68.

The requirement of *animus manendi* has given the courts considerable difficulty. On the authorities it appears settled that in order to establish a domicile of

choice it must be established that the person concerned has abandoned his domicile of origin and has in fact acquired a domicile of choice in another place by arriving at that place and intending to remain there - *Boberg supra* p 71. The person must intend to reside in the place of his choice indefinitely; he must not have the present intention of leaving on the occurrence of some feasible or reasonably likely event – at p 70.

The Immigration Act [*Cap 4:02*] provides in s 3 that a person shall be regarded as being domiciled in a country if he resides permanently in that country or that country is the country to which he returns as a permanent home. It must be the country where in the settled routine of life, the *de cujus* regularly, normally or customarily lives – *Boswinkel v Boswinkel supra* p 62 E.

A change of domicile is a serious matter and may involve far-reaching consequences in regard to succession and distribution and other things that depend on domicile – *Winans & Anor v Attorney General* 1904 AC 287 at 291. For this reason some decided cases had previously suggested that a party suggesting change of domicile bore a heavy *onus*. In *Senior and Anor v Commissioner for Inland Revenue* 1960 (1) SA 709, it was argued that there is usually a strong presumption or probability against a person abandoning his domicile of origin for a foreign origin. The position now appears settled that the *onus* is no more than on a balance of probabilities – *Ley v Ley's Executors & Ors* 1951 (3) SA 186 at 192H; *Senior & Anor v Commissioner for Inland Revenue supra*, at p 714A.

On a careful analysis of the factors highlighted by the court *a quo* in reaching its decision, it is clear that, whilst the *factum* of residence was common

cause, an intention on the part of the appellant to abandon his domicile of origin was never established. It is also apparent that the court *a quo* took into account circumstances that may have arisen well after the commencement of the divorce proceedings. For reasons already given this is, of course, not proper as the important question is whether the court had jurisdiction at the time of commencement of the divorce proceedings.

Both parties to this matter were agreed in their pleadings that the appellant was domiciled in Zimbabwe. That in itself is, of course, not conclusive. The appellant frequently comes back to Zimbabwe. He has both movable and immovable property in Zimbabwe. After a stay of four years in the United Kingdom, so he told the court, a person in his position could apply for citizenship or indefinite leave to remain in the country. It is common cause that at the date of commencement of the proceedings he had been in the United Kingdom for only three years. The four year period was still to expire. Although the record seems to suggest that he told the court that he had already applied for citizenship, this would appear to be incorrect as he had not yet achieved the minimum stay necessary for such application to be made. It is also apparent that the possibility of applying for citizenship was mentioned in the context of ensuring that the education of the children was not interrupted. In his evidence he told the court *a quo* that it was his intention to develop the stand in Harare so that when he comes back he has somewhere to come back to. It was also his evidence that his desire is that his children remain Zimbabwean.

These assertions do not lend support to the conclusion reached that the appellant had formed an intention to permanently stay in the United Kingdom. In

this day and age persons leave their countries and stay in other countries for years whilst pursuing their education or professional careers. In these circumstances one must, as stated by LORD McNAUGHTEN in *Winans & Anor v Attorney General supra* at p 294:

> "Look very narrowly into the nature of a residence suggested as a domicile of choice before you deprive a man of his native domicile."

The factors taken into account by the court *a quo* did not, whether singly or cumulatively, suggest an intention on the part of the appellant to abandon his domicile of origin. First, the court *a quo* found that if granted custody the appellant "will perforce have to apply to extend his stay indefinitely in the United Kingdom". This is a development that would have taken place long after the commencement of the proceedings and which would not affect the jurisdiction of the court as at the commencement of the proceedings. In any event mere residence in a particular place is not, in the absence of an intention to permanently stay in that place, proof of an intention to adopt a domicile of choice. In *Bowie or Ramsay v Liverpool Royal Infirmary* 1930 AC 588 at 595, the House of Lords concluded that a thirty-five-year stay by Bowie in Liverpool merely established the *factum* but was insufficient to infer the *animus* in the sense of a definite intention to abandon his domicile of origin and to acquire a new one.

Secondly, the court *a quo* found that the appellant had indicated that he was eligible to apply for citizenship and had already submitted his application. This finding similarly relates to circumstances that were to occur long after the date of commencement of the proceedings. The fact that this may have been the position in

November 2005 when the appellant gave evidence has no effect on the question whether as at February 2005 the High Court in Zimbabwe had jurisdiction. In any event the position is now settled that domicile is clearly distinguishable from citizenship. As *Boberg supra* notes at p 55:

> "… it is by no means unusual for a person to be domiciled in one country while having the citizenship of another…."

The appellant in any event denies that such an application was made. Even if it had, this would not by itself be conclusive evidence of an intention to permanently settle in the United Kingdom.

Thirdly, the court *a quo* found that the appellant did not intend to disrupt the educational environment of the children and for that reason wanted to keep the children in the United Kingdom if granted custody. It is clear that he was doing this, not in order to stay permanently in the United Kingdom, but rather to ensure that his children's education was not disrupted. That was his intention.

Fourthly, the court *a quo* found that he had purchased a house in the United Kingdom. The house was intended to accommodate the appellant and the children. The acquisition on its own did not establish an intention to abandon his domicile of origin and acquire a new domicile particularly when regard is had to the appellant's evidence that he still had plans to develop a stand in Waterfalls, Harare.

In all the circumstances, the evidence before the court *a quo* did not establish an intention on the part of the appellant to stay in the United Kingdom

permanently. Indeed Mr *Warara*, who appeared for the respondent, conceded that the evidence did not conclusively show an intention on the part of the appellant to abandon his domicile of origin. The court *a quo* therefore erred in dismissing the appellant's counter- claim for want of jurisdiction. That decision must therefore be set aside.

One further matter calls for comment. In his notice of appeal, the appellant seeks an order setting aside the decision of the court *a quo* and for another order granting a decree of divorce and other ancillary relief. In their oral submissions before this Court, both counsel urged this Court to grant the relief sought but refer the issue of custody of the minor children to the trial court for determination.

I have some difficulty with this suggestion.

The trial judge heard evidence from the appellant. She was in a position to conclude the matter but reached the decision that she lacked jurisdiction to hear the matter. She then dismissed the matter for lack of jurisdiction. For reasons given in this judgment, that decision was wrong. Since this court has now determined that the trial judge did in fact have jurisdiction to hear the matter, the proper course would be for the matter to be referred back to the trial court for finalisation. The issues of divorce and other ancillary relief that the appellant would like this court to deal with were never determined by the trial court. Clearly therefore there would be no basis upon which this Court could grant the decree of divorce and ancillary relief that is sought.

On the question of costs, it is common cause that the respondent withdrew her claim and tendered costs. The matter thereafter proceeded on an uncontested basis. The appellant then appeared before the court *a quo* and gave evidence. It was the court *a quo* that *mero motu* raised the question of jurisdiction and instructed both parties to file heads of argument on the matter. This is the same matter that is before this Court.

In the circumstances it seems fair that the respondent pays the costs of the proceedings up until the time she filed her notice of withdrawal. Thereafter each party should pay his or her own costs.

Accordingly it is ordered as follows:-

"1. The order of the High Court dismissing the appellants' counter claim for want of jurisdiction be and is hereby set aside.

2. The matter be and is hereby remitted to the trial court for determination.

3. The respondent is to bear the costs of the proceedings up until the date of withdrawal of her claim and thereafter each party is to bear its own costs."

CHEDA JA: I agree.

GWAUNZA JA: I agree.

Mbidzo, *Muchadehama & Makoni*, appellant's legal practitioners

Warara & Associates, respondent's legal practitioners