CONSTITUTIONAL VALUES AND THE PROPRIETARY CONSEQUENCES OF MARRIAGE IN PRIVATE INTERNATIONAL LAW – INTRODUCING THE *LEX CAUSAE PROPRIETATIS MATRIMONII*

Sadiku v Sadiku case no 30498/06 (26-01-2007) (T) (unreported)

Dedicated to Prof I M Rautenbach

1 *Introduction*

Prof Emmanuel Rotimi Sadiku applied for summary judgment in order to evict his former wife, Ms Grace Jumai Sadiku, from a house registered in his name. Her defence was that the parties were previously married in community of property and that she therefore was the co-owner of the immovable property (par 1). Van Rooyen AJ found that both parties were domiciled in Nigeria at the time of their marriage. As such, Nigerian law applied to the proprietary consequences of the marriage (par 9-10). According to the expert evidence, "the concept of community of property is foreign to the matrimonial regime in Nigeria" (par 4; also see Agbede "Nigeria" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2004) par 174). The judge therefore found that Ms Sadiku would not have a viable *bona fide* defence in the event that the matter was to go on trial (par 9). He nevertheless allowed Ms Sadiku to remain in the house for another three months and a few days (par 12), apparently in terms of section 4(8)(a) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. (The reader should note that the decision as found at www.saflii.org (15-03-2008) contains two paragraphs 10. The first par 10 will be referred to as par 10 and par 11 in the electronic version will be referred to as par 12.)

2 *The legal system to govern the proprietary consequences of marriage*

Before the new constitutional dispensation, it was accepted that the law of the domicile of the husband at the time of the marriage (also called the law of matrimonial domicile or *lex domicilii matrimonii*) governed the proprietary consequences of marriage (both in respect of movables and immovables), unless the parties, in their antenuptial contract, chose another legal system to be applicable. (In any event, until 1 August 1992 a woman automatically took the domicile of her husband at the time of marriage – this was changed by s 1(1) of the Domicile Act 3 of 1992.) The *lex domicilii matrimonii* governed the proprietary consequences of the marriage once and for all; a change in domicile at a later stage did not affect the applicable legal system. (See *Frankel's Estate v The Master* 1950 1 SA 220 (A); *Sperling v Sperling* 1975 3 SA 707 (A); Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2003) 278-283.)

In the *Sadiku* case, Van Rooyen AJ considered "whether a categorical application of the *lex domicilii* of the husband is still acceptable within a gender equal society, such as ours. In the present matter the domicile of the parties did not differ and, accordingly, a possible inequality is irrelevant" (par 10). Of course, it depends on the content of the relevant legal systems whether the application of the law of the domicile of the husband at the time of the marriage or rather the law of the domicile of the wife at that stage would be beneficial to her (also see Forsyth 278 n 114). But the rule as such, on a formal or abstract level, constitutes discrimination on the basis of gender and is therefore in conflict with section 9(3) of the Constitution of

the Republic of South Africa of 1996. The common-law rule also does not make provision for same-sex marriages (see *Fourie v Minister of Home Affairs* 2005 1 All SA 273 (SCA) par 124-125; *Minister of Home Affairs v Fourie (Doctors for Life International); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) par 29 n 24 (also see par 70 n 80)) that are now legalised in terms of the Civil Union Act 17 of 2006.

To overcome these difficulties, two proposals have been made by the authors. Schoeman suggests that, in the absence of a choice of law in an antenuptial contract, the law of the common domicile of the parties at the moment of conclusion of the marriage applies. If there is no such common domicile, the law of closest connection applies. (See Schoeman "The connecting factor for proprietary consequences of marriage" 2001 *TSAR* 72 80-81 and also Collins (ed) II *Dicey, Morris and Collins on the Conflict of Laws* (2006) 1280-1288.) She adds that it is possible that "connecting factors, such as habitual residence, may develop to lend more certainty to the notion of 'most significant connection'" (81). In a later article, Schoeman proposes "a thorough investigation into the viability of habitual residence as a connecting factor for the proprietary consequences of marriage, probably as a second option to domicile" (Schoeman "The South African conflict rule for proprietary consequences of marriage: learning from the German experience" 2004 *TSAR* 115 133; also see Schoeman "The South African conflict rule for proprietary consequences of marriages: the need for reform" 2004 *Praxis des Internationalen Privat- und Verfahrensrechts* 65). The proposal by Schoeman in the 2004 article in *TSAR* was referred to by Farlam JA in the *Fourie* case (par 125 n 112) as "a possible solution to the problem" of the inappropriateness of the common-law rule to same-sex marriages.

Stoll and Visser propose the following five-step model: In the absence of an express or tacit choice of law in an antenuptial contract, the proprietary consequences of marriage must be governed by the law of the country of the common domicile of the parties at the time of the marriage. If they do not have such a common domicile, the law of the common habitual residence of the parties at the time of the marriage applies. If they do not have such a common habitual residence, the law of the common nationality of the parties at the time of the marriage governs. If they do not have such a common nationality, the law of the state with which both spouses are most closely connected at the time of the marriage applies. (See Stoll and Visser "Aspects of the reform of German (and South African) private international family law" 1989 *De Jure* 330 335. The authors refer to a decision of the German constitutional court BVerfGE 31 58 = 1971 *NJW* 1509. For the position in German law today, see a 14-15 of the *Einführungsgesetz zum Bürgerlichen Gesetzbuche, inter alia* referring to a choice of law by the parties, the law of common nationality, the law of common habitual residence and the law of closest connection. *Cf* a 3-4 of the Hague Convention on the Law Applicable to Matrimonial Property Regimes (1978).)

The present authors support the latter proposal as the extra two steps (with the express reference to habitual residence and also to nationality) provide far more certainty. This is, in our view, a more significant consideration than the fact that the connecting factors of citizenship and habitual residence did not traditionally play an important role in South African private international law. (Also see Neels "The revocation of wills in South African private international law" 2007 *ICLQ* 613 620.)

In any event, habitual residence and nationality or citizenship are increasingly employed as connecting factors in South African private international law, often under the influence of international conflicts conventions. Habitual residence already plays a role in respect of the formal validity of wills (s 3*bis* (ii)(1)(a)(ii) of the Wills Act 7 of 1953) and the determination of the proper law of a contract (Fredericks and Neels

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"The proper law of a documentary letter of credit" (part 1) 2003 *SA Merc LJ* 63 68; *cf* Forsyth 309), as well as in the context of the Hague conventions on international child abduction and inter-country adoption incorporated in the Children's Act 38 of 2005. (Also see Forsyth 190-197 on residence and jurisdiction in international cases. Furthermore, s 13(1)(b) of the Divorce Act 70 of 1979 refers to *ordinary* residence in the context of the recognition and enforcement of foreign divorce orders. See Schoeman and Roodt "South Africa" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2007) par 37-50 on the differences between habitual residence and residence *simpliciter*/ordinary residence.)

Nationality by now plays a role in the context of the formal validity of wills (s 3*bis* (1)(a)(iii) and 3*bis* (4)(a) of the Wills Act 7 of 1953), the recognition and enforcement of foreign divorce orders (s 13(1)(c) of the Divorce Act 70 of 1979), an application in terms of terms of s 21(1) of the Matrimonial Property Act 88 of 1984 (*Ex Parte Senekal* 1989 1 SA 38 (T) 39-40), and the determination of the proper law of a contract (Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 98; Forsyth 313; Fredericks and Neels 68).

The proposed order of the connecting factors in the five-step model is supported as: (i) the principle of contractual autonomy is generally accepted in the South African private international law of contract (see Forsyth 295-302 but also 283-284; also see, in general, Nygh *Autonomy in International Contracts* (1999) and Roodt "Conflict of law(s) and autonomy in antenuptial agreements" 2006 *THRHR* 215, 367 and 546); and (ii) domicile is the most important connecting factor in personal-law issues in our private international law, whilst habitual residence is the concept that is most closely related to that of domicile.

For the purposes of the first step under both models, it will have to be decided whether the essential validity of a choice of law in an antenuptial contract must be governed: (i) by the legal system that would have governed the proprietary consequences of marriage if the contract did not contain a choice of law; (ii) by the legal system that would have governed the proprietary consequences of marriage if the contract did not contain a choice of law (in respect of movables) and by the *lex situs* (in respect of immovable property); or (iii) by the legal system applicable to substantive validity of contracts in general. (For the various views in South Africa, see the references by Roodt, especially at 225-226 and 550-558. The author seems to suggest that the system listed under (i) above must be applied as default but that the court has a discretion whether or not the choice of law must be recognised: "[A] choice-of-law clause in an antenuptial contract is best treated as a factor in an objective determination of the applicable law" in respect of substantive validity (557). Protection of the weaker party (if any) must play the dominant role here (*ibid*). The proper law of a contract, the *lex fori* and the *lex loci solutionis* may all play a role in respect of the inherent validity of contracts in general. See Forsyth 320-325; Van Rooyen 161-175; and Neels "Geoorloofdheid van 'n kontrak en openbare beleid in die internasionale privaatreg" 1991 *TSAR* 694. According to Dicey, Morris and Collins 1288-1289, the proper law of an antenuptial contract must be presumed (rebuttable presumption) to be the law that would, in the absence of a choice of law, govern the proprietary consequences of marriage.)

3 *The appropriate Latin term for the legal system to govern the proprietary consequences of marriage*

The term *lex domicilii matrimonii* is no longer appropriate to indicate the applicable

legal system to govern the proprietary consequences of marriage under either of the proposals discussed above, as both also make use of connecting factors other than domicile.

The grammatically most sound and literal Latin translation of the phrase "the law governing the proprietary consequences of marriage" would arguably be *lex quae patrimonialium consequentiarum matrimonii gubernat*. This phrase may be shortened to "the law of the proprietary consequences of marriage" without compromising its meaning; its Latin equivalent would then be *lex patrimonialium consequentiarum matrimonii*. *Lex* ("law", from *lex*; *legis* (f) – see Lewis and Short *A Latin Dictionary* (1966) 1055) is a feminine noun in the nominative case, depicting the subject of the phrase. *Patrimonialium* ("patrimonial", from *patrimonialis*; *patrimoniale*, is the adjective derived from *patrimonium* and literally means "of or belonging to a patrimony"; Lewis and Short 1315 also specifically mention that this adjective was used in juridical Latin) is an adjective, derived from the noun *patrimonium* (according to Lewis and Short 1315, *patrimonium*, *patrimonii* (n) literally means an estate inherited from a father or a paternal estate; Glare (ed) *Oxford Latin Dictionary* (1982) 1310 translates *patrimonium* as "the property of the *paterfamilias*") and is used here in the genitive case and in the feminine plural form to conform to the noun *consequentiarum* ("consequences", from *consequentia*, *consequentiae* (f) (consequence), derived from the deponent verb *consequor*, *consecutus* meaning to follow: Lewis and Short 429 refer to the fact that this word was frequently used by the jurists as evidenced in *D* 4 3 19; *D* 10 1 15; *D* 2 8 1 and *D* 47 10 1). *Matrimonii* ("of the marriage", from *matrimonium*, *matrimonii* (n) (marriage, matrimony) – Lewis and Short 1119) is also a noun in the genitive case.

An etymological study of the words *matrimonium* (marriage) and *patrimonium* (estate) reveals interesting gender issues. According to Glare *Oxford Latin Dictionary* (1084), the word *matrimonium* is a conjunction of *mater* (mother) and *monium* (a suffix). The well-known Latin author, Aulus Gellius, provides us with a corresponding first-hand etymology of *matrimonium*. According to him, *matrimonium* or marriage is derived from the word *mater*: "'matronam' dictam esse proprie quae in matrimonium cum viro convenisset ... dictamque ita esse a matris nomine ... unde ipsum quoque 'matrimonium' dicitur" – "the word 'matron' was correctly applied to a woman who had contracted a marriage with a man ... and that she was so called from the word 'mother' ... '*matrimonium*' itself is derived from the same word" (Gellius *Noctes Atticae* XVIII 6 8; also see Maltby *A Lexicon of Ancient Latin Etymologies* (1991) 371 with regard to the etymology of *matrimonium*). This fact gives "marriage" a decidedly feminine character.

On the other hand, the word *patrimonium* is a combination of *pater* and *monium* (Ernout and Meillet *Dictionnaire étymologique de la langue Latine* (1959) 487). The primary meaning attached to this word in classical Latin is that of the property of a *paterfamilias* (the head and representative of a Roman household; see Lewis and Short 1313 and Glare 1310). In its secondary meaning, *patrimonium* may refer to an estate or to private possessions (Lewis and Short 1315; Glare 1310). Gaius also attaches the meaning of "estate" to *patrimonium*, which justifies the conclusion that this was indeed the meaning of the word in juridical Latin. (*Institutiones* I 33: "praeterea, a Nerone constitutum est ut, si Latinus, qui patrimonium sestertium centum milium plurisve habebit, in urbe Roma domum aedificaverit, in quam non minus quam partem dimidiam patrimonii sui impenderit, ius Quiritium consequatur" – "Further, it has been enacted by Nero that a Latin having a fortune of two hundred thousand sesterces or more, who builds a house in the city of Rome on which he spends not less than half his fortune, is to obtain Quiritary status." *Institutiones* II

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I states: "quae vel in nostro patrimonio sunt vel extra nostrum patrimonium habentur" - "These things are either in our estate or regarded as outside our estate." Also see *Institutiones* III 42, where the word *patrimonium* is used to describe the estates of freedmen (*liberti*).)

It is interesting to note that, etymologically speaking, "marriage" is of feminine origin, whilst "estate" or "property" is of masculine origin. Therefore even the etymology corresponds to the traditionally assigned gender roles: that of woman or wife confined to the private or domestic sphere and that of man or husband as the head of the household and person in control of the estate in the public sphere. (See Barnett *Sourcebook on Feminist Jurisprudence* (1997) 155-159 for critique on the traditional public/private distinction.) However, given the etymological origin of *patrimonium*, it is not the appropriate word to use in a phrase aiming to portray gender neutrality. Therefore a suitable replacement needs to be found for *patrimonialium* in the abovementioned Latin phrase.

The word *proprietas* (the corresponding adjective is *proprius*) comes to mind as a synonym for *patrimonium*; it also carries the meaning of "property" in juridical Latin. (The noun *proprietas, proprietatis* (f) carried the primary meaning of a peculiar nature or quality of a thing in classical Latin – see Lewis and Short 1472 in this regard. In classical non-legal Latin texts, such as Quintilian's *Institutio Oratoria* VIII 2, *proprietas* was almost exclusively used in the meaning of the nature of a thing. However, it also carried the meaning of ownership or property, specifically in juridical Latin. In *Institutiones* II 30 Gaius employs the phrase *dominus proprietatis*, to be translated as "the owner of the property", which is also indicative of the meaning attached to *proprietas* in legal texts.)

Another possibility is substituting *patrimonium* in the phrase above with *res*, meaning "a thing" as used in the law of property. However, *res* in its primary meaning is too restrictive to depict the concept of an estate accurately. Furthermore, *res* bears so many diverse meaning that this word is highly susceptible to incorrect interpretation. (*Res, rei* (f) carries the meaning of a thing, object, event, fact, circumstance or occurrence – see Lewis and Short 1575.)

The problem with the use of either *proprietas* or *res* is the fact that both these words are nouns. In order to represent the word "proprietary" accurately in the phrase, an adjective should be employed instead of a noun. The adjective derived from *proprietas* is *proprius* (*proprius, propria, proprium* – special, particular, see Lewis and Short 1472). *Proprius* bears the meaning of "peculiar" or "one's own" and would therefore not portray the intended meaning of "proprietary" accurately. *Res* does not have a corresponding adjective.

A further possibility is to change the phrase from the law governing proprietary consequences of marriage to "the law of matrimonial property" or *lex matrimonialis proprietatis*. (According to Glare 1084 *matrimonialis, matrimoniale* carries the meaning of "matrimonial" or "of the marriage" and is the adjective derived from *matrimonium, matrimonii*.) This phrase is, however, at risk of being interpreted as merely referring to the subject of matrimonial property law. In order to make it clear that the phrase refers to the legal system that governs matrimonial property matters, the translation may be altered to *lex de matrimoniale proprietate* – literally: the law regarding matrimonial property.

However, since this phrase will be utilised in the field of private international law to denote the legal system applicable to the proprietary consequences of marriage, it may be prudent to include the notion of the proper law in the phrase. The proper law or *lex causae* of proprietary consequences of marriage is the concept seeking a proper translation. A possibility in this regard would be *lex causae matrimonialis*

proprietatis, literally: "the proper law of matrimonial property". The only point of critique against this phrase is the use of the adjective *matrimonialis* (matrimonial) – even though it is grammatically accurate, it is not a well-known word. In order to overcome this problem, the noun *matrimonium* may be employed instead. The translation would then read *lex causae proprietatis matrimonii*, literally: "the proper law of the property of the marriage". This Latin phrase represents the most streamlined translation of the concept it is aiming to convey – namely the appropriate legal system to be applied to the proprietary consequences of marriage. (In English one could employ the phrase "the proper law of the proprietary consequences of marriage": in Afrikaans "die *lex causae* van die vermoënsregtelike gevolge van die huwelik".)

4 *Determination of domicile*

The content of a connecting factor, for instance domicile, must be determined by the *lex fori* (*Ex Parte Jones: In re Jones v Jones* 1984 4 SA 725 (W); *Chinatex Oriental Trading Co v Erskine* 1998 4 SA 1087 (C) 1093H; Forsyth 10-11 and 125-127). An exception is nationality, which has to be determined by the law of the alleged nationality (Forsyth 10-11). South African law therefore had to be applied to determine Prof (and Ms) Sadiku's domicile at the moment of the conclusion of the marriage.

Ms Sadiku's counsel referred to a *dictum* from *Eilon v Eilon* (1965 1 SA 703 (A) 721) as the appropriate test to determine whether Prof Sadiku was already domiciled in South Africa at the time of the marriage (par 8). The passage lists physical presence and the intention to settle permanently as requirements for domicile (also see the judge's reference to Prof Sadiku's hope "to settle permanently in South Africa" – par 9). As the wedding took place during or after 2001 (par 6), this particular intention test was no longer applicable but rather that in section 1(2) of the Domicile Act 3 of 1992, which entered into force non-retrospectively on 1 August 1992, namely "the intention to settle ... for an indefinite period". The court found that Prof Sadiku was still domiciled in Nigeria at the time of the marriage (par 9). Had the court been referred to the correct test, it might have been easier to prove (on a balance of probabilities: see s 5 of the act) that Prof Sadiku was already domiciled in South Africa at the relevant time – the new test is undeniably far more lenient than the criterion used in the common law (see Forsyth 131; *cf* the *Chinatex* case 1094B: the Domicile Act "does not require an intention to remain permanently").

5 *Intended matrimonial domicile*

Ms Sadiku's counsel argued that the court in the *Frankel's Estate* case had perhaps left open the possibility of application of the law of the place of the intended matrimonial domicile "if a husband and wife, at the time of their wedding, agreed to move their domicile to a new country" (par 7). (Also see the interpretation of the case by Anderson *Private International Family Law* (2005) 108 and Clarkson and Hill *The Conflict of Laws* (2006) 277. The authors appear to suggest that the court applied the law of the intended matrimonial domicile; they also seem to confuse the essential validity and the proprietary consequences of marriage. For the correct interpretation of *Frankel's Estate* in foreign textbooks, see Dicey, Morris and Collins 1284; Sykes and Pryles *Australian Private International Law* (1991) 805; and Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 649.)

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Van Rooyen AJ correctly rejected the submission:

> "I have once again, read the learned opinions of the judges of appeal, and it is clear that only an express contract between them could alter the law that governs the patrimonial consequences of their marriage. The mere fact that they planned to move to a new country does not justify the inference that there was a 'tacit' contract between them to alter the governing law ..." (par 7).

It is submitted that the reasons given in the *Frankel's Estate* case as to why the intended matrimonial domicile should not play a role, are still convincing. Schreiner JA argued:

> "Now it is clear that, if the mere intention of the spouses regarding their future home is to decide what law is to govern their proprietary rights, a world of uncertainty is introduced into the problem. How firm or definite must their intention be? Must their resolve be fixed to remain in the new country permanently, whatever the conditions may prove to be? How soon must it be their intention to move thither? ... [T]he result could only be to leave it in serious doubt what law would govern the rights of any married couple who at the time of their marriage considered migrating to another country. They themselves could not be certain of their position, especially if one spouse had somewhat different views from the other as to the advisability or urgency of moving to the new country. So far as other persons, like creditors, are concerned, they would be entirely unable to ascertain or prove the law governing the rights of the spouses" (239-240; also see Forsyth 279 n 118).

It is tentatively suggested that this reasoning also excludes a role for the intended matrimonial domicile in determining the law of the closest connection as last resort under both the suggested models as discussed in paragraph 2 above (*contra* Schoeman 2004 *TSAR* 115 134). However, the intended matrimonial domicile could be one of the factors in proving a choice of law as a tacit stipulation forming part of the antenuptial contract (*cf* Dicey, Morris and Collins 1285). Neither the *Frankel's Estate* case (see especially at 239) nor the *Sadiku* case (see the *dictum* in par 7 quoted above) necessarily excludes this possibility (but see Kahn 628). (On a tacit choice of law in general, see Forsyth 304-307.)

6 *Act 19 of 1998, the* lex situs *and mandatory rules of domestic law*

Section 26(3) of the constitution determines that "[n]o one may be evicted from their home ... without an order of court made after considering all the relevant circumstances". The provision has been given effect to in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

The court in the *Sadiku* case referred to the constitutional provision and then suggested that ownership to immovable property in the context of the proprietary consequences of marriage should be governed by the *lex situs*:

> "Is this not a case where the *lex rei sitae* should, in any case, govern the rights of the parties in regard to immovable property? Such an approach could be a realistic one in the light of the important position which the right to adequate housing and the prohibition against arbitrary eviction play in our law. Does the local interest not overshadow the interest served by the *lex domicilii*, in this case the law of Nigeria? This point was not argued before me and was also not raised in the opposing affidavit and testimony. However, *de lege ferenda*, it would seem to be most relevant that this matter be considered by the legislature or even, where properly raised and argued, by the courts in terms of section 39(2) of the constitution" (par 10).

However, it is submitted that the eviction of an ex-spouse (or any other person) from immovable property should in any event not be dealt with under the proprietary consequences of marriage – it constitutes an ordinary property-law issue, to be gov-

erned by the *lex situs*. (See, in general, Forsyth 344-345.) If the present authors are incorrect in this regard (*ie* if the *lex causae proprietatis matrimonii* were in principle applicable to the eviction of an ex-spouse), Act 19 of 1998 would nevertheless apply as a mandatory rule of domestic law. (See Forsyth 13-15 on the doctrine of *lois d'application immédiate*.) The following pointers indicate that Act 19 of 1998 should indeed be applied as a statute of direct application: (i) the fact that its provisions are based on a fundamental right found in the bill of rights; and (ii) the peremptory nature of its provisions (see *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 4 SA 1222 (SCA) 1227E; *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) 131D-E; and *Baartman v Port Elizabeth Municipality* 2004 1 SA 560 (SCA) 563I-J). (S 4(1) of the act determines: "Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier." The formulation is sufficiently wide to include any common-law conflicts rule that might have applied.) The judge in any event applied the provisions of the act (see par 12, where s 4(8)(a) is apparently utilised), although it is not clear whether this took place *qua lex situs* or by virtue of the act as a statute of direct application. (The court also referred to the serving of notice on the relevant municipality in terms of s 4(2). See further par 2, which refers to the authorisation by Makafohla AJ to serve notice to the defendant in terms of the same subsection.)

There seems to be no reason why the *lex situs* should also be applied to the question as to whether the parties were married in or out of community of property as a proprietary consequence of marriage. The proposal by the judge is perhaps similar to suggesting that a contract concluded by electronic means should no longer be governed by its proper law but by the *lex fori* as a result of the important role of the consumer protection measures (mandatory intervention norms of domestic law: see s 47-48) in chapter 7 of the Electronic Communications and Transactions Act 25 of 2002.

Of course, where all the aspects of a certain legal issue are governed by a law of immediate application, it could be decided for the purposes of convenience that indeed the *lex fori* applies (or, in the case of immovables: the *lex situs*, which will usually be the *lex fori*). (See, in general, Martinek "Look back before you leap? Fateful tendencies of materialization and of parallelism in modern private international law theory" 2007 *TSAR* 277.) One could for instance state that maintenance of an ex-spouse is governed by the *lex fori* rather than the *lex domicilii*, as in all cases where the South African courts have jurisdiction in a divorce matter the court "shall determine any issue in accordance with the law which would have been applicable had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted" (s 2(3) of the Divorce Act 70 of 1979: see Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 336 337; and Neels "Classification as an argumentative device in international family law" 2003 *SALJ* 883 887).

Some common-law authority may be referred to in support of the proposal by the judge. However, from the outset the South African courts adhered to the views in Voet's *Commentarius ad Pandectas* (1.4 appendix 19 and 23.2.85). (See the detailed references in Kahn "Jurisdiction and conflict of laws in the South African law of husband and wife" in Hahlo *The South African Law of Husband and Wife* (1975) 529 629-630; also see Kahn 630-631 and Forsyth 280 on the situation where the *lex situs* requires a formal act of transfer.)

Some modern legal systems apply the *lex situs* to immovables also in the context of the proprietary consequences of marriage (see s 39(1) of the Family Law (Scotland)

Act, 2006; Anderson 204 (Caribbean Community); Nygh *Conflict of Laws in Australia* (1991) 384-385 and Tilbury, Davis and Opeskin 643 and 652 (but *cf* Sykes and Pryles 804-805); *cf* s 7(1) of the Property (Relationships) Act, 1976 (New Zealand); and Tan Yock Lin *Conflicts Issues in Family and Succession Law* (1993) 271-272, who is, however, critical of the legal position in Singapore). In par 9 the judge refers to a 1941 Californian case in this regard (the concepts of "the local interest" and "the interest served by the *lex domicilii*" employed in par 10 also seem to be inspired by American choice of law – see, in general, Forsyth 59). But the position in the United States is rather complicated (see *eg* Scoles, Hay, Borchers and Symeonides *Conflict of Laws* (2000) 583-588; Symeonides, Perdue and von Mehren *Conflict of Laws: American, Comparative, International. Cases and Materials* (1998) 399-408; and Weintraub *Commentary on the Conflict of Laws* (2001) 530-536 and 548-551) and various authors and some recent decisions reject the application of the *lex situs* (see the references in Weintraub 548-551). In any event, many other legal systems apply one governing law to both movables and immovables in this context (see *eg* a 18-19 of the Austrian private international law (PIL) act; a 51 of the Belgian PIL code; a 14-15 of the German *EGBGB*; Shava *Selected Topics in Family and Private International Law* (2000) 322 (Israel); a 29-30 of the Italian PIL act; a 19-20 of the PIL act of Liechtenstein; a 50 of the Civil Code of Macao; a 1-2 of the *Wet Conflictenrecht Huwelijksvermogensregime* (the Netherlands); a 2078 of the Civil Code of Peru; a 20 of the PIL act of Romania; a 37-38 of the PIL act of South Korea; a 38-39 of the PIL act of Slovenia; a 54 of the Swiss PIL act; a 48 of the PIL code of Tunisia; a 12 of the Turkish PIL act; and a 22 of the PIL act of Venezuela; *cf* Agbede par 174; also see a 3-4 of the Hague Convention on the Law Applicable to Matrimonial Property Regimes (1978)). The position in England is uncertain but Dicey, Morris and Collins 1285-1288 strongly argue in favour of one legal system to be applied to both movables and immovables. (The position in Canada differs from province to province: see Walker II *Castel and Walker: Canadian Conflict of Laws* (2005) par 25.2; and Walker *Halsbury's Laws of Canada: Conflict of Laws* (2006) 614-619.)

The judge also referred to an article by Roodt ("Migrerende egpare se huweliksgoedereprobleme: *common law*- en gemengde regstelsels" 1995 *THRHR* 440 458 ff) as authority for "a diversified methodology ... in choice of law cases" (par 9). However, in her proposal for the application of the *lex fori* to redistribution at divorce and even the division of property "wat ingevolge die reg van die *forum* as gemeenskaplike bates getipeer is" (459), she does not distinguish between movables and immovables (although the application of the *lex fori* to immovables usually results in the *lex situs* governing the relevant issue). (On redistribution of assets at divorce in private international law, see Neels "Substantiewe geregtigheid, herverdeling en begunstiging in die internasionale familiereg" 2001 *TSAR* 692.)

Application of the *lex situs* to immovable property in the context of the proprietary consequences of marriage may lead to undesirable results. If the proposal by the judge were followed, Prof and Ms Sadiku would have been married out of community of property for the purposes of movables (as Nigerian law would apply *qua* the law of matrimonial domicile) but in community of property for the purposes of the immovable property situated in South Africa (as South African law would apply *qua lex situs*). (*Cf* Neels "Die onegte insidentele vraag in 'n internasionaal-erfregtelike geskil" 1993 *TSAR* 760 764.)

A further disadvantage of the rule proposed by Van Rooyen AJ

> "is that the estate is juridically fragmented, there being a separate matrimonial property regime for each piece of land owned in a different country. The application of the *lex situs* could also result in

> the application of a matrimonial property régime based on social considerations alien to the couple and could run counter to their legitimate expectations: an Englishman who bought a holiday home in a Mediterranean country would probably be surprised if he were told that it was subject to the matrimonial property régime of the *lex situs*; a foreigner who bought land in England would be equally surprised if he were told that the property was not subject to the régime of the matrimonial domicile" (Dicey, Morris and Collins 1287)

Applied to local circumstances: a woman, domiciled and habitually resident in the United Kingdom and *ex lege* married out of community of property in terms of English law, who buys a holiday home in Clifton (Cape Town), would be surprised to learn that her husband automatically becomes the co-owner of that valuable asset on the basis that South African law, as the *lex situs*, provides for community of property between spouses in the absence of an antenuptial contract specifically opting for separate estates. Even if the parties acquired domicile in South Africa before the conclusion of the contract and the subsequent transfer, the result would still be in conflict with the reasonable expectations of the parties.

The suggestion by the judge that the proprietary consequences of marriage in respect of immovable property are to be governed by the *lex situs* is therefore not supported. (*Cf* Edwards *The Selective Paulus Voet* (2007) 545-547.) But the authors welcome his decision on the intended matrimonial domicile and his views on the constitutional untenability of the existing rule in respect of the proprietary consequences of marriage in private international law.

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