REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case no: 30498/06

In the matter between: DATE: 26/1/2007

EMMANUEL ROTIMI SADIKU PLAINTIFF

and

GRACE JUMAI SADIKU FIRST DEFENDANT

THE CITY OF TSHWANE METROPOLITAN MUNICIPALTY SECOND DEFENDANT

_Divorce – lex domicilii of husband applying to proprietary consequence of marriage – domicile not established by mere application for work permit even if possibility of permanent work permit foreseen.
Question raised whether lex rei sitae should not, in terms of s 39(2) of the Constitution - de lege ferenda - apply to immovable property within the Republic. Matter, however, not properly raised or argued.

Van Rooyen AJ

[1] This is an application for summary judgment for the eviction of the first defendant ("Mrs Sadiku") from the house of the plaintiff. The plaintiff and first defendant were divorced on the 17th August 2006 by this Court. It is common cause that the defendant is still occupying the house and that the house is registered in the name of the plaintiff. The defense of the defendant is that in spite of the registration, she is entitled to live in the house since she is a co-owner of the house and that, after the divorce, her undivided share should have been transferred to her.

[2] On the 30th August 2006 a letter was sent to the defendant, in which she was informed that the plaintiff would file a complaint with the South African Police on the ground that the defendant was trespassing on the plaintiff's property by living there. The defendant's answer was that she was entitled to her share of the property and that she had

no intention to move out. Thereupon the defendant was informed that since they had been married in Nigeria, the marriage was out of community of property and that she was not entitled to a half share or any share in the property. Once again she was warned that charges would be laid against her. Summons for eviction were then served on the defendant. She filed a notice of intention to defend. On the 20th October 2006 my Brother, Makafohla AJ, authorized the plaintiff to serve a notice of eviction in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act no 19 of 1998 ("PIE") on the defendant. The notice had to be served fourteen days before the hearing of the application for summary judgment.
The Second Respondent was joined as a respondent, obviously to dispose of the requirement in terms of PIE that notice of the application for eviction must be given to the relevant Municipal Council.

[3] On the 3rd November 2006 this application for summary judgment was brought before me on the unopposed role. At that stage it was opposed by the defendant. She argued that she had a *bona fide* defense in that she was entitled to live in the house since she had a share in the property.

[4] Since the parties were married in Nigeria, I requested counsel to obtain an expert opinion from a Nigerian lawyer. Plaintiff's attorneys did more than that. They obtained the opinion of a Nigerian firm of attorneys and added to that the opinion of the Honourable Justice MA Medupin from Lokoja, Kogi State, Nigeria. I would like to express my gratitude to the law firm and the esteemed colleague from Nigeria. Although both the views were not attested to, Mr. *Thabethe*, who appeared for the defendant, did not dispute the admissibility of the opinions. From the opinions it is clear that the concept of community of property is foreign to the matrimonial regime in Nigeria.

[5] The only remedy left for the defendant in a trial would be to prove on a balance of probabilities that the Nigerian law did not apply to the patrimonial consequences of their marriage. So as to establish whether she had a *bona fide* defense based on this ground, which was not touched upon in her opposing affidavit, Mrs. Sadiku added to her statement by way of testimony before me. Although Rule 32 does not permit cross-examination, I permitted Mr *Schoeman* to ask her a few questions so as to clarify matters. As this was a new point, I also permitted Prof. Sadiku to testify. Once again questions were put. Both counsel did not object to these questions and I am satisfied that the questions did not amount to cross-examination. I also asked several questions.

[6] Prof. Sadiku testified that in 1999 he taught at the University of Stellenbosh. When, in 2001, he returned to Nigeria SASOL, the well-known South African petro-chemical giant, had already approached him to join its staff. In 2001 he met the defendant in Nigeria and the couple were married. His application for a permanent work permit, however, failed since the South African Department of Home Affairs was of the view that SASOL had not shown that they had taken steps to establish whether they could not employ a local expert. Prof. Sadiku then obtained a temporary work permit. Once in

South Africa he, with the assistance of SASOL, obtained a permanent work permit. He denied that when the couple were married he intended to make South Africa his new home and establish a new domicile. Mrs. Sadiku, however, testified that at the time of the wedding Prof. Sadiku intended making South Africa his new home and that he included her in his applications as a dependent. She testified that he was certain that he would obtain a permanent working permit once he arrived in South Africa.

[7] In *Frankel's Estate v The Master* [1] our Appellate Division, after a scrutiny of Roman-Dutch authorities and a few works on modern Private International Law, held that the *lex domicilii* of the husband at the time of a marriage, governed the patrimonial consequences of the marriage. The question which arose before me during argument was whether that Court had not possibly left open the possibility that if a husband and wife, at the time of their wedding, agreed to move their domicile to a new country, that would not also have an effect on the law that would govern the patrimonial consequences of the marriage. 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, i.e the *lex domicilii* of the husband at the time of the marriage.

[8] Mr. *Thabethe*, on behalf of Mrs. Sadiku, argued in the alternative that Prof Sadiku had, at the time of the marriage in Nigeria, *animo et facto* decided to settle a new domicile in South Africa. He referred me to *Eilon v Eilon*[2] where comparable facts were before the Appellate Division. In that matter, Potgieter AJA stated as follows:

> " The onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the *de cujus* had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded.

On the facts of that case, the majority of the Court held that the respondent had not altered his domicile from Israel to South Africa. The fact that he had applied for permanent residence was not regarded as of sufficient weight to establish a new domicile.

[9] Of course, each case has to be judged on its own facts. Although there is sufficient evidence that Prof. Sadiku was, at the time of the marriage, hoping to settle permanently

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1 1950(1) SA 220(A).
2 1965(1) SA 703(A).

in South Africa, I am not convinced that it could be inferred, on the probabilities, that he had at the time of the marriage decided to alter his domicile *animo et facto*. There were simply too many uncertainties as to whether his attempts would be successful. Of course, the main question in summary judgment proceedings is whether, judged from the documentation and evidence as a whole, the defendant has a viable *bona fide* defense in law if the matter were to go to trial. I am not so convinced. The mere fact that Mrs. Sadiku believes that she has a share in the house, is also not sufficient to provide her with a *bona fide* defense. There is nothing in her opposing affidavit or testimony which could possibly support a defense that she could prove that Prof. Sadiku had, for example, promised her that she could live in the house for a period after the divorce. The letters written to her after the divorce threatening criminal charges for trespass, were not countered by any allegation of a promise that she could live in the house for a period. The only defense is that they were married in community of property and that she is, accordingly, entitled to a half share in the property after the divorce. That defense is not viable, in the circumstances.

[10] In coming to the above conclusion I 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. For the present matter s 26(3) of the Constitution of the RSA, which provides that "no one may be evicted from their home...without an order of court made after considering all the relevant circumstances" would seem to be more relevant. 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 s 39(2) of the Constitution. That the *lex rei sitae* could very well be applied in practice, appears from a judgment of the California High Court in *Commissioner of Internal Revenue v. Skaggs*.[3] Prof Christa Roodt, from Unisa, has also argued that a diversified methodology could be followed in choice of law cases.[4]

[10] In so far as costs are concerned, I believe that Mrs. Sadiku genuinely believed that she had a share in the house. Prof. Sadiku brought her as his wife to South Africa and thereby, in effect, put an end to her business career in Nigeria. I do not think that it would be in the interests of justice to order her to pay Prof Sadiku's costs.

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3 5th Cir. (1941) 122 F.2d 721. I wish to express my gratitude to Howard Wayne, Deputy Attorney-General of California, for researching this matter for me.

4 Roodt "Migrerende Egpare se Huweliksgoedereprobleme: Common Law en Gemengde Regstelsels (deel 2)" 1995 THRHR 440 op 458 ff. ; generally compare Roodt "Conflict of Law(s) and Autonomy in Antenuptial Agreements" 2006 THR-HR 215, 367 and 546; and also Heaton and Schoeman 2000 THR-HR 144 as to the effect of s 7(3) of the Divorce Act on redistribution orders.

[11] Furthermore, although Mrs. Sadiku has, for some time been aware that she might have to move out of the house, it would, in the circumstances, be inequitable, to order her to immediately leave the house. The required notice has been given to the Second Respondent in terms of PIE.

The application for summary judgment is granted. Each party is to pay his or her own costs. Mrs. Sadiku must leave the house on or before 30 April 2007.

JCW van Rooyen
Acting judge 26 January 2007

For the Plaintiff: Z Schoeman instructed by Van der Westhuizen & Partners Inc, Pretoria

For the First defendant : Mr. MI Thabethe instructed by Siwela Vincent Attorneys, Pretoria