IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.14211/2008

In the matter between:

H S- W **Applicant**

and

H S-W

JUDGMENT: 1 DECEMBER 2008

NDITA: J

INTRODUCTION:

[1] The Applicant in this matter instituted divorce proceedings against the Respondent under case number 1694/2008 in this Honourable Court.

[2] The Respondent filed a special plea in terms of which the Respondent denies that this Honourable Court has jurisdiction to entertain the divorce action on the basis that both plaintiff, the defendant as well as the minor child born of the marriage are resident and/ or domiciled in Namibia and have so been resident and/or domiciled at all material times.

[3] The divorce proceedings are pending. On 23 October 2008 the applicant instituted Rule 43 proceedings wherein she seeks *pendente lite,* maintenance for herself and the minor child as well as contribution towards her legal costs in the main action.

[4] In support of her application the Applicant states in her founding affidavit that this court has jurisdiction to adjudicate on this matter as the applicant is ordinarily resident within the

jurisdiction of this court and has been ordinarily resident in South Africa for a period exceeding one year prior to the institution of the divorce proceedings.

[5] In his opposing affidavit, the Respondent raised a point *in limine* in which he challenges the jurisdiction of this court on the basis that:

1. The Applicant, Respondent as well as the minor child are resident and /or domiciled in Namibia and have been resident and/or domiciled at all material times.

2. The Applicant had every intention of returning to Namibia once she had completed her studies in Cape Town, and

3. The Namibian court is the only competent and appropriate court with the jurisdiction to decide both the main action and the matters ancillary thereto, including Rule 43.

[6] For these reasons the Respondent postponed dealing with the merits of the Rule 43 application until the issue of jurisdiction has been adjudicated upon.

THE ISSUE:

[7] The issue to be decided is whether this court either on the basis of domicile or ordinary residence, has of the jurisdiction to adjudicate on the Rule 43 application.

THE LAW:

[8] Section 2 of the Divorce Act governs the question of jurisdiction in divorce proceedings and provides as follows:

> ***"(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.

(2) A court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a counter-application in the divorce action concerned.

(3) A court which has jurisdiction in terms of this section in a case where the parties are or either of the parties is not domiciled in the Republic shall determine any issue in accordance with the law which would have been had the parties been domiciled in the area of jurisdiction of the court concerned on the date on which the divorce action was instituted."

[9] It is clear from the above that either domicile or ordinary residence confers jurisdiction to adjudicate in divorce proceedings. Either of the two jurisdictional facts must be present prior to the court adjudicating on the matter.

[10] In this matter it is common cause that the parties are domiciled in Namibia. For this reason I propose not to deal with the question of domicile in this matter.

[11] This matter turns on the determination of whether the plaintiff was ordinarily resident in the area of this court's jurisdiction or ordinarily resident in the Republic of South Africa at the time of the institution of the divorce proceedings or not.

[12] The Divorce Act does not define the meaning of ordinary residence. The question of the meaning of ordinary residence has been subject of much judicial debate. In the absence of any statutory definition, the meaning of the phrase must be found in the exhaustive judicial interpretation thereof.

[13] As early as 1917 the court in **Robinson v commission of Taxes** laid down the following guidelines in the interpretation of the word residence;

"There are however 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 casual visitor is not a 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; though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Clearly physical presence for a prolonged period would constitute residence. And conversely if physical presence is entirely wanting even though an establishment is maintained for a man's family, residence would as a rule be negatived: Turnbull v Solicitor of Inland Revenue (42 Scot. L.R. 15). Again the maintenance of an establishment coupled with intermittent or occasional dwelling is sufficient to constitute residence; see Inland Revenue v Cadwallader (ibid. 117), where a man who took a shooting box for three years and lived there two months in each year was held to be resident. Attorney-General v Coote (18 RR 692) was a somewhat similar case. There the defendant leased a house in London indefinitely and lived there a few months in every year, and it was considered that he was resident.

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. And the result is the same whether the establishment is for a defined period or whether the intention expressed or to be implied from the circumstances is to prolong the arrangement for a period exceeding the limit (whatever that may be) of casual visitation. If the case is one of physical presence without an establishment a similar test must be applied. When the intention is to prolong the presence beyond the possible limits of a casual visit, and that intention is not abandoned, it seems to me that that intention would constitute residence, the intention of course being gleaned from all the circumstances of the case."

[14] ***In Ex Parte Minister of Native Affairs*** 1941 AD 53 Centlivres JA, in dealing with the proper meaning of the word "residence" in a certain statute, held as follows:

"There have been a number of decisions under these statutes and

certain general principles have been laid down in construing the word 'resides'. Firstly it has been decided that the question to be considered is not one of domicile but of residence and that a defendant may have his domicile at one place and his residence for the time being at another place. See Langerman v. Alport (1911, C.P.D. at p. 379) and Chapman v. D'Alton (1914, E.D.L at p. 276). These decisions seem to me to be sound. For instance a citizen of the United States, while still domiciled there, may for the purposes of his business reside in South Africa, although he intends to return to the United States as soon as he retires from business.

Secondly it is clear on the authorities that a person can have more than one residence and should in that case be sued before the magistrate of the place where he is residing at the time when the summons is served. See Norman v. Davis (9 N.L.R. at p. 220), Ngadi v. Temba (22 S.C. at p. 576), Becker v. Forster (1913, C.P.D. at p. 968) and Maritz v. Erasmus (1914, C.P.D. at p. 122). The case of Ngadi v. Temba (supra) is instructive. That was a case in which the plaintiff claimed from the defendant his (plaintiff's) wife or eight head of cattle, being the number of cattle handed over by plaintiff to defendant as payment for the wife. It appeared that the defendant was a constable at Sterkstroom where he lived with one wife. He had another wife who lived at his kraal in the district of Idutywa, where he paid hut tax for the wife. He used to visit Idutywa. It was held that the defendant resided at Sterkstroom and not at Idutywa.

Thirdly it is inherent in the decision of Solomon v. Wolff (15. S.C. 152) that a person cannot be said to reside at a place which he is temporarily visiting. In such a case it seems to me that such a person resides at his home which he has temporarily left, or as Wessels, J., put it in Cowie v. Pretoria Municipality (1911, T.P.D. at p. 632) 'in ordinary language a person is said to live in a place, even though he may be temporarily absent on certain occasions and for certain short periods.'

2. *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 or exhaustive definition of the word 'resides'. For as Searle, J., correctly said in Hogsett v. Buys (1913, C.P.D. at p. 205):-*

'It has never been laid down what degree of permanence is required in

residence; but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place where he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation at the date of service.'

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 the light of the general principles referred to above." (At 58-60.)

[15] In Tick v Broude and another 1973 (1) SA 462 (T) at 469F-G it was said that residence is a concept which conveys "some sense of stability or something of a settled nature". A presence which is merely fleeting or transient would not satisfy the requirement for residence; some greater degree of permanence is necessary.

[16] The principles enunciated above have recently been followed in **Mayne v Main 2001 (3) All SA 157 A.** In this matter, the Respondent had business interests in several countries including South Africa. His activities in South Africa increased after 1994, and sometime after that, his presence in the country increased as a result of his business interests and a romantic relationship which he developed here.

[17] In spite of the fact that he was spending significant periods of time with his romantic partner in the country, and the fact that he had set up an office in the country, the Respondent declared that he had no intention of making South Africa his home. He also denied that he was residing in the country when the summons was served on him. He alleged that he was at the time residing in his London flat. However, that was not borne out by the evidence. The Court rejected the allegation that Respondent's visits to South Africa were of a temporary nature. Having regarded to an all the facts and circumstances, the inference drawn was that the Respondent was residing in South Africa when the summons was served on him. The court expressed the view that one needs to adopt a common-sense and realistic approach when deciding whether, having regard to all the relevant circumstances, a person can be said to be residing at a particular place.

[18] Applying the principles enunciated above to the facts of the present matter most of which

are common cause, the Applicant, being born and bred in South Africa, is a former citizen of this country. She married the Respondent, a Namibian citizen in September 1987. As appears from the endorsement in her passport, she retained her right to residence in the Republic of South Africa. During October 2005, the Applicant attended rehabilitation at Stepping Stones in Kommetjie, Western Cape and thereafter returned to Namibia in March 2006. In May 2006 she returned to Stepping Stones until November 2006. She then returned to Namibia for a month. In December 2006 she returned to Cape Town by that time she had formed an intention to remaining in Cape Town or its surrounds, permanently. In line with her intention she intention she enrolled for a masters degree at the University of Cape Town in 2007 and when she finished her course work in 2008 she applied for over 30 positions in Cape Town and the greater Cape Town area. When she was unsuccessful she as a last resort made applications to Windhoek as the Respondent had ceased paying maintenance for her. She has fixed property in Wynberg, within the area of jurisdiction of the area of jurisdiction of this court. During April 2008 she was offered a contract position at the Legal Assistance Centre in Namibia. In terms of that contract she was employed until November 2008. She was willing to take up that position as she was desperately financially and also taking up that position would enable her to reside with her minor son for the duration of that school year. She rented out her flat in Wynberg until April 2009. She signed a lease in respect of accommodation in Windhoek until October 2008 and arranged for her son to stay with her. The contract position that she was offered fell through, and she was duly informed about this when she arrived in Windhoek. When she could not find any alternative employment in Windhoek, she resolved to enrol for pupilage with the Society of Advocates in Namibia starting from June 2008 until she wrote her examination in October 2008It has been argued on behalf of the Respondent that the applicant had no intention of remaining in South Africa but has through her actions shown every intention to return to Namibia. Further that her mere residence of passage cannot found jurisdiction for divorce and that such residence has to be bona fide.

[19] I find myself in disagreement with this argument. The applicant, apart from the fact that she had retained her residence status in the country, she owns immovable property in

Wynberg wherein she resided until such time she accepted a contract position in Windhoek. As required by the Divorce Act, she resided in Cape Town for more than a year prior to the institution of the divorce proceedings. Contrary to the Respondent's argument that the Applicant has demonstrated every intention to return to Namibia, the most probable inference that can be drawn from the Applicant's actions was that her desperate circumstances compelled her to accept employment in Namibia. In my view the objective facts inexorably lead to a different conclusion. This is not the type of case where, as stated in **Tick v Broude** and another 1973 (1) SA 462 (T) at 471D-E, one "is left with a definite feeling or view that there is no element of stability in the residence or that he is liable to move from the Republic without notice".

[20] A further argument by the counsel for the Respondent is that even though on the face of it the Applicant complies with section 2 of the Divorce Act regarding residence, she fails to comply with the principles of private international law which require that the residence is "bona fide..."

[21] On a proper reading of the international authorities, "bona fide residence" means no more than residence resorted to for the mere purpose of getting divorce in a convenient country. See ***Indyka v Indyka 1967 (2) All ER 689(HL), Welsby v Welsby [1970] 2 All ER 467*** The actual decision in ***Indyka v Indyka*** was that a divorce could be recognised by our courts if the petitioner had a real and substantial connection with the country whose court granted the divorce. But in ***Welsby v Welsby (supra),*** substantial period of actual residence and the fact that such residence appeared to be more or less permanent was sufficient to found jurisdiction. In that matter the parties were married in 1957 and lived together in England until 1964. The wife then went to America, and, when she had been living in Washington, District of Columbia for about two and a half years, she was granted a decree of divorce in the court of the District of Columbia on the jurisdictional ground that she had been resident there for more than one year. In his judgment, Cairns J. said

> ***" I am satisfied that in this case the wife had made her home in the United States. She could not, of course, during her marriage acquire a domicil there because the English rules relating to domicil do not***

enable a wife during her marriage to have a domicil separate from that of her husband. But she was clearly something much more than a mere sojourner there. This is not in any sense the case of a person who has gone to a country, where divorce is easy, for the purpose of obtaining a divorce."

[22] In line with our South African courts, the international courts draw a distinction between a person who makes his home in a country and a person who is a mere sojourner there. What is clear from the court's decisions is that it has never been a requirement that there must be an intention not to leave the place of residence or ordinary residence.

[23] In ***Macrae v Macrae,*** **[1949] 2 All ER 34** where the question was whether a husband was ordinarily resident in Scotland so as to oust the jurisdiction of justices to entertain a summons for maintenance of his wife, Somervell LJ said at page 37

"Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house—and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place."

[24] Having regard to all the circumstances the most probable inference to be drawn is that the Applicant made Cape Town his home and as such Cape Town was the Applicant's place of ordinary residence" on 30 January 2008 and, accordingly, she was residing there as envisaged by section 2(1)(b) of the Divorce Act 70 of 1979. The mere fact that she was ready to take up employment in Namibia after so many unsuccessful attempts of getting employment in Cape Town does not mean that she no longer has the intention of making Cape Town her home. It follows that this court has jurisdiction to entertain the appellant's action. In the result the point in limine cannot succeed.

[25] In his replying affidavit the Respondent did not deal with the merits of the Rule 43 application but simply dealt extensively with the jurisdictional point raised in limine and has

now sought leave to deal with the merits.

[26] In view of the fact that the Respondent should have known or anticipated that in the event of him not succeeding on the jurisdictional point raised in limine, this court would deal with the merits of the application. He chose not to deal with the merits and must have known that this would delay dealing with the application and as such caused unreasonable hardship to the applicant. I am of the view that the hearing of this application should not be delayed further.

[27] In the result the following order is made:

1. The point *in limine* is dismissed with costs.

2. The Respondent is granted leave to file his response to the merits of the Rule 43 application no later than 8 December 2008.

3. This matter is postponed until 10 December 2008 at 10h00 for hearing.

NDITA, J