Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 10019/2014

In the matter between:

D……] [B……] Applicant

V

M…….] [B…..] Respondent

Court: Justice J Cloete

Heard: 28 October 2014

Delivered: 2 December 2014

JUDGMENT

CLOETE J:

Introduction

[1] This is an opposed application in terms of rule 33(4) in pending divorce proceedings for an order declaring that the parties are married in community of property.

[2] The relevant common cause facts are as follows. The applicant is a Philippine citizen and the respondent is a German citizen. In 1996 the respondent left Germany to travel the world on his yacht, leaving behind his then wife, M……, in Austria. In April 2001 the parties met in Singapore where the respondent employed the applicant as an *au pair* for his daughter who was born of a relationship with another woman on his travels. Over time the parties became romantically involved, and in 2002 they set sail for South Africa, arriving in Richards Bay, KwaZulu Natal, in about November 2002.

[3] The parties thereafter travelled on their yacht to K……, arriving there in late 2002 or early 2003. Since that date they have lived in South Africa in the Southern Cape area. Two sons were born of their relationship, namely J…… on 16 July

2004 and M…. J…… on 26 November 2008. Shortly after the applicant fell pregnant with J……, the parties concluded a notarial agreement at K….. on 28 January 2004 in which *inter alia* they recorded that they had lived together in a spousal relationship since April 2001 and that it was their intention to continue that relationship indefinitely in the future. The respondent further irrevocably contracted with the applicant to ensure her financial security going forward.

[4] During 2005 the respondent divorced Maria and on 6 February 2006 at Oudtshoorn, South Africa, the parties married without an antenuptial contract. They have never concluded a postnuptial contract. On 24 January 2014 the applicant instituted divorce proceedings in the Eastern Circuit Local Division in George (which has concurrent jurisdiction with this court), in which she alleged *inter alia* that the parties are married in community of property (which is the default matrimonial property regime in South Africa where no antenuptial or postnuptial contract has been concluded and the husband to the marriage was domiciled here at the date of marriage). The respondent in due course filed a plea and counterclaim, in which he alleged that the parties are married according to German law because at the date of the marriage he was not domiciled in South Africa but in Germany.

[5] The applicable matrimonial property regime is of considerable importance to the parties. If they are married in community of property according to South African law then, subject to any successful claim which the respondent might advance in

the divorce action for a forfeiture of benefits, either in whole or in part, his entire estate, which is substantial on either version, will be shared equally with the applicant (as will her considerably more meagre estate be shared with him). If however they are married in accordance with German law, in very basic terms, the respondent will retain the bulk of his estate as his sole property, given that it was built up by him prior to the marriage, and only what the parties have accrued since the marriage will be shared.

Applicable legal principles

[6] It is trite that under the common law the matrimonial property regime is determined according to the law applicable in the husband's country of domicile at the time of the marriage, the so-called *lex domicilii matrimonii*: see *inter alia* *Sperling v Sperling* 1975 (3) SA 707 (A) at 716F-H.

[7] The Domicile Act 3 of 1992 (*'the Act'*) came into effect on 1 August 1992 and it is common cause that this is the legislation to be applied in the present matter.

[8] Section 1(2) of the Act provides as follows:

> *'The domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.'*
>
> [emphasis supplied.]

[9] Section 3(1) of the Act stipulates that:

> *'No person shall lose his domicile until he has acquired another domicile, whether by choice or by operation of law.'*

[10] Forsyth: Private International Law 3rd Ed 1996 at 119 explains that in order to acquire a domicile of choice in terms of the Act:

> *'The intention (or animus) required is that of settling there* "for an indefinite period"*; no question of settling permanently is required.'*

[11] Once the matrimonial domicile is established, it cannot be changed, as Forsyth points out at 261:

> *'Secondly, the authorities also make plain that the matrimonial domicile determines the law applicable to the proprietary consequences of the marriage, once and for all. In other words, the principle of immutability is adopted, in terms of which the proprietary regime is determined by the matrimonial domicile, it cannot be changed during the subsistence of the marriage. The advantage of the immutability principle is that it ensures that the husband cannot disadvantage his spouse, by shifting his domicile to a place where the wife's proprietary position is weaker.'*
>
> [see also *Sperling* at 716H.]

[12] Forsyth at 131 also states that:

> *'The courts…have been prepared to recognise that a propositus* (i.e. an immigrant) *can acquire a domicile of choice even when his residence within*

South Africa is dependent upon a temporary residence permit revocable at the whim of a Minister of State.'

[13] The parties are *ad idem* that:

'The onus of proving that a domicile of choice has been acquired rests on the party who asserts it and this onus is discharged by a preponderance of probabilities.'

[*Eilon v Eilon* 1965 (1) SA 703 (A) at 719H; s 5 of the Act.]

Relevant facts relating to the respondent's domicile at the date of marriage

[14] The facts which are common cause, or appear from the objective documents, are as follows:

14.1 In early 2004 (i.e. two years before the marriage) the respondent purchased the farm D….. Near O…….. It has served as his permanent home since that date and was also the matrimonial home before the parties separated. After D…… was purchased the respondent bought another five properties, three of which also appear to have been purchased before the marriage;

14.2 According to the respondent, the parties decided to raise their children in South Africa, at least until they were much older. J……. was born in July 2004, 20 months before their marriage;

14.3 Although the respondent owns properties which he rents out in Germany, he last had a home in Germany long before the marriage;

14.4 On 12 August 2003 (some 2½ years before the marriage) the respondent's German tax advisor provided a certificate of his income and assets for presentation to the South African authorities for purposes of immigration to this country;

14.5 In a letter to the applicant dated 24 November 2013 (two months before the applicant instituted divorce proceedings) the respondent wrote that he had never wanted to separate from her *'which is why I never entered into any agreement to protect myself…I want you to do everything possible so that we don't lose our farm and apartments through the divorce'*. The apartments to which the respondent refers are all located outside of South Africa;

14.6 The respondent did not return to Germany, even for a holiday, between the date of his arrival in South Africa in late 2002 and the date of the marriage in February 2006. He has subsequently travelled only twice to

Germany, once for a holiday of three weeks in 2008 and on another occasion for medical treatment for a month in 2010. In a rule 43 application in the current divorce proceedings the respondent sought leave to take the children on holiday to Germany during June 2014. In his supporting affidavit he alleged that he merely wished the children to accompany him on what might be his last trip to Germany, given his advanced age and medical condition;

14.7 The respondent suffers from a skin condition, which he had prior to the marriage, and which, on his own version, contra-indicated a return to the colder climate of Germany on a permanent basis;

14.8 Since his arrival in South Africa the respondent's residence status has been both valid and lawful, first under temporary visitors visas and thereafter under *'business permits'* from at least March 2006, i.e. a month after the marriage. According to the respondent, the business visas were valid for two years at a time and were renewed about five times before he decided to apply for permanent residency during 2010. Such permanent residency was granted to him during 2013;

14.9 During 2013 the respondent consulted an attorney, Mr Roux, and the latter recorded his instructions (in a letter which the respondent himself handed

to the applicant) that the parties are married in community of property and that:

> *'It appears from the factual position and circumstantial evidence that it was the intention of both parties to be bound by the marriage in community of property, governed by the South African legal system. You have confirmed that it is not your intention to move back to Germany.'*

[15] The respondent's protestations and attempts to explain away this overwhelming evidence in the applicant's favour ring hollow. He claims that he has a limited understanding of the English language and that he has not understood many of the objective documents provided by the applicant, some of which he also claims to have been entirely unaware. This is not the pattern of a man who, on his own version, has built up a substantial estate comprising a number of immovable properties both locally and abroad; who has travelled extensively throughout the world; who has a son in Germany who collects and forwards to him all relevant mail received; and who has had no difficulty in deposing to a number of affidavits in English during the course of the litigation between the parties. He has also now lived in South Africa for 12 years.

[16] Further, on his own version, although remaining permanently in South Africa might not have been agreed upon in terms, remaining in South Africa for an

indefinite period, and at least until the children (one of whom had already been born at the time of the marriage) were much older, was indeed agreed. This is borne out by the events subsequent to the marriage which the respondent is unable to meaningfully refute. He relies on the fact that he retained his yacht, berthed in K….. for a period after his arrival in South Africa. However, if as he alleges, he intended to only remain in South Africa for a short period and then sail on to Brazil, there would have been no point in him having purchased a berthing slot for his yacht for R70 000 even before the applicant fell pregnant with James, or to execute a notarial contract under South African law to cater for the financial consequences of his *'spousal relationship'* with the applicant in January 2004, i.e. two years before the marriage. The yacht itself was sold in 2009.

[17] In addition, the best which the respondent could proffer regarding the letter from attorney Roux is a denial that he furnished any such instructions to him; and that *'properly read it contains the legal opinion of attorney Roux and his advice to me in contemplation of divorce and ancillary litigation'.* The respondent claimed that he did not know which *'factual position and circumstantial evidence'* attorney Roux took into consideration when he formed his opinion. In a separate affidavit attorney Roux maintains that the advice furnished to the respondent was on the *assumption* that the parties are married in community of property, and that he did not have any specific instructions to that effect. This is not what is to be expected of an attorney furnishing advice to his or her client. In addition, the letter itself bears only two handwritten amendments in the respondent's handwriting. The

one records the date of the marriage and the other corrects attorney Roux's recordal of his instruction that the parties had been married for more than 14 years. The respondent deleted *'14'* and replaced it with *'7'.* There is not even a suggestion on the letter itself that attorney Roux had misunderstood his instructions or had in any way furnished incorrect advice. The respondent had obviously read the letter (which was written in English) carefully; the handwritten amendment relating to the length of the marriage appears towards the end of the letter. There is also no suggestion that the respondent sought clarity from attorney Roux about any of its contents after he had received it.

[18] Having regard to the aforegoing and applying the now trite Plascon-Evans rule (*Plascon-Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634E-635C), I am persuaded that the applicant has shown, on a balance of probabilities, that at the date of the parties' marriage, the respondent intended to remain, at least indefinitely, in South Africa. Accordingly, the applicant has shown that the respondent was domiciled in South Africa at the time and that the parties are thus married in community of property.

Costs

[19] The parties have agreed that each shall pay their own costs in respect of the postponement on 2 September 2014. As far as the remaining costs are concerned, there is no reason why they should not follow the result.

Conclusion

[20] Accordingly the following order is made:

1. **It is declared that the marriage between the parties is governed by South African law, that such marriage is in community of property, and that the patrimonial consequences of a marriage in community of property will follow upon the divorce of the parties, subject to the right of the respondent/defendant to contend and claim, during the hearing of the divorce proceedings, that the applicant/plaintiff should forfeit the benefits of the marriage in community of property;**
2. **Save for the wasted costs of the postponement on 2 September 2014, in respect of which each party shall pay their own costs, the respondent shall bear the costs of this application on the scale as between party and party from his one-half share of the joint estate.**

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J I CLOETE