IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20540/2018

In the matter between:

O[…] B[…] **Appellant**

and

L[…] B[…] D[…] S[…] **Respondent**

Coram: Saldanha J, Henney J *et* Cloete J

Heard: 22 January 2021; supplementary notes delivered: 2 and 25 February 2021

Delivered electronically: 9 March 2021

JUDGMENT

CLOETE J: (HENNEY J concurring, SALDANHA J dissenting)

[1] This is an appeal with leave of the court a quo against its order dismissing the appellant's unopposed divorce action on the ground that the jurisdictional requirements contained in s 2(1) of the Divorce Act 70 of 1979 ("the Divorce Act") had not been met. There is no opposition to the appeal.

[2] The relevant background facts are as follows. On 6 December 2017 at Cape Town the parties, both foreign nationals, entered into a civil union in terms of the Civil Union Act 17 of 2006, in which they married out of community of property by antenuptial contract with the incorporation of the accrual system.

[3] On 18 October 2018 they concluded a settlement agreement in anticipation of a divorce. The appellant's summons was issued on 7 November 2018. She alleged in her particulars of claim that she was domiciled within this court's area of jurisdiction and was also *'currently residing'* on a farm in the Caledon area. The respondent was alleged to be residing in Namibia. It was further alleged that the marriage had broken down irretrievably and that the parties ceased living together on *'the estimated date'* of 15 December 2017. The settlement agreement (*'Consent Paper'*) was annexed to the particulars of claim, and the appellant sought a decree of divorce incorporating its terms.

[4] On 22 January 2019 an *ex parte* order was granted authorising the appellant to serve the summons via the sheriff on the respondent personally in Namibia. This duly occurred and the matter was thereafter enrolled on an unopposed basis in the motion court for hearing on 10 April 2019.

[5] The appellant testified that she relocated back to Moscow, Russia (her country of origin) sometime around the end of December 2018. In response to a question by her counsel she confirmed that she was *'permanently resident'* in Caledon from April 2018 until December 2018, and conducted her freelance accounting business remotely from there for her clients in Russia.

[6] The appellant was afforded the opportunity to give further evidence after the court a quo indicated that it was not satisfied, based on that testimony, that it had the necessary jurisdiction. The appellant then explained that she and the respondent came to South Africa with the intention of marrying here, since same-sex marriages are not recognised in either Namibia or Russia.

[7] She testified further that before the marriage, the parties travelled to various places in South Africa: *'We were looking for a place where we want [to] maybe live'.* In Caledon they met a certain Mr Kleyn who had what she described as a beautiful farm: *'So we became friends and he suggested to us [that] before we find our own property to live, to live at his place…'.* An agreement was then reached in terms of which the parties would reside on the farm: *'We choose Caledon and decide to stay there'.* From what can be gleaned from the evidence, the parties were residing in Caledon and intended to remain there indefinitely at the time of their marriage.

[8] It was a few weeks after the marriage, towards the end of December 2017, that they travelled to Germany on honeymoon for 10 days. The appellant testified that while on honeymoon she realised the marriage had been a mistake. Although she no longer wished to continue with the marriage she nonetheless planned to continue living in Caledon.

[9] She travelled on to Moscow to make the necessary arrangements with her clients, and returned to Caledon during April 2018. It bears mention that the appellant signed the Consent Paper in Moscow on 8 October 2018 and the

court a quo stated in its judgment that the founding affidavit in the edictal citation application was also signed by her in Moscow on 27 November 2018. Her evidence in this regard was limited to *'I was for two weeks in Moscow in November, and I was moving'*, and that she also travelled to Russia during the period April to December 2018 for business purposes.

[10] Although not entirely clear from the record given the appellant's testimony in English (her mother tongue being Russian), it would seem on the probabilities that in stating *'I was moving'* she was referring to her move to South Africa, since in response to a question by the court a quo whether her entire life was still in Moscow she replied: *'No, my entire life was in Caledon'*. She explained that over that period she was also looking to buy property in the Caledon area in which to live.

[11] It appears that after the appellant's visit to Russia in November 2018 matters with her clients did not work out as planned, since some insisted on personal contact which was impossible given the geographical distance. The appellant's evidence was that it was at the end of December 2018 she came to realise that she would have to move back to Russia permanently.

[12] Counsel for the appellant, without dealing with domicile, then addressed the court a quo on the issue of residence, and more particularly the meaning of *'ordinarily resident'* as it appears in s 2(1) of the Divorce Act, which provides as follows:

> *'**2. Jurisdiction.** – (1) A court shall have jurisdiction in a divorce action if the parties are or either of the parties is---*
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> *(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.'*

[13] In its judgment the court a quo dealt comprehensively with the issue of jurisdiction, but focused on the meaning of *'ordinarily resident'* in light of the submissions made by counsel at the hearing. The learned Judge concluded that the period of the appellant's *'sojourn'* in Caledon was insufficient to meet the ordinary resident requirement in s 2(1)(b). He correctly stated that during the hearing the appellant's counsel, by implication, abandoned any reliance on s 2(1)(a) above.

[14] The failure to rely on s 2(1)(a) persisted in the application for leave to appeal, the notice of appeal and the appellant's heads of argument filed prior to the appeal. The approach taken was that at the time the divorce action was instituted neither of the parties were domiciled or resident in this court's area of jurisdiction, seemingly in terms of s 2(1) of the Divorce Act. I say "seemingly" since the grounds of appeal were that the court a quo erred in failing to find it had jurisdiction under the common law, alternatively developing the common law to provide a basis for jurisdiction in the particular circumstances of this matter.

[15] An invitation was extended to us to develop the common law so as to permit spouses in the position of the parties to divorce in South Africa where the countries in which they are domiciled or ordinarily resident at the time of institution of divorce proceedings do not recognise same-sex marriages.

[16] It was however incumbent upon us to nevertheless raise the issue of domicile, in terms of s 2(1)(a), with the appellant's counsel during the appeal. As the Constitutional Court remarked in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*[1]:

> *'[20] In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in* R v Hepworth *to the effect that a criminal trial is not a game and a judge's position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a 'judge is an administrator of justice' who has to see that justice is done. While these remarks were made in the context of a criminal trial they are equally applicable in civil proceedings and in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may 'amount to the confirmation by it of a decision clearly wrong', and not performing its essential function. This in turn would infringe upon the principle of legality…'*

[1] 2014 (3) SA 96 (SCA).

[17] Domicile in terms of s 2(1)(a) was raised because what the appellant's counsel overlooked, and thus failed to draw to the court a quo's attention, is that s 1(2) of the Divorce Act contains the following deeming provision:

> *' (2) For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.'* [emphasis supplied]

[18] Accordingly, the question is whether or not the evidence before the court *a quo* was sufficient to warrant the conclusion that the appellant was domiciled in its area of jurisdiction on 7 November 2018, the date when summons was issued by the registrar, and not the date when it was later served on the respondent in Namibia after the appellant returned permanently to Russia. (In its judgment the court a quo stated that the summons was served on the respondent on 31 April 2019 and that the action therefore commenced on 4 April 2019. I accept that what he probably meant was that the summons was served on 30 April 2019 and the action thus commenced on that date).

[19] The appellant's counsel was afforded the opportunity to provide us with a supplementary note, in which the invitation to develop the common law was abandoned, and we were instead requested to decide the appeal solely on the basis that the court a quo erred in failing to find the appellant was in fact domiciled within its area of jurisdiction when the summons was issued in terms of s 1(2) as read with s 2(1)(a) of the Divorce Act. Written submissions were also provided in support thereof.

[20] Since its amendment by GN R472 of 12 July 2017, uniform rule 49(4) mirrors the wording of sub-rules 7(3)(a) and (b) of the Supreme Court of Appeal rules. They read as follows:

> *'Every notice of appeal and cross-appeal shall state –*
> *(a) what part of the judgment or order is appealed against; and*
> *(b) the particular respect in which the variation of the judgment or order is sought.'*

[21] In *Leeuw v First National Bank Limited*[2] the Supreme Court of Appeal set out the position as follows:

> *'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to "any matter flowing fairly from the record". The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked…'*

[22] Accordingly, in addition to the authority of *Quartermark Investments*, we are in any event not precluded from dealing with the appeal on the new ground advanced.

[23] There is a dearth of authority on the deeming provision in s 1(2) of the Divorce Act. In *H V v C V*[3] the respondent had already issued summons for a divorce in KwaZulu-Natal when one was issued at the instance of the applicant out of

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2 2010 (3) SA 410 (SCA) at para [5].
3 (6384/2019) [2019] ZAWCHC 74 (21 June 2019).

this court. The applicant's summons was served on the respondent before his was served on her.

[24] The applicant thereafter launched a rule 43 application in this court and the respondent objected to its jurisdiction on the basis of s 1(2). Although his counsel conceded in argument that this court had jurisdiction, Binns-Ward J considered the import of s 1(2) as follows:

> *'[5] Counsel, however, quite properly, drew my attention to the provisions of s 1(2) of the Divorce Act 70 of 1979, which at first blush might be read to have the opposite effect…*
>
> *Counsel were not able to refer me to any decided case in which the import of s 1(2) of the Divorce Act had been considered or determined, and in the limited time available to me in the context of managing the Third Division roll I have also not been able to find any.*
>
> *[6] There are two striking features about the provision. The first is that it is a deeming provision and the second is that the object of the deeming function is to serve* "the purposes of th[e] Act"*. A deeming provision generally has the effect of causing something to be treated as if it were something that it is actually not. Actual joinder, and the attendant commencement of the action, occurs only upon service of the initiating summons. I have been unable to identify any purpose of the Act that would be served by treating the date of* issue *of an unserved summons as determinative of the question before which court the action is pending when* service *of a summons issued later in another court of competent jurisdiction had been effected. Put otherwise, it does not serve any purpose of the Act to treat the court before which the action is not actually pending as if it were the court in which the action was effectively commenced.*
>
> *[7] What then are the purposes to which the deeming effect of s 1(2) might sensibly pertain? In my view, the deeming provision is germane in respect of a number of issues arising for determination under the Act, in which the effect of the decision is time-related in terms of the Act. I do not pretend to have undertaken an exhaustive consideration, but examples that leap out on a cursory examination of the statute's provisions are the time-related presumption bearing on proof of the irretrievable breakdown of a marriage relationship provided in s 4(2)(a), and the calculation of the two-year period of detention in respect of mentally ill spouses for purposes of s 5(1) of the Act and the six-month period of continuous unconsciousness in s 5(2) in respect*

> *of defendant spouses who are suffering from a physical disorder. Those periods fall to be calculated from the deemed date of the institution of the divorce action irrespective of the court in which that action became pending.*
>
> *[8] In the circumstances, I am satisfied that this court is seized of the divorce action, and that the deeming provision in s 1(2) does not detract from that fact…'* [emphasis supplied]

[25] There is however another reason for the deeming provision in s 1(2), and this was explained by the authors of The Law of Divorce and Dissolution of Life Partnerships in South Africa (editor Heaton) at 507-508:

> *'Action proceedings are generally regarded as having been instituted when they are served on the Defendant. An exception operates in respect of divorce proceedings. Section 1(2) of the Divorce Act provides that for the purposes of the Act, a divorce action is deemed to be instituted on the day on which the summons is issued, or the notice of motion is filed, or the notice delivered in terms of the rules of court. This section can be very important, particularly in respect of jurisdictional disputes. It can sometimes be very tricky to effect service of proceedings instituted, and parties frequently attempt to forum shop to secure the most favourable result. Although it is not a failsafe means of securing jurisdiction in respect of a matter, the institution of proceedings will at the very least secure the litigant the opportunity of litigating in his or her chosen jurisdiction.'* [emphasis supplied]

[26] In his further written submissions counsel for the appellant submitted that whilst at first blush it may seem that *H V v C V* renders s 1(2) *'redundant'*, this is not the case; the learned Judge's findings were clearly directed at those instances where a spouse causes a divorce summons to be issued but thereafter takes no steps to have it served, but although the other spouse's summons is issued thereafter (in another court of competent jurisdiction), he or she does ensure that service is effected. In such circumstances, he

submitted, s (1(2) would have no bearing on the matter since the deeming provision would serve no purpose, and the parties should not be required to proceed with an action in a court where the matter is not actually pending.

[27] I am unable to agree with this submission. Binns-Ward J expressly stated that he had been unable to identify any purpose of the Divorce Act that would be served by treating the date of issue of an unserved summons as determinative of jurisdiction, where service of such a summons issued later in another court of competent jurisdiction had been effected.

[28] As previously stated, the purpose which I have identified (as submitted by Heaton et al) is to afford a spouse the opportunity of litigating in his or her chosen area of (competent) jurisdiction. There may of course be other purposes, including those mentioned by the learned Judge, but they have no bearing on jurisdiction. However it is not necessary to go further than this since in the instant case the date of issue of the appellant's summons by the registrar is all-important.

[29] That being said, it may well be necessary in an appropriate case to consider whether there should be a "reading in" of a proviso in s 1(2) to the effect that a later issued summons, subsequently served, shall be determinative of jurisdiction in divorce actions if the spouse who first caused summons to be issued subsequently fails to take steps to effect service either wilfully or negligently. This would however no doubt require input from the Government

Minister(s) concerned as well as other interested parties, with their attendant joinder(s).

[30] Returning to the instant matter, the court a quo found that the appellant gave no evidence regarding her domicile. It also referred to her testimony that the parties wished to establish whether they liked South Africa for purposes of relocating here permanently. As the learned Judge put it: *'It was more a trial run before finally deciding to establish a domicile of choice in this country'.*

[31] While the latter may have been the factual position when the parties first arrived in South Africa, my understanding of the appellant's evidence is that an agreement had already been concluded with Mr Kleyn prior to the marriage that the parties would reside on his farm because they had chosen Caledon as the place where they would live.

[32] This is consistent with the appellant's testimony that after the parties separated in December 2017 she took the necessary steps to inform her Russian clients of her intention to do so, in fact returned on her own to this court's jurisdiction for some nine months, and considered buying property here, before circumstances caused her to realise at the end of December 2018 that she had no choice but to return to Russia. There is also her evidence that her trips to Russia during the period April to December 2018 were not because she still considered it to be her home (or domicile).

[33] All of these facts, cumulatively, lend support for the averment in her particulars of claim that at the time the action was instituted on 7 November 2018 she was domiciled within this court's area of jurisdiction.

[34] Section 1 of the Domicile Act 3 of 1992 ("the Domicile Act") provides as follows:

> *'**1. Domicile of choice.** ---(1) Every person who is of or over the age of 18 years, and every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make a rational choice, shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status.*
>
> *(2) A 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.'*

[35] There is no suggestion that at any stage the appellant was in South Africa unlawfully. In *Chinatex Oriental Trading Co v Erskine*[4] the court dealt with the acquisition of a domicile of choice for purposes of the Domicile Act as follows:

> *'…A domicile of choice can thus be acquired by sufficing two elements:*
> *(i) physical presence (an objective fact) and*
> *(ii) an intention to remain indefinitely (a subjective test).*
>
> *A person's physical presence requires more than a visit or a sojourn to the country. Accordingly the longer the person is settled at a particular place, the greater the likelihood of a court regarding him as resident there for the purposes of domicile. (*Johnson v Johnson *1931 AD 391 at 411.) The second element,* animus manendi*, does not require an intention to remain permanently. The person must display a state of mind which is consistent with*

[4] 1998 (4) SA 1087 (C) at 1093J-1094C.

> *the intention of remaining indefinitely, which intention need not be irrevocable in order to show that a domicile of choice has been acquired. (Pollak (1933) 50* SALJ *at 465;* Ley v Ley's Executors and Others *1951 (3) SA 186 (A);* Eilon v Eilon *1965 (1) SA 703 (A) at 721A.) Furthermore a continuing emotional attachment to one's country of origin is insufficient to negative a domicile of choice. (*Eilon v Eilon *(*supra*)at 705A).)'* [emphasis supplied]

[36] In the absence of an adverse credibility finding against the appellant by the court a quo, we are bound to accept her version. As submitted by C F Forsyth Private International Law (5ed) at 141 the most apt description of an intention to reside in a particular place for an indefinite period is *'until and unless something, the happening of which is uncertain, occurs to induce the person to leave…'.*

[37] In LAWSA: Conflict of Laws (2ed 2(2)) at para 301 the author, relying on the opinion expressed in para 3.44 of the South African Law Commission Working Paper 20 on the issue of domicile of choice, states:

> *'Whilst the strength of an intention to settle in a country may be easy enough to gauge… and thus satisfy the test of intention, the just resolution of hard cases will require a more flexible approach for determining the acquisition of a domicile of choice than can be provided by the test of intention which serves legal certainty alone.'*

[38] Having regard to the evidence before the court a quo I am persuaded that, although the facts in this matter may constitute a "hard case" on domicile, a flexible approach is called for, and that to lean on legal certainty alone would militate against the interests of justice. It would follow, on this reasoning, that

the appellant established on a balance of probabilities that at the time of institution of the divorce proceedings she was domiciled within this court's area of jurisdiction, and the court a quo thus had the requisite jurisdiction to grant the decree of divorce.

[39] **The following order is made:**

1. **The appeal succeeds.**
2. **The order of the court *a quo* is set aside and substituted with the following:**

   'A decree of divorce is granted incorporating the terms of the parties' Consent Paper'.
3. **No order is made as to costs.**

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J I CLOETE

I agree.

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R C A HENNEY

SALDANHA J (dissenting):

[1] I have had the advantage of reading the judgment of the majority, for which I am grateful, and for the reasons set out herein respectfully dissent therefrom. In my view, the appellant had, on a careful reading of the evidence presented

to the court *a quo*, failed to establish as a matter of fact that she had adopted a domicile of choice in this country, and in particular the Western Cape, on the date on which the proceedings were instituted, and that the court a quo had the necessary jurisdiction to terminate the marital relationship between the parties.

[2] It is perhaps necessary to reflect very briefly on the proceedings before the court *a quo*, and in particular with regard to the concerns raised by Dolamo J regarding the appellant's domicile, and his findings in relation thereto.

[3] It is not necessary to set out the details of the relationship between the appellant and the defendant, save to state that both, as peregrines, elected to solemnise their marriage in South Africa in terms of the Civil Union Act 17 of 2006 ("the Civil Union Act"). The appellant claimed that her country of origin, Russia, did not recognise same sex marriages, and so too did the country of origin of the defendant, Namibia. For that reason they elected to live in South Africa after their marriage, and chose it as their domicile of choice in light of their marital relationship.

[4] In the particulars of claim the appellant claimed that, at the time of the institution of the divorce proceedings, she had 'currently resided' at plot 240 Tesselaarsdal, Caledon, in the Western Cape. She also claimed to be domiciled within the area of jurisdiction of the court.

[5] At the date on which the divorce proceedings were heard before the court *a quo*, 10 April 2019, the appellant resided in Moscow, in her country of origin. When led by her counsel in her evidence in chief, she stated that she had been permanently resident in Caledon in the Western Cape prior to having returned to Moscow. In response to a question from the court as to whether she had intended to remain in Caledon, or whether it was just a temporary stopover, she stated: 'I was just trying to return me myself (sic) and to stay at a place where I like to stay'. It is to be noted that no English-Russian interpreter was used in the proceedings, which may have accounted for the manner in which the appellant expressed herself in her testimony. In further clarification to the court she stated that Caledon was the place that she 'had liked but [she] had to move to Russia because of work'. It was apparent from the evidence that after the parties' marriage on 6 December 2017, the relationship had lasted no more than about 10 days, and that the parties had, subsequent to their honeymoon in Germany during December 2017, no longer lived together.

[6] The appellant, an accountant, appeared thereafter to have gone to Moscow, where she entered into contracts with her clients to attend to their work, which she was to conduct remotely from South Africa. She had no clientele in South Africa, and explained that she would have had to enter into contracts on an annual basis with her clients in Moscow.

[7] She also claimed that the intention behind the decision for herself and the defendant to live in South Africa, was to 'live as a family here'.

[8] During the course of her testimony in the court *a quo,* the court indicated that it was not satisfied that the appellant had established the court's jurisdiction to terminate the marriage. The appellant was led further in evidence by her counsel in an attempt to clear that aspect up. She explained that prior to her marriage to the defendant, they had travelled around in search of a place to settle down. They had struck up a friendly relationship with one Mr. Donovan Kleyn in Caledon, who owned a large property and allowed them to reside on part of his farm without a formal lease. In response to the question as to why she had returned to Caledon after the relationship between herself and the defendant broke down, she stated: 'I still intended to go to Caledon because I really wanted that place…'. It appeared that she had returned to South Africa in April 2018. Although it is not clear from the evidence, it appears that at the time the divorce proceedings were instituted, on 7 November 2018, she had been in Moscow, as she had shortly thereafter deposed to an affidavit for the summons to be served on the defendant, in Namibia, by way of edictal citation. She returned to South Africa sometime in either November or December and, because of personal and financial reasons, 'finally decided' in December 2018 to return permanently to Russia.

[9] The court *a quo*, in its judgment, stated that the legal question for determination was whether the appellant was domiciled within the area of

jurisdiction of the court at the time of the institution of the divorce proceedings; alternatively, whether the defendant was ordinarily resident in the area of jurisdiction of the court, and had been so ordinarily resident for a period of no less than one year immediately prior to the institution of the divorce proceedings. In respect of the question of domicile, the court stated: 'this bold statement was not borne out by the evidence. Not a stitch of evidence was led regarding the domicile'. The court recorded that the appellant's legal representative had, by implication, conceded as much and had not persisted with the argument that domicile was a basis for the court's jurisdiction. Instead, he sought to persuade the court that the appellant had been ordinarily resident in the country at the time the proceedings were instituted. The court *a quo* dealt extensively in the judgment with the issue of 'ordinarily resident', as provided for in the Divorce Act 70 of 1979 ("the Divorce Act"), and arrived at the conclusion that the appellant had not proved that she had been ordinarily resident within the jurisdiction of the court for a period of no less than 12 months immediately prior to the institution of the action. On that basis, the court *a quo* found that it did not have jurisdiction and dismissed the action.

[10] The appellant sought leave to appeal against this decision, on the basis that the court *a quo* had failed to consider the common law as a basis for jurisdiction, and/or alternatively had failed to develop the common law in terms of sections 39[5] and 173[6] of the Constitution, Act 108 of 1996, to

[5] '(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

provide a basis for jurisdiction for the court to determine the divorce proceedings peculiar to same sex couples whose country of origin did not recognise such unions. In the judgment of the court *a quo* on the application for leave to appeal, it noted that the issue as to the development of the common law had not been raised before it at all, but given its importance, granted leave to appeal.

[11] When the appeal was first heard by the full bench of this court, we raised the following issues with the appellant's legal representative:

Inasmuch as the appellant sought the development of the common law in respect of the jurisdiction of the court, in circumstances where the parties were married in terms of the Civil Union Act and in which their countries of origin did not recognise such unions, and given its impact, not only on the common law but also on various statutory provisions, it was necessary that notice was given in terms of Rule 16A of the Superior Courts, and in particular to the relevant Ministers of Justice and Constitutional Development and Home Affairs, as such ministries may have an interest in the relief sought. The appellant was also required to provide expert testimony with regard to the issue of jurisdiction in the country of origin of the defendant, Namibia, and, to the extent relevant, the application of the doctrine of f*orum non conveniens.*

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[6] 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[12] In a note provided to the court by the appellant's legal representative he stated that, in light of the difficulties with regards to the non-compliance with Rule 16A, as well as the issue of *forum non conveniens*, and in consideration of the court's remarks with regard to the issue of domicile, in particular the application of the deeming provision in section 1(2)[7] of the Divorce Act, that the appellant would now seek relief in the appeal on the following basis:

1. That the court *a quo* had erred and/or misdirected itself by its failure to consider the fact that the court had jurisdiction to entertain the divorce proceedings on the basis that the appellant was domiciled within this court's jurisdiction upon the issuing of the divorce action; and consequently
2. That the court *a quo* had erred and/or misdirected itself by finding that it had no jurisdiction to entertain the divorce action.

[13] The appellant further contended that on the basis of section 1(2) of the Divorce Act, which provides that '[f]or the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued…', and read with section 2(3)[8] of the Divorce Act, that the court *a quo* had had the necessary jurisdiction to hear the divorce proceedings on 10 April 2019. In a further note to the appeal court, upon enquiry as to whether the appellant had confined herself to the grounds of appeal raised in (1) and

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7 'For the purposes of this Act a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court, as the case may be.'

8 '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 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.'

(2) above, counsel for the appellant confirmed that that was now the position of the appellant.

[14] The appellant's legal representative contended that from the appellant's evidence before the court *a quo*, she had 'formed the unequivocal intention to pursue her future in South Africa', had made all the necessary arrangements with her clients in Russia for her to work remotely from South Africa, and that her entire life was situated in this court's jurisdiction. She had only eventually decided to move back to Russia at the end of December 2018. Counsel for the appellant contended that she had had a clear intention to remain in South Africa for an indefinite period, to which she had given effect by having resided in Caledon for the period April 2018 to late December 2018. That view appears also to be shared by my colleagues in the majority judgment, although with less certitude than that proffered by counsel for the appellant. I, however, as was the court a quo, am not persuaded that the appellant had in fact unequivocally expressed or established that she had elected the Western Cape and South Africa as her domicile of choice. More so, in my view, after the breakup of the marriage between the parties. It was apparent that she and the defendant had initially sought to live in South Africa, and to establish it as their domicile of choice, because of their marriage not being recognised in their countries of origin. The situation, however, appeared to be more tenuous after the breakdown of the marital relationship, and with the appellant's sojourn to Moscow in 2018 when the divorce proceedings were instituted. She herself stated that she

had 'finally taken' the decision to return to Moscow in December 2018. In my view, there was clearly no expressed and clear intention that she had in fact chosen South Africa as her domicile of choice, or that she had demonstrated that it was so as at 7 November 2018, when the divorce proceedings were instituted.

[15] The authorities are clear that to establish a domicile of choice the person concerned, besides expressing a mere intention to reside permanently at a proposed domicile, must also establish such choice of domicile from all the surrounding circumstances and that she has in fact done so. See LAWSA Vol 7(1) 3rd Ed para 328: 'Factors to be considered in determining whether a new domicile has been acquired are the (probably questionable) assumption that a spouse who leaves the other spouse behind at a place does not change his or her domicile there; the period of residence at the alleged domicile; the motive for residing there; the ownership of property there (or sale of property in the previous domicile); the application for permanent residence or citizenship there; any circumstantial evidence indicating the presence or absence of an *animus manendi*; direct evidence about the subjective intention to be domiciled in a certain area; and evidence of past expressions of intention.' (Original text footnotes omitted.) In the evidence presented by the appellant in the court *a quo*, she did no more than to express her 'liking' to live in South Africa after the marriage relationship had broken down between herself and the defendant. She had established no other connection with South Africa, whilst retaining her clientele in Moscow

and servicing them remotely. Moreover, she had indicated no more than an intention to acquire property in her own name. No indication was provided that she had officially sought to obtain formal residence or citizenship in South Africa, or that she had a social circle here. She certainly had no clients in South Africa. She was required to return to Russia to enter into or renew contracts with her Russian clients. That arrangement, however, appeared to be neither feasible nor financially viable and, for personal reasons also, she was forced to 'finally' return to Russia in December 2018.

[16] In this regard I am mindful of the reference by the majority to LAWSA: Conflict of Laws (Vol 7(1) 3rd Ed para 326), where reliance is placed on the opinion expressed by the South African Law Commission Working Paper 20 on the issue of domicile of choice. While this may indeed be a 'hard case' on domicile, I am not persuaded that a flexible approach, in respect of the facts of this matter, can be adopted in the interests of justice. In my view, the interests of justice are more properly served when a domicile of choice is properly established on the facts and on the evidence presented, rather than on an overly generous interpretation of the evidence, or by a lack thereof. That, in my view, could also lead to undesirable situations where a domicile of choice is expediently chosen as a guise for jurisdiction (country or forum) shopping, or by a peregrine in an attempt to subvert the requirements of the relevant statutes and the common law relating to the jurisdiction of our courts.

[17] I am therefore not persuaded that the appellant established that the court *a quo* had the necessary jurisdiction to deal with the divorce proceedings, and, in my view, the court *a quo* correctly dismissed the action.

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V C SALDANHA

Judge of the High Court