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RECENT DEVELOPMENTS

Determining Matrimonial Property Rights of Non-Domiciled Spouses: The Applicable Law in Botswana

The Private International Law rule to the effect that where there is no antenuptial contract the proprietary consequences of a marriage are determined by the husband's domiciliary law at the time of the marriage was, for the first time, the subject of legal arguments before the Court of Appeal in the case of *Mtui* v. *Mtui*.[1] Under South African law, the law selected by this rule applies to all property of the spouses, whether acquired before or after the marriage, and whether movable or immovable.[2] Furthermore, the domiciliary law determines the law applicable to the proprietary consequences of the marriage once and for all because of the immutability doctrine of Roman-Dutch law[3] and will be the *lex causae* whenever questions concerning the property relations of the spouses arise.[4]

The facts of the case were that the appellant (husband) and the respondent (wife) were married in Moshi, Tanzania on 29 December, 1970. The appellant came to live in Botswana in 1982 and was joined by the respondent in 1983. It was common cause that their domicile was, and at the time of the appeal still was, Tanzania. The parties while living in Botswana, according to the respondent, acquired considerable assets, both movable and immovable, by the joint efforts of both parties. The relationship broke down in 1987 and the appellant instituted divorce proceedings in the court of the Resident Magistrate at Moshi in Tanzania. A decree of divorce was pronounced on 9 July, 1993. This was subjected to an appeal before the High Court of Tanzania and after considerable delay, the appeal (which was not related to the divorce itself) was allowed in part on 31 August, 1998. The relevant part of the order was as follows:

> "(b) That the Court of the Resident Magistrate at Moshi should distribute to the parties their jointly acquired assets, which are located in Tanzania under the marriage Law of Tanzania.
> (c) That since the courts in Tanzania do not have jurisdiction to distribute assets of the parties which are located in Botswana, the said properties be distributed to them in accordance with the law obtaining in Botswana where the properties were acquired and are located."

[1] Civil Appeal No. 33 of 2000, High Court Misca. No. 247/1992 (20 July, 2001). The rule was alluded to by the High Court in *Ndzinge* v. *Ndzinge* MC No. 268/90 unreported. See J. Kiggundu, *Private International Law in Botswana—Cases and Materials*, Gaborone, 1995, at 200–202.

[2] See *Union Government* v. *Larkan* 1915 C.P.D. 681 at 685, *Union Government* v. *Larkan* 1916 A.D. 212 at 215, *Sperling* v. *Sperling* 1975 (3) S.A. 707 (A) at 716 and *Blatchford* v. *Blatchford's Executors* (1881) 1 E.D.C. 365.

[3] This doctrine does not permit parties to a marriage to change the matrimonial property system governing the marriage by a postnuptial agreement. Despite the limited relaxation made to this principle in South Africa by s. 21 of the Matrimonial Property Act 88 of 1984, the doctrine in its original rigidity still applies in Botswana.

[4] See *Brown* v. *Brown* 1921 A.D. 478 at 484; *Blatchford* v. *Blatchford's Executors* above; *Sperling* v. *Sperling* above.

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By a notice of motion dated 3 May, 1999, the appellant sought an order from the High Court that paragraph (c) above be made an order of the High Court of Botswana and for an order appointing a liquidator of the matrimonial property of the parties and for an interdict.[5] The High Court conceded that there are no statutory provisions in Botswana for the recognition of foreign decrees[6] but held that such recognition can be done under the common law.[7] Furthermore, the common law allows a court to enforce a judgment of a foreign court (save on grounds of public policy) if the court is one of "competent jurisdiction". In doing so the court does not apply the laws of the foreign court but rather its own rules.[8] The Tanzanian court by its decree of 31 August, 1998, created a right which right is recognized and enforceable by the Roman-Dutch common law which forms part of Botswana's common law.[9] The High Court consequently held that the Tanzania decree was enforceable in Botswana because the expert testimony on Tanzanian law indicated that the Tanzanian court applied the domiciliary law and the court had competent jurisdiction in the action between the parties. The Respondent's submission that the Tanzanian court, having granted the divorce, should have gone ahead to resolve the issue of distribution of property and should have given direction to the Botswana High Court as to how such distribution should be made, was rejected by the court.

The High Court consequently made the following orders:

> "(1) That since the courts in Tanzania do not have jurisdiction to distribute assets of the parties which are located in Botswana, the said properties be distributed to them in accordance with the law obtaining in Botswana.
> (2) That the Registrar do appoint an accountant or an attorney to act as liquidator of the matrimonial property of the parties with the following duties:
> ... (c) to divide the said assets equally between the parties or sell them and divide the proceeds where a division cannot conveniently or advantageously be effected ..."[10]

The appeal centred on two matters, namely, what system of law did the court a quo apply when directing an equal division of the Botswana assets and what was the proper interpretation of paragraph (c) of the Tanzanian divorce decree.

The respondent argued that either the court a quo must have applied the law of Tanzania or the law of the matrimonial regime in Botswana. WEIR, J.A., who delivered the judgment, and with whom the other two judges of appeal agreed, pointed out that the provisions contained in paragraph (c)

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[5] [2000] 1 B.L.R 406.

[6] At p. 410 *per* LISIMBA, J., citing with approval a statement by the present writer to the effect that the common law of Botswana is a mixed system of Roman-Dutch and English common laws and hence recognition of such decrees is by the rules of these laws. See (1991) 23 *B.N & R* 107. See also J. Kiggundu, "The recognition of foreign divorces in Botswana", (1992) 25 *CILSA* 83.

[7] See the English cases of *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517 at 540; *Wilson* v. *Wilson* (1872) L.R. 1 P.D. 432 at 442; *Armitage* v. *Attorney General* [1906] P. 135; *Travers* v. *Holley* [1953] P. 246; and *Indyaka* v. *Indyka* [1967] 2 All E.R. 689.

[8] See the English case of *Adams & Ors*. v. *Cade Industries Plc & Anor*. [1991] 1 All E.R. 929.

[9] The court approved the *dictum* of WILSON, J.P., in the South African case of *Estate Seedat* v. *R*. 1916 N.P.D. 535 at 540.

[10] See p. 414.

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of the Tanzanian decree are capable of more than one interpretation and opined that:

> "... the question is whether the Tanzanian court intended that the assets located in Botswana should be distributed in accordance with the local law (the *lex situs*) or whether they should be distributed according to the statute law of Tanzania."[11]

In approaching this question, WEIR, J.A., said two considerations should be borne in mind, namely, (1) the general rule to the effect that in the absence of a contract or settlement, the rights of the spouses in each other's property are determined by the law of the domicile of the husband; and (2) viewed against this general rule, paragraph (c) of the Tanzanian decree, should be construed accordingly. This meant that paragraph (c) should be construed as to apply the same matrimonial property regime in Botswana as in the court of domicile unless the wording of the paragraph points otherwise. Although some doubts have been expressed in other jurisdictions as to the applicability of the general rule to both movable and immovable property, he held that in Botswana the general rule is applicable to both types of property. In his view if the appellate court were to follow the direction of the court a quo to divide the Botswana assets equally, that would not only be a departure from the general rule but could lead to anomalous results.[12] He was prepared to construe paragraph (c) in a manner which would not lead to inconsistency in the distribution of the matrimonial assets according to where they happened to be situated.

He agreed with the court a quo that matrimonial differences were to be settled in the court of the domicile of the husband (and sometimes the spouses) and in accordance with the law prevailing there.[13] He also agreed with the court a quo that since the domicile of the parties was Tanzania, it is the courts of that country that have jurisdiction to divide the matrimonial assets on divorce. Furthermore, he accepted that the court a quo was right in concluding that the Tanzanian decree was recognizable and enforceable by the common law of Botswana.[14]

In determining the "law obtaining in Botswana" in terms of paragraph (c) of the Tanzanian decree, WEIR, J. A., expressed the opinion that:

> "It is necessary to first of all look at the status of the parties. When this is done, it will be seen that they are domiciled abroad. The foreign court wishes its order on distribution to be enforced here. The law in Botswana is obliged to recognize that order. In doing so, it has to recognize the rule of private international law that the distribution of the matrimonial property, in the absence of special circumstances, should be done in accordance with *lex domicili*. Accordingly, by directing that the assets should be distributed in accordance with the law of Tanzania the court would be applying the law obtaining in Botswana. That in my judgment, is the way to proceed in this case."[15]

He stated that under the law of Botswana, a civil marriage might be contracted in or out of community of property.[16] If it is in community of

[11] See p. 8 of the transcript.
[12] Reliance was placed on the view of the authors of *Dicey and Morris—The Conflict of Laws*, 12th ed., London, 1993, at 103.
[13] See p. 5 of the transcript.
[14] See p. 6 of the transcript.
[15] See p. 11 of the transcript.
[16] See s. 3 Married Persons Property Act, 1970. See generally E.K. Quansah, *Introduction to Family Law in Botswana*, Gaborone, 2001.

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property, the law conceives such a marriage as a partnership in which property is jointly owned and, upon dissolution falls to be divided equally. According to the expert evidence accepted at the court a quo, the law of Tanzania differs from that of Botswana in as much as it has been derived from the common law of England.[17] The relevant provisions of the Tanzania Law of Marriage Act No. 5 of 1971 (s. 114) provides, *inter alia*, as follows:

> "(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.
> (2) In exercising the power conferred by subsection (1), the court shall have regard—
> (a) to the custom of the community to which the parties belong;
> (b) to the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;
> (c) to any debts owing by either party which were contracted for their joint benefits; and
> (d) to the needs of the infant children if any, of the marriage, and subject to those considerations, shall incline towards equality of division."[18]

The underlying principle of the Tanzanian provision in the learned Justice of Appeal's view is equality of division of matrimonial property subject to the factors mentioned therein. It will therefore be of practical and financial consequence for the parties depending on whether the matrimonial property is to be divided upon a strict equal division, as may be required by the law of Botswana, or on the less clear-cut basis of division specified by the law of Tanzania.

In the light of his acceptance that the domicile of the parties was Tanzania at the time of the marriage, the proper course, according to the learned Justice of Appeal, was to remit the case back to the court a quo with a direction to distribute the assets located in Botswana in accordance with the provisions of section 114 of the Tanzanian Law of Marriage Act, 1971. This means the distribution of the assets situated in Botswana must be done in accordance with the law of Tanzania. This overruled the interpretation of the court a quo of paragraph (c) of the divorce decree to mean the law applicable to the distribution of the assets in Botswana (the *lex situs*).

The Court of Appeal's decision establishes for private international law in Botswana the following principles:

(a) the recognition and enforcement of foreign divorce decrees is by virtue of the common law of Botswana.
(b) that the distribution of matrimonial property, in the absence of special circumstances, should be done in accordance with the *lex domicili* and that this law applies to both movable and immovable property.

The Court also expressed the view, albeit *obiter*, that the domiciliary law determines the law applicable to the proprietary consequences of a marriage once and for all, subsequent change in domicile notwithstanding.

It is submitted that the Court of Appeal's decision will be favourable to the respondent wife. For if the High Court's interpretation of "the law obtaining

[17] See J.S. Read, "A milestone in the integration of personal laws: The new law of marriage and divorce in Tanzania", [1972] *J.A.L.* 19 at 32.
[18] At p. 11 of the transcript.

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in Botswana" had been upheld, the respondent wife would have been worse off in the distribution of the matrimonial assets. This is because although under section 13 of the Matrimonial Causes Act, 1973, a court granting a divorce is empowered to determine the mutual property rights of the parties, this power has been construed by the courts to be no wider or narrower than the normal powers given to the court where the ownership or possession of property is in issue. In the leading case of *Molomo* v. *Molomo*[19] HANNAH, J., expressed the view that:

> "The powers of the court under section 13 are substantially the same as in any other proceedings where the ownership or possession of property is in issue. The discretion is no wider and no narrower than the ordinary discretion of the court in such cases."[20]

He rejected a submission that the section conferred a wide discretionary power to adjust property rights by utilizing principles of equity and fairness. He also rejected a suggestion that the section should be interpreted in accordance with the rationale behind the English Matrimonial Causes Act, 1973, upon which the Botswana statute was based.[21] Thus interpreted, the function of the court under section 13 is to decide what has been called the "cold legal question"[22] of who owns what on divorce. The answer is likely to be found in "whose is this?"[23] Once it is determined who owns the property it is given to him or her. The court has no discretion to give what belongs to one spouse to the other. There are no guidelines with which the court may determine the mutual property rights and so unless a spouse can prove that there was an agreement to share the matrimonial property or that he or she contributed financially to the purchase of the matrimonial property, he or she is unlikely to get a share in it.[24] This situation does not augur well for the spouse, usually the wife, whose marriage was out of community of property and who, during the marriage did not have the opportunity to acquire property of his or her own. The matrimonial property regime applicable to the marriage of the Mtuis is one of out of community of property and if the assets of the marriage were to be divided by the law of Botswana, the wife will, in the absence of an express agreement to share the matrimonial property, have to prove that she has contributed financially to the acquisition of the matrimonial property. Unlike the expert evidence of the Tanzanian law accepted by both the court a quo and the appellate court, the wife's domestic duties will not be taken into account in deciding whether she had acquired any rights in the matrimonial property.[25]

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[19] [1979–80] B.L.R. 250 at 251.

[20] This view was accepted by HAYFRON-BENJAMIN, C.J., in *Moisakamo* v. *Moisakamo (2)* [1981] B.L.R. 126 at 147–148.

[21] See Quansah, *Introduction to Family Law in Botswana*, above, n. 16 at 3–4. Under s. 24 of the English Matrimonial Causes Act, as amended by s. 7 of the Matrimonial and Family Proceedings Act 1984, the court is given wide powers to make property adjustment orders on granting a divorce decree. Section 25 of the 1973 Act, as amended by the 1984 Act, directs the court to take certain specific factors into account in an application for financial provision for a spouse.

[22] *Per* Lord Denning, M.R., in the English case of *Gissing* v. *Gissing* [1969] 2 Ch. 85 at 93.

[23] *Per* Lord Morris in the English case of *Pettitt* v. *Pettitt* [1970] A.C. 777 at 798.

[24] See *Rabantheng* v. *Rabantheng* [1988] B.L.R. 260 at 266, 267.

[25] In *Rabantheng* v. *Rabantheng* above, although there was evidence that the wife made indirect contribution to the family's welfare; the judgment gave the impression that had she not contributed financially towards the acquisition of the matrimonial home, she would not have been given a share in it.

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Under section 114 of the Tanzanian Law of Marriage Act however, there are laid-down factors, which the court is to take into account in achieving the underlying preference of the law of an equality of division of property.[26] The following case law on the section gives a clue as to how the court has interpreted the factors indicated in achieving the statutory objective. In *Pundugu* v. *Pundugu*[27] it was stressed that the principle underlying division of matrimonial property is one of compensation. It is irrelevant whether what is being compensated is direct monetary contribution or domestic services. When the court considers the question of division of matrimonial assets under section 114(1) and where the parties are of different customs, a non-traditional mode of life may be assumed in which case section 114(2)(a) may not be invoked. The compensatory principle underlying the division of matrimonial property was again stressed in *Abdallah* v. *Lisangwe*.[28] In *Aranjo* v. *Mwijuma*[29] it was held that section 114 does not make a distinction for the purposes of division of matrimonial assets between an innocent and guilty party. There is no provision in the Law of Marriage Act, 1971, requiring the court to consider to what extent a party has contributed to the breakdown of the marriage for the purpose of division of matrimonial assets. In this regard it was held in *Chikamba* v. *Malunga*[30] that section 114 of the Law of Marriage Act provides that a divorced woman is entitled to and does not forfeit her share in matrimonial property because of her immoral or loose character. However, a spouse's mismanagement of matrimonial property is a relevant factor to be taken into account in the division of matrimonial property. In *Mohamed* v. *Sefu*[31] the Court of Appeal held that since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider contribution by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets. Furthermore, "joint effort" and "work towards the acquiring of assets" must be construed to include the domestic "efforts" or "work" of husband and wife.[32] However, where a spouse commits a matrimonial offence, irrespective of their contribution towards the welfare of the family and consequential acquisition of the matrimonial or family assets, he or she would not be entitled to a share in the property. Finally, it has been held in *Kanungha* v. *Kanungha*[33] that property acquired in the form of cows, goats and donkeys inherited before the marriage by the husband was liable to be distributed under section 114 when such property has been "substantially improved" during the marriage by the joint efforts of the spouses. The wife helped in grazing the animals in the bush and swept the kraal, thereby helping in the natural growth of the herd. There was also evidence that the spouses added to the herd by buying stock through their joint efforts.

[26] See B.A. Rwezaura, "Division of matrimonial assets under the Tanzania marriage law", (1984) 17 *Verfassung und Recht in Ubersee* 177.
[27] [1985] T.L.R. 7.
[28] [1988] T.L.R. 197.
[29] [1984] T.L.R. 7.
[30] [1989] T.L.R. 39.
[31] [1983] T.L.R. 32. See also *Mauridi* v. *Ibrahimu* [1989] T.L.R. 162.
[32] This decision would seem to overrule the holding by the High Court in *Tumbo* v. *Tumbo* [1983] T.L.R. 293 that housekeeping is a conjugal obligation and cannot be equated to work which refers to the physical participation in the production of the asset itself.
[33] [1996] T.L.R. 195.

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This brief discussion of the Tanzanian law shows its comparative superiority over the current law of Botswana relating to the division of matrimonial property on divorce for spouses married out of community of property. The absence of judicial discretion in Botswana to redistribute matrimonial property on divorce seriously undermines the realization of the legitimate expectation of spouses married out of community of property. A spouse (usually the wife) of such a marriage, who does not earn an independent income outside the home and thus has a relatively weak economic base, faces a bleak future without the support that was forthcoming during the marriage. The present writer has therefore suggested that the law in Botswana needs to be reformed to confer discretion on the court circumscribed by statutory guidelines to adjust matrimonial property on divorce. The fundamental rationale behind this proposed reform being that division of family assets should aim towards an outcome that is fair and just for both parties and their children.[34]

E.K. Quansah[35]

[34] See *Determining Matrimonial Property Rights on Divorce: An Appraisal of the Legal Regimes in Botswana*, LL.D. Thesis, University of South Africa, 2001 at 609.

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