

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Civil Appeal No. 33 of 2000
High Court Misc. No. 247/1992

In the matter between:

ELIA AMINIELI MTUI

Appellant

and

EDNESTER MTUI

Respondent

Advocate J. D. Maritz with Mr. Kamushinda
for the Appellant
Dr. H. Lever with Mr. T. Tafila for the
Respondent

J U D G M E N T

CORAM: Korsah JA
 Lord Weir JA
 Dibotelo J.

LORD WEIR JA

The appellant (the husband) and the respondent (the wife) were married in Moshi, Tanzania on 29th December 1970. The appellant came to live in Botswana in 1982 and was followed by the respondent in the following year. It is common cause that their domicile was and is Tanzania. For reasons into which it is unnecessary to enquire the relationship broke down and the appellant left the respondent in 1987. Considerable assets, both movable and immovable, have been acquired by the parties while living together in Botswana, according to the respondent, by the joint efforts of both of them.

(c) to divide the said assets equally between the parties or to sell them and divide the proceeds where a division cannot be conveniently or advantageously be effected.

There was considerable discussion as to which system of law the Court a quo was actually applying when directing an equal division of the assets in Botswana. Counsel for the respondent contended in the first place that it must have been applying the law of Tanzania. As an alternative, he submitted that the law of the matrimonial regime in Botswana was being applied. In order to focus this issue more clearly, it is necessary to understand the difference between these two systems of law.

According to the law in Botswana, marriage may be contracted in or out of community of property. If it is in community of property, the law conceives such a marriage as a partnership in which property is jointly owned and, upon dissolution, falls to be divided equally. The law of Tanzania, according to an affidavit of an advocate in practice in Tanzania (whose evidence was accepted by the Court a quo), differs in as much as it has been derived from the common law of England and is now governed by the Law of Marriage Act No. 5 of 1971

Section 114 of the Act provides inter alia:

“(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

The appellant instituted proceedings for divorce at the court of the Resident Magistrate at Moshi. Decree of divorce was pronounced on 9th July 1993 . This was subject of appeal to the High Court of Tanzania and after an immense delay the appeal (which was not related to the divorce itself) was allowed in part on 31st August 1998. The relevant part of the order is in the following terms:-

- “(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.”

It is the interpretation to be given to paragraph (c) which gives rise to controversy and it is the principal issue which we have to decide in this appeal.

The matter came before the Court a quo in Botswana by notice of motion dated 3rd May 1999 seeking an order that paragraph (c) (supra) of the decree of the High Court of Tanzania should be made an order of the High Court of Botswana. The application was heard by Lisimba J. and he made an order directing the registrar to appoint an accountant or an attorney to act as a liquidator of the matrimonial property with inter alia the following duties:

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 sub section (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 benefit; 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."

It will be seen that, having regard to the terms of sub-section 2(d), the underlying intention or preference by the law of Tanzania is to achieve an equality of division of property between spouses subject to an important proviso, namely, that the court is obliged to take into account the factors mentioned in the preceding subparagraphs.

In the present proceedings, there are - or may be - important practical and financial consequences 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.

Counsel for the respondent submitted that in this case there was little practical difference between the two systems of law as regards distribution of assets. There was no indication that in carrying out the distribution of the assets in Tanzania, the qualifying provisions of section 114 were in fact ever applied or that the respondent and the appellant obtained anything other than an equal distribution. The court a quo must have realised what had happened, and in ordering the equal distribution of assets it was applying the law of Tanzania. However, this submission was totally undermined when it turned out that the court in Tanzania never actually carried out the exercise of distribution, possibly because there were no assets located in that country. The court a quo, in making the order, had no means of knowing how the provisions of section 114 of the Act of 1971 would have been applied. The irresistible conclusion is that the court a quo could not and did not have the law of Tanzania in mind when ordering equal division of the Botswana assets and it follows that it must have been applying the law of Botswana. The question is whether the court a quo was correct in doing so.

In a learned judgment, Lisimba J. identified a number of issues which he had to determine. First, he expressed the view which is accepted by most systems of law 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. As Nganunu J. said in Ndzingo v. N H.C 268/90 (unreported):

“The law of Botswana, which is in line with laws of most civilized countries I know of, is this, that the domicile of a marrying couple is the law of the husband at the time of the marriage”

This is not in dispute in this appeal. Second, the learned Judge applied his mind to the question as to whether the decree of the High Court of Tanzania dated 31st August 1998 should be recognized and enforced in Botswana as regards the matrimonial property situated in this country. He accepted, correctly in my opinion, that as Tanzania was the country of domicile of both parties, it was the court of competent jurisdiction and the court therefore had the power to regulate inter alia the division of the matrimonial property upon divorce. Third, he discussed whether the Tanzanian decree was enforceable in terms of the Judgment (International Enforcement Act) Cap 11:04 and concluded that upon a careful analysis of relevant statutory provisions, that it was not. Again I agree with this view and furthermore with his conclusion that the decree is recognisable and enforceable by common law of Botswana.

This view is in accordance with the general principles of international private law (for a discussion see Dicey and Morris: The conflict of Laws, 12th Edition at page 461 et seq) and is recognized in both Roman Dutch Law and English Law (Estate Seedat v. R. 1916 NPD 535 at p540). No question has been raised in this case about possible exceptions to the general rule on the grounds, for example, of fraud or the decree being for one reason or another contrary to public policy.

A preliminary argument advanced by Counsel for the appellant was that paragraph (c) of the order of the Tanzanian High Court was not a decree at all. He sought to contrast the terms of paragraph (b) with those of paragraph (c). Paragraph (b) was undoubtedly an order to the local magistrate to distribute between the parties jointly acquired assets located in Tanzania. The local magistrate was obliged to obey that order. Paragraph (c), he submitted, was not of this character. It merely recognized the court's lack of jurisdiction to give any instructions concerning the distribution of assets located in Botswana. Accordingly paragraph (c) amounted to no more than advice to the parties to take the matters if they wished to the court in Botswana for decision. There being no order or decree there was nothing for the court in Botswana to recognise or to enforce.

In my opinion, this submission is without substance. If given effect, the result would be the end of these already prolonged proceedings and the necessity for the respondent to start all over again, and this prospect is not pleasing. Counsel for the respondent submitted that the cause of action was the order of the Tanzanian court in its entirety. It covered divorce, custody of children as well as property rights. The process of distribution of assets was ancillary to the divorce proceedings over which the court of that country had the sole jurisdiction. I consider that this is the correct approach, paragraph (c) was an integral and operative part of the order of 31st August 1998 and as such constituted a judgment for recognition and enforcement by the court in Botswana if appropriate.

In the result the court in Botswana, in my opinion, is under an obligation at common law to recognise, accept and enforce the decree of 31st August 1998 according to its terms. The judgment cannot be impeached on account of any supposed error either in fact or law on the part of the court in Tanzania (Dicey op cit 499). As Aguda Ag. J.P., in his ruling dated 17th January 2001 upon an application for this appeal to be heard out of time, shrewdly noticed, the terms of paragraph (c) of the decree are capable of more than one interpretation. In my opinion 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.

In approaching this question two considerations should be borne in mind. First, as already noticed, the general rule is that in the absence of a contract or settlement, the rights of the husband and wife in each other's property are determined by the law of the domicile. There is no doubt about that rule in the case of movable property. Some uncertainty as regards immovable property exists as a result of a decision of the House of Lords in a Scottish case at the end of the 19th century (Welch v. Tennent 1891 A.C. 639). But the general view is that this decision is inapplicable beyond Scotland and is in any event inconsistent with the common sense view that there is no reason to treat one species of property in a different manner from another. Furthermore Welch was not followed in South Africa

(*Chiwele v. Carlyon* 1897 S.C. 61). In this situation I am prepared to hold that in Botswana the general rule is applicable to both types of property.

Second, viewed against the general rule, in interpreting paragraph (c) of the decree, I would be disposed to construe it in the manner which conforms with the foregoing principle. In other words, if it is possible to do so, paragraph (c) shall be construed as to apply the same matrimonial property regime in Botswana as in the court of the domicile unless the wording of paragraphs (c) points otherwise. If we 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. As is stated in *Dicey op cit*, by way of illustration (at page 103:):

“The application of the lex situs could also result in the application of a matrimonial property regime based on social considerations alien to the couple and could run counter to their legitimate expectations; an English man who bought a holiday home in Mediterranean country would probably be surprised if he were told that it was subject of the matrimonial regime of the lex situs; a foreigner who bought land in England would be equally surprised if he were be told that the property was not subject to the regime of the matrimonial domicile.”

So I am disposed to avoid an interpretation of paragraph (c) which would lead to inconsistency in the manner in which the matrimonial assets are to be distributed according to where they happened to be situated. On examining the submissions

made before the High Court of Tanzania (see pages 79 and 80 of the record), it is interesting to see that no suggestion was made that different rules should be applied to the assets depending upon which country they were situated. It is clear that what concerned the Court was its lack of jurisdiction over the assets in Botswana.

The court said

“ Since our courts lack 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.”

Nothing said by the Tanzanian Court could be taken to infer that the court should apply different rules from that of the court of the domicile.

In interpreting paragraph (c) it is pertinent to notice the difference between the terms of paragraph (b) and (c). In paragraph (b) assets in Tanzania are to be distributed “under the marriage laws” of Tanzania. This expression is not repeated in paragraph (c). I regard the difference as significant and it denotes careful drafting. If in paragraph (c), the distribution of assets was to be in accordance with the marriage laws of Botswana then equal division would undoubtedly be required. But by refraining from expressing paragraph (c) in identical terms to paragraph (b), the Tanzanian court left it open for interpretation of what is meant by “the said properties be distributed in accordance with the law obtaining in Botswana.”

What is the “law obtaining in Botswana? It may mean the law of Botswana applicable to the distribution of the assets in Botswana (the lex situs). This is how the court a quo apparently thought it meant. Another interpretation, which in my judgment is to be preferred is this. In considering the problem, it is necessary to first of all to 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 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.

The proper course now is for the case to be remitted 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 Law of Marriages Act 1971, that is in accordance with the law of Tanzania. I recognize that the task may prove to be complicated and it will therefore be necessary for the court a quo to determine with some care the manner in which it is accomplished. The first step is for the total joint assets of the parties to be ascertained and then for evidence to be led, if so advised, pertaining to the criteria specified in Section 114.

In making the order, the court a quo interdicted both parties “from dealing in any way with the assets of the matrimonial estate, save with the permission of the Liquidator.”

I do not see there to be any room for a liquidator in what may well be a difficult and contentious case and the order shall be varied so as to substitute the words “the court” for “the liquidator.”

Counsel for the appellant argued that the terms of the interdict were too wide. There were companies in which one or both parties were involved in running where particular assets might have to be sold in the interests of the company concerned. I recognise that problems may arise but I am satisfied the order as framed provides a necessary safeguard. If any point of practical difficulty arises, it will be open to a party to apply to the court for permission.

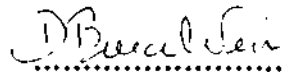
This case has been in the Court for far too long and it is to be expected that the court a quo will not brook any delay on the part of either party at any state in connection with the distribution of the assets of the marriage partnership.

In so far as the appellant succeeded in having the judgment of the trial court set aside, the appeal is allowed with costs. It is hereby ordered that:

- (a) The matter is remitted to the trial court to be heard de novo regarding the division of the matrimonial assets.

- (b) At such hearing the trial court is to apply the provisions of Section 114 of the Law of Marriages Act No. 5 of 1971 of Tanzania.
- (c) To that end, the Court may entertain such evidence as either party may adduce in support of his or her claim.
- (d) This matter is to be heard before the end of November 2001.
- (e) The order for interdict remains in force subject to substituting "the Court" for "the Liquidator."

DELIVERED IN OPEN COURT THIS 20th DAY OF JULY 2001



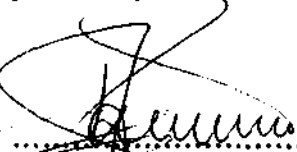
 LORD WEIR
 JUDGE OF APPEAL

I agree



 K. R. A. KORSAH
 JUDGE OF APPEAL

I agree



 M. DIBOTELO
 JUDGE