C.of A. (CIV) No.14 of 1985

IN THE LESOTHO COURT OF APPEAL

In the Appeal of

S. MOHAMMED Appellant

and

S.M. MOHAMMED Respondent

HELD AT MASERU

COKAM

Aaron J.A.
Odes J.A.
Schreiner A.J.A.

J U D G M E N T

Aaron, J.A.

Appellant in this matter instituted proceedings against her husband in the High Court, in which she claimed an order for the restitution of conjugal rights, failing which a decree of divorce, with custody of the minor children of the marriage, or alternatively, for a decree of judicial separation, also with custody of the minor children.

Her husband, the respondent in this appeal, was described in paragraph 2 of the declaration as being "a Kenyan male adult of House No.677 Race Course, Maseru Urban Area, in the Maseru district". From paragraph 3 it appears that the parties were married in the United Kingdom during July, 1968, and from further particulars furnished by appellant, that she had been working in California as a nurse from March, 1973 to July, 1984.

The declaration does not contain any allegation that the parties are domiciled within Lesotho, but para. 4 alleges that "immediately prior to the said marriage,

2/ Plaintiff ....

Plaintiff was domiciled in Lesotho". What the pleader apparently had in mind was to make the allegation necessary to establish jurisdiction in respect of the claim for a restitution order under s.2(1)(b) of the Matrimonial Causes Jurisdiction Act, 1978. But if that were indeed his intention, the pleader did not go far enough, because that section has two requirements not only must the wife have been domiciled in Lesotho immediately prior to the marriage, but she must also have been ordinarily resident in Lesotho for the period of one year immediately preceding the date on which the relevant proceedings are instituted There was no averment in the declaration to cover the second requirement.

Respondent requested further particulars which elicited from appellant the reply that "she only came to reside in Lesotho in January, 1985". As summons had been issued on 15th July, 1985, this was less than a year before the proceedings were instituted. Respondent then noted an exception to appellant's summons and declaration in terms of rule of court 29(1), in that "the said plea (sic) lacks necessary averments to maintain an action". Various grounds were stated, of which it is necessary to mention only the first

> "Plaintiff has not averred that she was ordinarily resident in Lesotho for the period of one year immediately preceding the date on which the above proceedings were instituted".

The exception was set down for hearing on 21st August, 1985, but the date was changed first to 23rd August, 1985, and later to 24th October, 1985 by the issue of fresh notices of set down.

Before the matter could be heard, there was another development. On 6th September, 1985, appellant brought an ex parte application as a matter of urgency against her husband in which she asked for a rule nisi to issue, calling upon him to show cause, if any, why respondent should not be directed, pending the finalization of the divorce proceedings,

3/ to desist .....

to desist from assaulting or in any way interfering with appellant and the children of the marriage, from disposing of the parties' assets, and from going to and/or visiting the parties' home at Race Course Maseru Urban Area, and also to direct respondent to release the parties' private motor vehicle into appellant's possession. She also asked that the rule nisi operate with immediate effect as a temporary interdict.

This ex parte application came before KHEOLA, J. and rule nisi was issued as prayed, with the return day set as 23rd September, 1985. Respondent filed an opposing affidavit, and also gave notice in terms of rule 8 (18) of Legal Notice 9 of 1985, that the return day of the rule nisi was being anticipated, and that the matter would be heard on 16th September, 1985.

In his opposing affidavit, respondent referred to the fact that the application was pendente lite and recorded his contention that the court had no jurisdiction to entertain the main proceedings. He went on to state that the exception would be set down to be heard simultaneously with the application , a further notice of set down in respect of the exception was then served and filed

The matter appears to have come before the High Court on 18th September, 1985, when COTRAN C.J. heard both the exception and the opposed application for interim relief.

As far as the exception was concerned, it would appear that counsel for appellant argued that respondent had followed the wrong procedure, and that instead of taking an exception, he should have objected to the jurisdiction by way of a special plea

A similar argument was advanced in the written heads filed by appellant in the course of this appeal. It is frequently correct that an objection to jurisdiction must be raised by special plea this is when the facts relevant to the question of jurisdiction are in issue, and must

first be determined before the court can be in a position to rule on jurisdiction There is no exception "that the court had no jurisdiction", because that raises an issue of fact and law which must be determined at the trial (cf. Ritchie Motors v. Moolman, 1956(4) S.A. 337 (T)). But if the summons and declaration do not contain the necessary allegations of fact, or if it appears ex parte the facts alleged in the declaration that the court cannot have jurisdiction, then the defendant is entitled to except to the declaration on the ground, not that "the court has no jurisdiction", but on the ground that "the declaration does not disclose a cause of action", or "does not disclose that the court has jurisdiction", (Viljoen v Federated Trust Ltd, 1971(1) S.A 750 (O) at 759-60) The judge a quo followed this approach, and correctly held that the exception procedure could be used to test the validity of the declaration in the present case. This portion of the judgment was not challenged before us in argument, despite the contention advanced in the heads.

COTRAN, C.J. held that the exception was a good one. In so far as the claim for a restitution order was concerned, this was in my view perfectly correct for the reasons already given, and indeed Mr. Pheko who argued the matter before us on behalf of appellant, conceded this. He contended, however, that in so far as the alternative claim for judicial separation was concerned, the declaration did contain sufficient averments to establish jurisdiction, and that accordingly the exception should not have been allowed in respect of that portion of the declaration relating to the claim for judicial separation

At common law, there is a clear distinction between what is required to establish jurisdiction in a claim for divorce and that which is required to establish jurisdiction in an action for judicial separation. A decree of divorce affects the status of the parties, and the only court which has jurisdiction to pronounce a judgment affecting status is the court of domicile In the case of a decree of judicial separation, however, no change of status is involved, and the courts assume jurisdiction at common law if both parties are

resident in the area of the court's jurisdiction at the time when proceedings are instituted (Murphy v. Murphy, 1902 T.S. 179, Stewart v.Stewart 1919 CPD 225). In South Africa, the Appellate Division has held that the Courts assume jurisdiction on the basis of the principle of effectiveness, and that as it is well recognized that a court can give an effective judgment if the defendant is physically present within the area of the court's jurisdiction, the physical presence of the defendant within the area of a court's jurisdiction is regarded in common law as a sufficient ground for exercising jurisdiction in an action for judicial separation. Physical presence on the part of the defendant alone at the time when action is instituted suffices, it is not necessary for both parties to be resident (Eilon v. Eilon, 1965(1) S.A. 703 at 725 F - 726 A) In Hahlo, The South African Law of Husband & Wife, 4th Ed, at 557, this view is challenged, but it is not a matter which need be decided in the present case.

Mr. Gwentshe, who appeared for respondent, conceded that under the common law, residence of the parties in the court's area at the time when action was instituted suffices, but he contended that the common law had been changed by the Matrimonial Causes Jurisdiction Act, No.21 of 1978. He drew attention to the wording of s. 2(1)(a), which is in the following terms

> "2(1) Without prejudice to the jurisdiction which the High Court otherwise has,the High Court shall have jurisdiction to entertain an action instituted by a wife against her husband -
>
> (a) for divorce, restitution of conjugal rights or judicial separation if the wife has been ordinarily resident in Lesotho for a period of one year immediately prior to the date on which the proceedings are instituted and if -
>
> (i) .....
>
> (ii) in an action for judicial separation, the husband is at that date resident in Lesotho ....."

6/ In summary, ...

In summary, Mr. Gwentshe's argument was that these provisions were more restrictive than the common law in so far as judicial separation actions are concerned, they require not only residence by both parties in Lesotho but also that the wife should have been ordinarily resident in the country for a period of one year immediately prior to the institution of proceedings. Because the provisions of the statute are more restrictive than those of the common law, he argued that the statute must be read as having changed the common law.

In my view, this argument cannot be supported. In the first instance, it completely disregards the opening words of s. 2(1) "without prejudice to the jurisdiction which the High Court otherwise has .....". The argument further runs counter to what is said in the long title to the Act' "To extend the jurisdiction of the High Court in matrimonial causes". It has always been accepted that the purpose for which the Act was introduced was, as COTRAN,C.J. said in his judgment in the Court a quo to give "relief from the rigour of the common law to married women formerly domiciled in Lesotho if certain conditions are fulfilled".

It is in my view possible to read s.2(1)(a) of the Act as expanding the jurisdiction of the High Court in judicial separation actions if the residence which is required for common law jurisdiction is construed as meaning actual physical presence, while the husband's residence under s. 2(1)(a) (ii) means residence in the sense of having a home there, even if he has temporarily left it. In this regard, the distinction between the words "ordinarily resident" when used of the wife and "resident" when used of the husband, may be relevant. But whether this view is correct or not, need not be decided in this case Suffice it to say that whatever the correct interpretation of s. 2(1)(a) may be, I am satisfied that it was not intended to restrict the common law position, and that the High Court may still exercise jurisdiction on the basis that the parties

7/ are both .....

are both resident in the area of the court's jurisdiction at the time the action is instituted.

Mr Pheko contended before us that the declaration went far enough to allege residence on the part of the parties in the court's area when it gave their addresses at certain houses in Maseru. The allegation is bare but in my view it suffices, and is in any event not excipiable, for where a possible reading of the declaration discloses a cause of action (or, as here, may contain a necessary allegation) then it cannot be excepted to as disclosing no cause of action or omitting that necessary allegation (Kennedy v. Steenkamp, 1936 CPD 113 at 115) It follows, therefore, that the exception was correctly allowed in so far as it related to the claim for a restitution order, but should have been dismissed in so far as it related to the alternative claim for judicial separation. The learned judge a quo did not distinguish between the two claims, but simply allowed the exception to the declaration as a whole. In so doing, he erred. It follows that in so far as the exception is concerned, the appeal must partially succeed.

We were informed from the Bar that, although it does not appear expressly from the judgment, application was made on behalf of appellant for leave to amend the declaration, but that this was refused. There seems to be some indirect support for this is the way in which the judgment is worded and it was also not disputed by Mr. Gwentshe, who appeared for respondent in the court below, as well as on appeal. We can, therefore, accept that this was so. It does not seem to us that there was sufficient reason to refuse leave to amend, and that the learned judge in the court a quo erred in this respect also.

I come now to to the discharge of the rule nisi. The learned judge a quo did not state separately the reasons why he discharged the rule nisi, but he does at one passage of his judgment state that the "application cannot be divorced from the main action". As the relief being sought in the application was asked for "pending the finalization and divorce proceedings in CIV/T/470/85",it seems logical to

infer that when he allowed the exception, and refused applicant leave to amend the declaration, he regarded the main action as terminated, so that there was no longer room for any relief "pending the determination of the proceedings".

In view of the conclusions that we have already come to, namely, that the declaration was not excipiable in so far as the claim for judicial separation was concerned, and that in any event, leave should have been given to appellant to amend her declaration, it follows that the conclusion was wrong, and that the learned judge should have proceeded to deal with the application on its merits The question now arises as to what this court should do concerning the merits of the application. We were informed during argument that the respondent has now left the country. As it seems unlikely that he will return, there no longer appears to be a need for relief of the kind sought. It will, therefore, be sufficient if no order is made on the application, save that respondent is ordered to pay the costs of appeal incurred in connection therewith.

As far as the costs in the court below are concerned, respondent succeeded in his exception to the claim for restitution of conjugal rights, failing which a decree of divorce. This was the more substantial issue, and respondent was, therefore, successful in the greater part of his exception, and is entitled to the costs relating to the exception. As far as the rule nisi is concerned, there were disputes of fact which cannot be decided on motion and the question of costs should, therefore, be reserved for decision at the trial, when oral evidence can be heard from both parties.

The appeal is accordingly allowed, with costs, and the judgment of the court below is altered to read

> "1. The exception to the plaintiff's declaration, in so far as it relates to the claim for restitution of conjugal rights, failing which a decree of divorce and ancillary relief, is upheld.

2. *Insofar as it relates to the claim for* judicial separation and ancillary relief, the exception is dismissed.

3. Plaintiff is granted leave to amend her declaration, such amendment to be effected on or before 22nd April, 1986.

4. Defendant is ordered to pay the costs relating to the exceptions.

5. The rule nisi in CIV/APN/212/85 is discharged, the costs connected therewith are reserved for decision by the trial court".

There is one other matter to which I must refer. The learned judge a quo took the view that Mr. Pheko had failed to disclose to KHEOLA,J. that an exception had been taken to the declaration in the main proceedings, and that he had in this manner surreptitiously obtained the rule nini. For this reason he ordered Mr. Pheko not to submit a bill for professional fees to appellant. The result of this may be to benefit respondent, if he is later ordered to pay appellant's costs in connection with the application. I also do not share the view adopted by the learned judge that there was a failure to disclose to KHEOLA,J. that an exception had been noted - particularly if this is intended to mean a deliberate failure to disclose. The affidavit filed by appellant in the application referred to the main action, and invited the court's attention specifically to the declaration. This would have meant that KHEOLA,J.would have had the file before him, and could be expected to see that an exception had been noted.

For these reasons, the order made against Mr. Pheko is set aside.

Signed by S Aaron
A AARON
JUDGE OF APPEAL

I agree Signed by M.W. Odes
M.W. ODES
JUDGE OF APPEAL

I agree Signed by W.H.R. Schreiner
ACTING JUDGE OF APPEAL

Delivered on this 9th day of April, 1986 at Maseru.

For Appellant Mr. Pheko.
For Respondent Mr. Gwentshe.