THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 120/13
Reportable

In the matter between:

PHILLIPPE FRANCOIS GEORGES LENFERNA **Appellant**

and

MARIE LOURDES CHRISTINE LENFERNA **Respondent**

Neutral citation: *Lenferna v Lenferna* (120/13) [2013] ZASCA 204 (2 December 2013)

Coram: NAVSA ADP, LEACH, PETSE, SALDULKER JJA and ZONDI AJA

Heard: 12 November 2013

Delivered: 2 December 2013

Summary: Husband and wife – Divorce – Proprietary Rights ─ Parties married in Mauritius under Separation of Goods Regime – parties domiciled in Mauritius at time of marriage – Wife claiming one half of the value of certain immovable properties registered in husband's name – Proprietary consequences of the marriage determined by *lex domicillii matrimonii* at time of marriage.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Victor J sitting as court of first instance):

(a) The appeal succeeds with costs.

(b) Paragraphs 1 and 2 of the order of the court below are set aside and substituted with the following:

'1. The plaintiff's claim for 50 per cent of the value of the properties known as York Road, Ferndale (Ferndale property) and the Boathouse Garage at Pecanwood Estate is dismissed.

2. The plaintiff is to pay the defendant's costs.'

JUDGMENT

ZONDI AJA (NAVSA ADP, LEACH, PETSE and SALDULKER JJA concurring):

[1] Up until the present appeal, the primary issue between the parties had been whether the law of Mauritius or of South Africa governed their proprietary rights upon divorce. Put simply, the proper law of the marriage had to be determined. Thereafter it was simply a matter of applying the law to the facts. The background is set out hereafter.

[2] The parties were married to each other on 29 June 1983 in Mauritius. A month later they moved to South Africa and continued to live here until their divorce in November 2011. In about July 2006 the respondent, the wife (plaintiff in the court below) sued the appellant, the husband (defendant in the court below) for divorce in the South Gauteng High Court, Johannesburg, contending that the marriage relationship between her and the respondent had irretrievably broken down.

[3] In her particulars of claim the plaintiff, Marie Lourdes Christine Lenferna (Marie), alleged that at the time of her marriage to the defendant, Phillippe Francois Georges Lenferna (Phillippe), he was domiciled in Mauritius and that the proprietary consequences of

the marriage 'are governed by the law of Mauritius', alternatively, that the parties were married to each other in Mauritius according to the laws of South Africa and that the proprietary consequences of the marriage 'are accordingly governed by the law of South Africa'. On either basis, Marie alleged that during the subsistence of the marriage she had contributed to the maintenance and or increase of Phillippe's estate by the rendering of services and the saving of expenses, which otherwise would have been incurred. She listed the contributions she had made in cash and in kind. She claimed that it was just and equitable that Phillippe be directed to transfer to her such part of his assets so as to effect an equal division between the parties of their combined net asset values, alternatively, that he pay to her the monetary equivalent thereof. In a further alternative she claimed that the parties were married according to South African law in community of property.

[4] In his plea Phillippe pleaded that at the time of their marriage he and Marie had agreed that their matrimonial regime would be governed in terms of the provisions of Mauritian law, and in particular in terms of the provisions of the *regime legal de separation de biens* – separation of goods, a concept I intend to deal with in due course. Phillippe pleaded that at the time of the marriage, he and Marie had made a declaration that their marriage was to be governed by the *regime legal de separation de biens* which was recorded by a marriage officer. Phillippe pleaded further that in terms of the said regime each party retains its separate estate during the marriage and on dissolution thereof, neither party has a claim against the estate of the other party. Ultimately, Phillippe denied that Marie was entitled to any part of his estate.

[5] At the time of the trial Marie moderated her claim and sought only a 50 per cent share in two properties registered in Phillippe's name and referred to as the York Road, Ferndale property and the Boathouse at Pecanwood Estate. A trial ensued before Victor J. Both Marie and Phillippe testified as well as an expert on Mauritian law, a barrister, Narghis Bundhan (Bundhan). It was agreed by the parties that a divorce order should be granted before a decision was made in respect of Marie's proprietary claims. That was done.

[6] In adjudicating Marie's claims, Victor J considered the evidence of Bundhan and somewhat confusingly, under the heading 'The Separation of Goods Matrimonial Regime Does Not Preclude the Application of the Logical Rules of Evidence', concluded that it had been the intention of the parties at the time of the marriage that any property acquired after

the marriage would be common property. The learned judge then went on to consider under the heading, 'Domicile of Choice', where Phillippe was domiciled at the time of the marriage. She accepted Marie's evidence that Phillippe had intended to move to South Africa permanently even before the marriage. She rejected his evidence that he had always considered Mauritius to be his permanent home and that he was never domiciled in South Africa. She took into account, against Phillippe, that he had applied for a permanent residence permit prior to the marriage. She concluded that Phillippe's domicile at the time of the marriage was South Africa and that in the absence of an ante-nuptial contract, they would have been married in community of property.

[7] Victor J made an order in terms of which she declared Marie to be entitled to 50 per cent of the value of each of the properties mentioned above. She appears to have arrived at that conclusion on the dual basis that, Mauritian law, even under the separation of goods regime, allowed a party to claim ownership of assets in proportion to which he or she made a contribution and, that Marie was entitled to such a division on the basis of community of property. Phillippe was ordered to pay Marie's costs of trial. It is these orders that are before us with the leave of this court.

[8] It is necessary to turn to examine the evidence adduced in the court below in order to determine whether the order made by Victor J, in relation to the properties in question, was correct. At the time of the marriage the appellant was resident in Mauritius, which is his domicile of origin. While it is correct that prior to coming to South Africa he already had a job offer by the South African Broadcasting Corporation (the SABC), such offer was subject to him obtaining a permanent residence permit and the fact that he had applied for, and obtained, a South African permanent residence permit does not in itself constitute a sufficient basis for the finding that the appellant abandoned his domicile of origin (*Eilon v Eilon* 1965 (1) SA 703 (A) at 723A). It was the appellant's evidence that he had not given up his domicile of origin and that he did not intend to remain in South Africa indefinitely or permanently. His evidence was further, that whilst he wanted to work for the SABC because it would provide him with experience he needed in his field, he also wanted to continue his studies in South Africa. If his application for permanent residence permit had not been approved, he would have remained in Mauritius and taken up further employment which he had already been offered by various Mauritian companies arising out of his employment in Diego Garcia. He emphasised that his ultimate intention was to return to Mauritius once he

had achieved his ambitions in South Africa. Even if this intention to return to Mauritius had been overcome by events, including his initial commercial success in South Africa, it is highly unlikely that before he had settled into a career here and was more secure financially and had finally adapted to this country, that he would, even before he took up his new post, have formed the intention to remain here permanently. In any event, in order for South Africa to have become his domicile of choice, it would have been necessary for him to have moved to this country. (*Clayton v Clayton* 1922 CPD 125). This he had not done before the parties were married. In my view it is clear that the learned judge in the court below erred in concluding otherwise.

[9] Before us counsel on behalf of Marie accepted that at the time of the conclusion of the marriage the parties were both domiciled in Mauritius. She also indicated that a claim for redistribution in terms of s 7(3) of the Divorce Act 70 of 1979 had been abandoned even before trial.

[10] At common law, the proprietary rights of spouses are governed, in the absence of express agreement, by the law of the husband's domicile at the time of the marriage (*lex domicilii matrimonii* or the law of the matrimonial domicile) (*Frankel's Estate & another v The Master & another* 1950 (1) SA 220 (A) at 241; *Sperling v Sperling* 1975 (3) SA 707 (A) at 716F-G; *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) at 494C-D; C F Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5 ed 2012 at 295). The rationale for this rule, according to the Roman Dutch and Civilian authorities, is that the parties are assumed in the absence of any indication to the contrary, to have intended to establish their matrimonial home in the country where the husband was domiciled at the time of the marriage and to have submitted themselves to the matrimonial regime obtaining in that country. Whether this statement can still be regarded as acceptable in our Constitutional democracy needs not be considered in the light of what is set out in the preceding paragraph, namely that at the time of the marriage, the domicile of both Phillippe and Marie was in Mauritius.

[11] What is now left to do is to consider what the law is in relation to the separation of goods regime under Mauritian law. Counsel on behalf of Marie accepted that essentially that regime meant that each party to a marriage retained its separate estate during the marriage and that on dissolution thereof neither party had a claim against the estate of the other.

Before us, it was common cause that even under a separation of goods regime a party could claim ownership of assets on the basis of having funded their acquisition. This would not discount a claim in proportion to funding.

[12] It is so that the parties operated a joint account and that household needs were met by both of them from monies earned by each. In respect of the Sundowner property, a house in which the parties resided before they moved to another address, it appears to be clear that it was purchased in 1986. It was financed by Phillippe, partly using his own savings accumulated from earnings in Diego Garcia before he came to South Africa, a subsidy from the SABC and a home loan from the bank. He sold the Sundowner property in July 1991 and used a substantial portion of those proceeds to fund the York Road property, Ferndale. At that stage the respondent was not gainfully employed. Her evidence was that although she started working for the appellant's company in 1991 she did not receive a salary until 1993. She conceded that she did not pay for the bond of the Ferndale property. The appellant's company did. Similarly the respondent did not contribute to the purchase of the Boathouse. The appellant paid R60 000 for it.

[13] Before us the claim for one half of the Ferndale property and the Boathouse appears to have been premised on the idea of a universal partnership which had not been pleaded. In any event there was no evidence to substantiate a claim in this regard. In my view, for the reasons set out above, the court below erred in declaring that Marie was entitled to one half of the properties in question.

[14] Counsel for the appellant submitted that the costs of appeal should include the costs of two counsel. He argued that the complexity of the legal issues justifies the employment of two counsel. I disagree. While it is correct that the dispute in this matter was about the choice of law according to which the parties' proprietary rights were to be determined and that an expert witness on the Mauritian law had to be flown in to testify, I am not convinced that the nature of the issues to be determined is such that it justifies the employment of two counsel. In the result costs to be awarded in favour of the appellant will not include costs of two counsel.

[15] In the result the order in the following terms is made:

(a) The appeal succeeds with costs.

(b) Paragraphs 1 and 2 of the order of the court below are set aside and substituted with the following:

‘1. The plaintiff’s claim for 50 per cent of the value of the properties known as York Road, Ferndale (Ferndale property) and the Boathouse Garage at Pecanwood Estate is dismissed.

2. The plaintiff is to pay the defendant’s costs.’

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D H ZONDI
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant: L M Hodes SC (with him M Feinstein)

Instructed by:

Wertheim Becker Inc, Johannesburg

Phatshoane Henney Inc, Bloemfontein

For Respondent: S A Nathan SC

Instructed by:

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