'Reportable'

SUMMARY

CASE NO.: A 401/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VICTOR MANUEL FERREIRA GRAVATO N.O AND ANOTHER *v* DIRK JOHANNES VAN DYK REDELINGHUYS

PARKER J

2012 January 20

Practice - Applications and motions – By agreement between the parties the Court allowing applicants to file replying affidavit – Court finding that the replying affidavit does not contain new matter, as averred by the respondent – Court concluding that the matter complained of by the respondent is evidence adduced by the applicants to meet the challenge put forth by the respondent in his answering affidavit – Consequently, Court ruling that the applicants, replying affidavit stays and is admitted as part of the applicants' evidence in these proceedings.

Prescription - Defence of – Prescription Act (Act 68 of 1969), s 17(2) – Interpretation and application of – Court finding that the respondent does not invoke prescription in his papers but prescription is rather raised in respondent's counsel's submission – In the circumstances of the case, Court refusing to exercise its discretion in favour of allowing counsel to raise prescription in his submission on the basis that to allow it would occasion irredeemable prejudice to the applicants.

Prescription - Domicile of choice – Acquisition of – Court accepting textual authority and Botswana case law that the *animus manendi* requirement of domicile may consist of an intention to reside permanently or for unlimited time in the country of choice and it does not require an intention never to change the new country of domicile – In instant case, Court finding that, on the facts, the respondent's domicile as at time of his sequestration is in South Africa.

Held, the rule of practice that 'new matter' may not be raised in replying affidavit should not be applied blindly and mechanically, without due regard to the facts and circumstances of the particular case; and this is, above all, apart from the Court deciding at the threshold whether what is contended as 'new matter' is, in truth, new matter.

Held, further, that the *animus manendi* requirement of domicile may consist of an intention to reside permanently or for unlimited time in the country of choice and it does not require an intention never to change the new country of domicile; and that this proposition of law indicated the direction in which the Roman-Dutch common law should develop.

CASE NO.: A 401/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VICTOR MANUEL FERREIRA GRAVATO N.O	**First Applicant**
DR MATHOLE SEROFO MOTSHEKGA N.O	**Second Applicant**

and

DIRK JOHANNES VAN DYK REDELINGHUYS	**Respondent**

***CORAM*: PARKER J**

Heard on: 2011 November 23

Delivered on: 2012 January 20

JUDGMENT

PARKER J: [1] The applicants brought application on notice motion for relief set out therein. The respondent moved to reject that application. The rule nisi sought in the notice of motion was granted on 27 November 2009, with the return date of 29 January 2010. Subsequently, on diverse dates the rule nisi was extended, the last date being 15 November 2010 when the matter was scheduled to be heard; and, as I understand it, the reason for the extension of the rule nisi was to enable the applicants to file their replying affidavit which they have now done. I shall return to the issue of the applicants' replying affidavit in due course. Some 11 days previous to 15 November 2010, by agreement between the parties, a Notice of Removal from the Roll was filed by the applicants' legal

representatives who by so doing inadvertently allowed the rule nisi to lapse without applying for the rule nisi to be extended.

[2] The next scenario in the course of this matter is the filing on 31 August 2011 by the applicants' legal representatives of a notice of motion in which the applicants sought an order primarily to revive the rule nisi which had lapsed on 15 November 2010, as aforesaid, and extending the rule nisi to 30 September 2011. After a status hearing the following order was issued on 19 September 2011 in terms of rule 6 (5C) of the Rules:

> '1. As respects the 30 May 2011 Condonation Application; by agreement between the parties, the late filing of the applicants' replying affidavit is condoned, and there is no order as to costs.
>
> 2. As respects the 31 August 2011 rule nisi revival application; by agreement between the parties, the rule nisi which lapsed on 15 November 2010 is revived and the rule nisi extended to 30 September 2011, and there is no order as to costs.
>
> 3. Counsel for the parties are called upon to attend a further status hearing in chambers at 09h00 on 30 September 2011 for the purpose of determining a suitable date for the hearing of the main application.'

[3] The present proceedings are a hearing of the main application, that is, a hearing to determine whether to confirm the rule nisi and make a final order. The key issue which it is the burden of the Court to determine is what the domicile of the respondent was at the date of his sequestration by a competent court in South Africa.

[4] Both parties accept the principle of law that this Court has discretion to recognize a foreign trustee (or liquidator) so long as the insolvent (or the company) is domiciled in the country, the competent court or tribunal of which issued the order sequestrating the estate (or liquidating the company). *In casu*, the applicants contend in the founding affidavit (made by Victor Manuel Ferreira Gravato (the first applicant)), an insolvency practitioner in South Africa, that the sequestration of the respondent was made by the competent court of the respondent's domicile, South Africa.

[5] The respondent takes issue with this piece of evidence in the founding affidavit – and evidence it is (see *Stipp and Another v Shade Centre and Others* 2007 (2) NR 627 (SC); *Tranet Ltd v Robenstein* 2006 (1) SA 591 (SCA)) – on the basis that the applicants only make a 'bald allegation' that 'the sequestration order of 20 March 2008 was granted by the Court of the respondent's domicile and they 'provide no facts to substantiate' what the respondent characterizes as 'this bald allegation'. Thus, according to the respondent, no factual allegations are made in the founding affidavit and that it is in the replying affidavit that the applicants allege certain facts. And so, Mr. Barnard, counsel for respondent, submits, 'The respondent has no opportunity to refute and explain this new matter raised for the first time in the replying affidavit.' Mr Dicks, counsel for the applicants, argue contrariwise. As I see it; Mr. Barnard's submission is, with respect, disingenuous, and at best *petitio principii*. Mr Barnard submitted that the so-called 'allegations do not justify an inference that the respondent was domiciled in South Africa at the time (of his sequestration) and further that these 'allegations further do not refute the facts stated by the respondent to show that he was in fact domiciled in Namibia at the time'. If these are the contentions of the respondent why would the respondent want to have an 'opportunity ... to

refute and explain' the 'bald allegations'? To refute and explain what, if I may ask? That which is 'bald', as the respondent contends? That which 'do not refute the facts stated by the respondent to show that he was in fact domiciled in Namibia at the time', as the respondent contends?

[6] With respect, on the facts, I do not accept Mr Barnard's submission that that statement is a 'bald allegation'. To start with, I will not characterize a statement made by a deponent in an affidavit in application proceedings as an 'allegation': it is a statement of fact, given on oath, that is, a piece of evidence, upon which the applicant relies for relief in application proceedings within the meaning of rule 6 (1) of the Rules of Court. In the instant case, it is a statement of fact given on oath by the first applicant. He states that the contents of his affidavit (i.e. the founding affidavit) 'are within my personal knowledge (unless otherwise stated or is apparent from the content)'. The deponent does not 'allege'; the deponent states on oath that it is within his personal knowledge that 'the sequestration order of 20 March 2008 was granted by the Court of the respondent's domicile ...' I therefore, with respect, fail to see in what manner that statement is 'bald'. In my opinion, a statement such as this one in an affidavit, may or may not be 'bald', depending upon what the statement seeks to convey. The word 'bald' ('plain' or 'blunt' (*Concise Oxford English Dictionary*, 11 edn)) should, therefore, not be thrown into every circumstance imaginable in a clichéd manner. That statement is not plain or blunt; it is replete with full meaning and sufficient information, to the extent that it was capable of eliciting the respondent's challenge as appears in the respondent's answering affidavit.

[7] This brings me to the next level of the enquiry; that is, to determine whether, as Mr Barnard submits, the evidence in the replying affidavit constitutes

'new matter'. As I observed in *Alexander Forbes Group Namibia (Pty) Ltd v Heinz Werner Ahrens* Case No. LC75/2010 (Unreported) at pp 12-13, 'the rule of practice that "new matter" in a replying affidavit may not be permitted should not be applied blindly and mechanically, without due regard to the facts and circumstances of the particular case.' This is, above all, apart from the Court deciding at the threshold whether what is contended as 'new matter' is, in truth, new matter. In the instant case, the applicants (through Gravato) state on oath that in their personal knowledge the sequestration order was granted by the Court of the respondent's domicile; that is to say, the domicile of the respondent was at all material times South Africa.

[8] The first applicant is an insolvency practitioner in South Africa, as I have said previously, and from his affidavit it seems to me clear that he has had personal knowledge of the papers that were placed before the 'Supreme Court of South Africa (Transvaal Provincial Division)', presently 'the North Gauteng High Court, Pretoria' ('the South African Court') during the sequestration proceedings and from that it is his evidence that 'the sequestration order of 20 March 2008 was granted by the Court of the respondent's domicile'. Thus, as Mr Dicks submitted, 'No wonder then that when this (present) application was launched, there being no indication to the contrary, the applicants stated ... that the respondent was sequestrated by the court of his domicile.' Thus, according to the applicants, little did they think that the respondent would be so audacious as to deny in a truly comparable Court in Namibia that he was domiciled in South Africa as at the date of his sequestration; something which the respondent did not aver in his papers before the South African Court.

[9] Be that as it may, the respondent delivered, as I have said previously, an answering affidavit in which he challenged the applicants' evidence that he was domiciled in South Africa at all relevant times respecting his sequestration. In effect, as Mr Dicks submits, the respondent invited the Court not to accept the applicants' evidence that the respondent was domiciled in South Africa, as aforesaid. In my opinion, the next allowable available opportunity open to the applicants in the present proceedings to challenge the respondent's answer is by way of a replying affidavit. Has the applicants introduced new matter in their replying affidavit? I think not. In my opinion, it 'is simply evidence which supports material already contained in the founding affidavit: evidence adduced by the applicant to meet a challenge laid down by the respondent in the answering affidavit (*Gerhard Geldenhuys v Tula's Plumbing* Case No. A16/2004 (Unreported) at p12; see also *Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd* 2010 (2) NR 703 (HC))'. Accordingly, I rule that the replying affidavit stays, and its contents are admitted as part of the applicants' evidence in these proceedings.

[10] I pass to consider whether on the facts the respondent was domiciled in South Africa as at the date of his sequestration. The applicants say he was. And why do the applicants say so? This is what I have to enquire into in order to determine whether the applicants have on the balance of probabilities (see *Ley v Ley's Executors and Others* 1951 SA 186 (A)) established that the respondent had as at the date of his sequestration the intention to reside (*animus manendi*) indefinitely (the third Pollock category, see Forsyth, *Private International Law*, 4th edn (2003): p 131) in South Africa.

[11] In Botswana, according to Forsyth, the courts have accepted that *animus manendi* may consist of 'an intention to reside permanently or for unlimited time in the country of choice. It does not [require] an intention never to change the new country of domicile'. And Forsyth writes further, 'This effective acceptance of Pollock's third category of intention as sufficient for the acquisition of a domicile of choice indicated the direction in which the Roman-Dutch common law should develop (Forsyth, *Private International Law*, ibid: p 134-5)'. And in determining whether a person has acquired a domicile of choice or not, regard must be had to the actions, life, statements and conduct of such person (*Ochberg v Ochberg's Estate and Another* 1941 CPD 15). Furthermore, the mere *ipse dixit* of the respondent, as an interested party, should be carefully scrutinized (see *Massey v Massey* 1968 (2) SA 199 (T)). And, in my opinion, that is more so in the circumstances of the instant case where now before the Namibia High Court the respondent contends that he was domiciled in Namibia at the time of his sequestration when the respondent did not so contend before the South African Court, as I have found previously.

[12] I shall now proceed to apply the aforegoing principles and approaches to the facts of this case; and in doing so – I must say – I do not find any use, *pace* Mr Barnard, for the *Plascon-Evans* rule (in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A)). Mr Barnard submits that 'from 1988 to July 2006 the respondent spent the majority of his time in South Africa but continued farming activities in Namibia and attended to those farming activities physically on continuous basis'. Mr Barnard submits further that the 'respondent attended in Namibia for continuous periods of approximately three months per year and further one week every two months'; whatever that means in terms of time frame. Be that as it may, in my view, the respondent could not have in '1988 to July

2006, spent the majority of his time in South Africa' and at the same time 'continued farming activities in Namibia and attended to these farming activities *physically on a continuous basis*.' (Italicized for emphasis) In any case, from his own evidence it seems to me clear that in '1988 to July 2006' the respondent was ordinarily resident indefinitely in South Africa and he carried out farming activities continually in Namibia during that period, and, significantly, that indefinite residence in South Africa was lawful (see *Government of the Republic of Namibia v Getachew* 2008 (1) NR1) on account of the fact that the respondent holds both South African citizenship and Namibian citizenship. Therefore, in my opinion, it matters not on what passport the respondent travelled to and from Namibia and South Africa. What is important is that all this fits the domicile requirements adverted to previously: In 1988, the respondent acquired a domicile of choice in South Africa. The fact that 'in 1988 to July 2006' the respondent *continually* travelled to Namibia in order to *continually* attend physically to farming activities during that period does not derogate from the fact that he was domiciled in South Africa. (Italicized for emphasis) The principles set out previously does not say that when X acquires a domicile of choice in country B, X's intention to remain indefinitely in country B is excluded just because X leaves country B occasionally and stays in another country, country D, continually for certain periods; and it is of no moment what X physically does whenever X is in country D during those periods. In any case, the following pithy submission by Mr Barnard demolishes any contention by the respondent that he was at the time of his sequestration not domiciled in South Africa. Mr Barnard submits, 'the respondent was born and (he) grew up in Namibia but (he) moved to the Republic of South Africa when (he became) an adult. The respondent was factually resident in the Republic of South Africa for '*an indefinite period but not permanently* and only intermittently'; '*indefinite period but not permanently'*, Mr Barnard says. (Italicized for emphasis)

If the respondent had no intention of limiting the period of his residence in South Africa, that is, if he had the intention of residing in South Africa for an indefinite period, as Mr Barnard submits; with the greatest deference to Mr Barnard, I do not see any merit in Mr Barnard's argument that the respondent had no intention of residing in South Africa 'permanently'? The *animus manendi* requirement of domicile is fulfilled in respect of X where X has the intention to reside permanently or for an unlimited time (i.e. 'for an indefinite period') in the country of choice (Forsyth, *Private International Law*, ibid, p 131 and the cases there cited). In the face of all this, I do not, with respect, need to have recourse to the *Plascon-Evans* rule to be able to decide, as I have done, that on the papers the evidence is clear and sufficient that as at the date of his sequestration the respondent was on the facts and in law domiciled in South Africa.

[13] Does the fact that in the beginning of July 2006 the respondent moved back to Namibia 'on a permanent basis' – 'on a permanent basis', the respondent contends – change the conclusion I have made? I think not. If the respondent, after acquiring a domicile of choice in South Africa, as I have found, had the intention thereafter to abandon that domicile and thereafter had the intention to reside for an indefinite period in Namibia, why would he do the following? Why would the respondent state in his answering affidavit that from July 2006 he had no address to return to in South Africa and yet he had stated in an affidavit he had deposed to on 10 May 2007 in proceedings before the South African Court that he resided at 55 George Street, The Strand, Western Cape Province (South Africa)? What was so difficult for him, if it was, indeed, the truth, for the respondent to state on oath then that he had moved to Namibia and he had the intention to reside in Namibia for an unlimited time? Of course, I accept Mr Barnard's submission that a person's residence in country X on its own and without more does not constitute

that person's domicile in country X. But, of course, as respects the issue of domicile, residence is important: it constitutes the *factum* requirement of domicile, and in the instant case the respondent's aforementioned statements in those affidavits fulfil the *factum* requirement; and the *animus manendi* requirement is fulfilled by such of the actions, statements and conduct of the respondent that I have described previously (see *Ochberg v Ochberg's Estate and Another* supra).

[14] For all the aforegoing reasoning and conclusions, it is with firm confidence that I find that the applicants have established on a preponderance of probabilities that when the sequestration order was made by the South African Court the respondent was domiciled in South Africa; and accordingly, I hold that the sequestration of the respondent was made by the competent court of the respondent's domicile. The law and the facts of this case inevitably compel this conclusion. It follows that in my judgment the principle in *Government of the Republic of Namibia v Getachew* supra, referred to me by Mr Barnard, that a person obtains a new domicile by choice if the previous domicile is abandoned (see also Forsyth, *Private International Law*, ibid: p 133) – which I accept as a correct statement of law – cannot assist the respondent.

[15] But that is not the end of the matter. Sensing that the respondent has no legal leg to stand on as respects the issue of domicile, Mr Barnard finds a second string to his bow – and legitimately so, I must add – in the form of argument based on extinctive prescription. Without a doubt, this is a rearguard action; an unacceptable rearguard action on account of the fact that there is not a wraith of suggestion in the respondent's relevant application papers filed of record that he also relies on prescription. Section 17 of the Prescription Act, 1969 (Act 68 of 1969) provides:

> '(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: provided that a court may allow prescription to be raised at any stage of the proceedings.'

Thus, it is for a party raising prescription to allege and prove prescription (see Harms, *Amler's Precedent of Pleadings*, 4th edn: p 264). The respondent does not invoke prescription in his answering affidavit, as Mr Dicks submitted and as I have found previously. In my opinion, in the circumstances of this case, to allow prescription to be raised in counsel's submission at this late hour would undoubtedly occasion irredeemable prejudice to the applicants, and so I refuse to exercise my discretion in favour of allowing counsel to raise prescription in these proceedings.

[16] For all the aforegoing, I am satisfied that a case has been made out for the grant of the relief sought; and so I must confirm the rule nisi granted on 27 November 2009. As to the matter of costs; I do not, with respect, accept Mr Dick's submission that costs on the scale as between attorney (legal practitioner) and client should be awarded. I do not think that the conduct of the respondent –although misguided – is such that it ought to attract such costs order. That is to say, I do not think that the respondent's conduct is vexatious or frivolous. Accordingly, I hold it just and reasonable that costs on the scale as between party and party should rather be awarded: it meets the justice of the case.

[18] Whereupon, I make the following order:

1. The rule nisi granted on 27 November 2009 is hereby confirmed.

2. The respondent must pay the applicant's costs of suit on the scale as between party and party, and such costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANTS:	Adv. G Dicks
Instructed by:	LorentzAngula Inc.
COUNSEL ON BEHALF OF THE RESPONDENT:	Adv. P Barnard
Instructed by:	Kirsten & Co. Inc.