IN THE HIGH COURT OF SWAZILAND

In the matter between:

DUMISANI S. NKABULE — Appellant

and

FIKILE L. NKAMBULE — Respondent

CORAM — F. X. ROONEY

FOR APPELLANT — LITTLER
FOR RESPONDENT — DUNSEITH

JUDGMENT
17 February, 89 Rooney, J.

On the 1st April, 1986 the present appellant insituted an action in the Magistrate's court for Hhohho in which he claimed against his wife, the present respondent (a) restoration of conjugal rights, failing which a decree of divorce, costs and alternative relief. The response of the respondent included a counterclaim for a restitution order, failing which a decree of divorce, forfeiture of benefits and costs.

On the 15th April, 1987 the matter was set down for hearing before Mr S.S. Ginindza. The respondent was not present or represented and the magistrate, having heard evidence made an order for restitution of conjugal rights.

On the 22nd May, 1987 an application for the recision of the order dated the 15th April, was granted by the late Mr J. V. Okaya with the consent of both parties.

On the 23rd November, 1987 the attorneys for the parties appeared before Mr A. P. Cele and it was agreed that the Court be asked to decide a point of law governing the proprietary consequences of the marriage.

On. the 9th November the magistrate ruled that the marriage between the parties was governed by common law and not Swazi law and custom.

In subsequent proceedings before Mr S.S. Ginindza, the marriage between the parties was dissolved on the,18th May, 1988 and a division of the joint estate ordered. The present appeal is against these orders.

Both the parties are Africans, domiciled in Swaziland. The marriage was solemnized in the London Borough of Barnet on the 9th March, 1979. The question at issue is the nature of the matrimonial regime which governs the marriage. The appellant contends that this is founded on Swazi law and custom and the respondent favours the Roman Dutch law as the common law of this country under which the division of the joint estate as ordered in the court below would be appropriate.

Where no marriage contract or settlement has beer; expressly made by the parties or is implied by law, the effect of marriage as an assignment of property depends, so far as moveable are concerned, on the law of the matrimonial domicile, that is the husband's domicile at the date of marriage, and in respect of immovable on the lex situs. That is the law of England and it is the same under the common law of this country (Frankel's Estates and another v. The Master and Another 1950 (1) S.A. 220. Van den Heever put it thus at 241.

view "What may be termed the orthodox/is that in the absence of such express agreement the law of the country where the husband is domiciled at the time of the marriage is the governing law. The Roman Dutch and Civilian authorities explain the rule, that the property rights of the spouses are prima facie governed by the lex domicilii of the marriage, by stating 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."

The matrimonial domicile of the husband in this case is Swaziland. The General Administration Act 1905 by section 3 provides that "The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute shall be law in Swaziland".

That statute still remains in force and has not been altered by constitutional developments which have taken place since.

The Marriage Act 1964 became law on the 31st July, of that year. The Act recognises two forms of marriage, one by civil rights and one by Swazi law and custom. (See section 3 (2) 5, 7 (1) and 7 (1). Section 24 reads -
"Common Law
24. The consequence flowing from a mariage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of section 25, the marital power of the husband and the property rights of the spouses shall be governed by Swazi law and custom.
25. (1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnization of the marriage the parties agree that the consequences following the marriage shall be governed by the common law.

2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register and on duplicate original register the fact of the agreement;"and the production of a marriage certificate, original register or duplicate original marriage register so endorsed shall be prima facie evidence of that fact unless the contrary is proved.

The parties did not marry in accordance with the term of the Swaziland statute. The parties did not agree that the consequences following from their marriage shall be governed by the common law and if they had done so it would not have been possible for them to insist that they marriage officer in England should comply with section 25 (2) of the Act. The application of that sub-section is clearly confined to marriage officers appointed under section 16 of the Act.

this supports to some extent the submission that sections 25 and 26 are limited in their application to marriages performed within Swaziland. The statute does nor clearly and unambigualy limit the common law governing matrimonial property in the case of a marriage celebrated elsewhere. In R. vs. Morris (1861-73) All E.R. Rep 484 at 486 Byles J. said -
".....it is a sound rule to contrue a statute in conformity with the common law rather than against it, except where so far as the statute is plainly intended to alter the course of the common law".

I am inclined to the view that the Marriage Act should be construed strictly in this respect. The intention was to legislate for the proprietary consequences following a marriage performed under the Act. It did not intend to alter the common law principle that the law of the husbands domicile was the Roman Dutch law of Swaziland. An African (and that term is not restricted to people who can properly be described as Swazis) who is domiciled in this country, who marries outside Swaziland without an

ante nuptual contract takes the law of his dimicile with him and it is that law and not Swazi law and custom, which determines the proprietary consequences which follow.

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The plaintiff did not seek a division of the joint estate as he denied such estate existed. The defendant sought forfeiture of benefits. The court below grated a division of the estate and in my view that was an appropriate order.

This appeal is dismissed with costs.

F. X. ROONEY
JUDGE