EDWARD ELIO GALANTE
vs
RONNIE JACARANDA GALANTE

HIGH COURT OF ZIMBABWE
SMITH J.
HARARE, 6 December, 2001 and 20 February, 2002

Mr *A P de Bourbon SC* for plaintiff
Mr *L Weinkove SC* & Mr *F Girach* for defendant

SMITH J: On 6 December, 2000 the plaintiff (hereinafter referred to as "Edward" issued summons claiming, *inter alia*, a decree of divorce and custody of the two minor children of the marriage. In his summons he claims that the parties are domiciled in Zimbabwe. The defendant (hereinafter referred to as "Ronnie") filed a Special Plea claiming that this court does not have jurisdiction to determine Edward's action against her because he is not domiciled in Zimbabwe. She alleges that he has not abandoned his domicile of origin, which is the United States of America, and did not enter Zimbabwe with the necessary *animus manendi*. Edward claims that Ronnie is issue-estopped from denying this court's jurisdiction. The Court must decide whether to uphold the Special Plea or to dismiss it.

The relevant facts leading up to this case are as follows. The parties were married in Harare on 1 September 1985. On 3 November 1998 Ronnie instituted a claim for divorce and other relief in case No HC 13661/98 (the First Divorce Case). In para 3 of her Declaration she stated that Edward "is domiciled in Zimbabwe". On l February 1999 Edward filed his plea in which he admitted the statement contained in the said para 3. In January 1999 Ronnie instituted case No HC 1305/98 (the Maintenance Case) seeking maintenance *pendente lite* for herself and the two minor children and a contribution towards her costs in the First Divorce Case . In para 2 of her founding affidavit she said

she adhered to the contents of her Declaration in the First Divorce Case. In para 4 thereof she stated -

> "We returned to this country in 1992. We have lived here since that time and the Respondent (i.e. Edward) holds a permanent residence permit".

In para 6.3 thereof she stated -

> "The list (of assets) was prepared when we immigrated to Zimbabwe".

In March 1999 Edward filed his opposing affidavit in the Maintenance Case and did not put in issue the question of domicile. In her answering affidavit filed in the Maintenance Case on 4 June 1999 she stated, in para 4.2 -

> "We returned to the United States thereafter and returned to Zimbabwe in 1992 and have lived here ever since".

The Maintenance Case was heard on 25 November 1999 and BARTLETT J awarded maintenance for Ronnie and the two children and ordered that she be paid a contribution towards her costs. Edward noted an appeal against the order of BARTLETT J, which was heard by the Supreme Court on 7 September 2000, and judgment was handed down on 7 December - SC 92/2000. A pre-trial conference for the First Divorce Case was held before BLACKIE J on 4 December 2000 and the First Divorce Case was set down for hearing on 5 December. Ronnie then withdrew all her claims and Edward instituted this case on the following day. On 16 February 2001 Ronnie sought further particulars which were filed by Edward on 15 March. The Special Plea as to jurisdiction was then filed by Ronnie on 6 April. Then on 17 September Ronnie instituted proceedings in the Superior Court of California, County of San Francisco, seeking a legal separation and other relief.

Mr *de Bourbon* submitted that the onus rests on Ronnie to prove that Edward is not domiciled in Zimbabwe. She must establish that he did not abandon his domicile of origin and therefore did not acquire a domicile of choice, i.e. Zimbabwe. In the First Divorce Case Ronnie averred that Edward was domiciled in Zimbabwe and she persisted with that allegation right up to the time she withdrew her claims in that case in December 2000. However, when Edward instituted these proceedings for divorce and ancillary relief, she changed her attitude and disputed the very allegation on which she had based her litigation. The Special Plea is premised on the assertion that Edward's domicile of origin is the United States of America. However, in a country with a federal system, such as is the case in the United States of America, a person is domiciled within a particular state or other entity with a separate legal system. Neither can a person be domiciled in a city, such as San Francisco in California, as alleged by Ronnie in para 2 (a) of her Special Plea. Accordingly, the Special Plea must be dismissed solely on those two points.

Mr *de Bourbon* went on to deal with the principles inherent in the Special Plea. In order to change a domicile of origin and acquire a domicile of choice there are four requisites that must be satisfied : a physical move from the domicile of origin; the physical arrival and residence at the domicile of choice; the intention to abandon the domicile of origin and acquire a new domicile of choice; the power to carry out that intention. A person's residence in a country is *prima facie* evidence that he is domiciled in that country and the length of the residence must be taken into consideration. It is not necessary to turn one's back on the country of origin or to sever all connections with that country or to have no desire ever to return there. All that is needed is an intention to live

in the new country indefinitely. The fact that a person does not possess citizenship or even permanent residence does not affect the issue of domicile of choice.

Finally Mr *de Bourbon* argued that Ronnie is estopped from challenging the jurisdiction of this Court in the present matter as she had, herself, sought the jurisdiction of this Court for the same relief in the First Divorce Case. In the Maintenance Case Ronnie adhered to her declaration in the First Divorce Case, including the averment that the Court had jurisdiction because Edward is domiciled in Zimbabwe. When the case was argued before BARTLETT J the issue of jurisdiction was not argued. The learned judge found in Ronnie's favour, thus accepting that the court had jurisdiction. A pre-trial conference was held in connection with the First Divorce Case. That was a formal step which could not have been taken unless the Court had jurisdiction. There was an appeal against the order granted by BARTLETT J in the Maintenance Case and the Supreme Court heard the appeal and made a finding - SC 92-2000. Even when Ronnie applied for leave to withdraw the First Divorce Case, ADAM J granted the application and ordered that Ronnie pay the costs. The admission made by Ronnie in the First Divorce Case that Edward is domiciled in Zimbabwe constitutes a judicial admission - see *Gordon* v *Tarnow* 1947(3) SA 525 (A) and *Moresby-White* v *Moresby-White* 1972(1) RLR 199(A). As such, it constitutes a finding by the Court, or at least an acceptance by the Court, that the Court has jurisdiction to entertain the application by her for a divorce. Accordingly, the issue of jurisdiction has been decided between the parties. It is a species of issue estoppel - see *Willowvale Mazda Motor Industries (Pvt) Ltd* v *Sunshine Rent-a-Car (Pvt) Ltd* 1991(1) ZLR 415 SC. Ronnie held out for 3 years that Edward was domiciled in this country and when she wanted to apply for maintenance *pendente lite*, she was content to

rely on her averment that Edward is domiciled in this country. Now she wants to disclaim this Court's jurisdiction and to litigate in California. In her Special Plea there is no allegation that there has been a change in circumstances since she issued summons in the First Divorce Case in 1998. Public policy requires that she should not now be allowed to deny what she has earlier relied on to pursue her claims - see *Arnold & Ors* v *National Westminster Bank plc* [1991] 3 All ER 41. In that case it was held that issue estoppel was a complete bar but could be relaxed. However, that would only be in exceptional cases and that would have to be pleaded. In this case, the equities demand that this Court should determine the issue. Both parties are ordinarily resident within the jurisdiction, the children are resident in this country and all the witnesses live here. Ronnie, in the First Divorce Case, could have relied on s 3(1)(b) of the Matrimonial Causes Act [Chapter 5:13] as conferring jurisdiction, but she did not. She relied on her averment that Edward is domiciled in this country.

Mr *Weinkove* argued that the question of domicile must be established when litigation is instituted. If at that stage the Court has jurisdiction, then it maintains jurisdiction for the entire case - see *Howard* v *Howard* 1966(2) SA 718 (R). In the First Divorce Case Ronnie was asked if Edward lives in Zimbabwe and she said he did. However, there are two aspects to the question of domicile. Mere physical presence is not sufficient. The question of intention is of equal significance. As was said in *Howard's* case, *supra*, to acquire a new domicile it is essential to show that the person who is said to have changed his domicile has abandoned his former domicile *animo et facto*. In the First Divorce Case and the Maintenance Case, the issue of domicile was never argued or adjudicated on. Edward never testified. When Ronnie applied to

withdraw her action, ADAM J allowed her to do so without deciding the question of domicile. There was no evidence led on this issue. Ronnie disputes Edward's allegation that he is domiciled in Zimbabwe. The duty lies on him to prove what he has averred. Admittedly the parties both live in Zimbabwe. Ronnie was entitled to claim that this Court had jurisdiction to deal with the First Divorce Case by virtue of the provisions of s 3 (1)(b) of the Matrimonial Causes Act [Chapter 5:13]. As Edward did not file a counter-claim, once Ronnie withdrew her claim the First Divorce Case came to an end. This present case is an entirely new and different case. Ronnie is entitled to show that Edward is not domiciled in this country. Domicile cannot be established on the mere *ipse dixit* of a party - see *Elian* v *Elian* 1965(1) SA 703(A). It would be against public policy and also inequitable to silence Ronnie on this issue. Edward had a master plan which did not include him living in this country for the rest of his days. He had taken steps to relocate and live elsewhere. If this case were decided by this Court, Ronnie would have to be satisfied with a judgment sounding in Zimbabwe dollars. If, however, the case were to be determined in San Francisco, the judgment would sound in United States dollars. The maintenance that Edward is paying is losing its value daily because of the rampant inflation in Zimbabwe.

It is common cause that this Court will not have jurisdiction to deal with this case unless Edward has acquired a domicile of choice in Zimbabwe. His domicile of origin is California or one of the other States in the United States of America. He has established a residence in Zimbabwe and the parties were married and lived together in this country. Both their children were born in the USA but have grown up in this country since 1992.

It is not disputed, however, that Edward could only have acquired a domicile of choice in this country if he had the requisite intention.

When Ronnie instituted action in the First Divorce Case she alleged that Edward was domiciled in Zimbabwe. That was necessary in order to satisfy the Court that it had jurisdiction to handle the case. She could, had she so wished, have relied on the provisions of s 3(1)(b) of the Matrimonial Causes Act [Chapter 5:13] to found jurisdiction but she did not do so. When she instituted the Maintenance Case, she again relied on the averment that Edward was domiciled in Zimbabwe in order to establish that this Court had jurisdiction. She was awarded maintenance, which she has been receiving since the order issued by BARTLETT J. When she withdrew her case, she did not allege that the case should be struck off the roll because the Court did not have jurisdiction to deal with the case. She merely applied for leave to withdraw her claim.

The doctrine of issue estoppel was considered by the Privy Council in *Hoystead & Ors* v *Commissioner of Taxation* [1926] AC 155 : [1925] All ER 56. Lord SHAW, in delivering the judgment of the Judicial Committee said at p 165-166 -

> "In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest

some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs".

The rule was expressed thus by Lord DENNING MR in *Fidelitas Shipping Co Ltd* v *V/O Exportchleb* [1965] 2 All ER : [1966] 1 QB 630 -

"The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances".

Then, in *Arnold's* case, *supra*, at p 47 Lord KEITH OF KINKEL said -

"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties, involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue. This form of estoppel seems first to have appeared in *Duchess of Kingston's Case* (1776) 20 State Tr 355, [1775-1802] All ER Rep 623. A later instance is *R* v *Inhabitants of Hartington Middle Quarter* (1855) 4 E & B 780, 119 ER 288. The name 'issue estoppel' was first attributed to it by HIGGINS J in the High Court of Australia in *Hoystead* v *Federal Comr of Taxation* (1921) 29 CLR 537 at 561. It was adopted by DIPLOCK LJ in *Thoday* v *Thoday* [1964] 1 All ER 341 at 352, [1964] P 181 at 198. Having described cause of action estoppel as one form of estoppel *per rem judicatam,* he said:

'The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation on one such cause of action any of such separate issues whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was'".

In our law, the principles of *res judicata* are almost analogous to those of issue estoppel. In *Liley* v *Johannesburg Turf Club* 1983(4) SA 548 (W) GOLDSTONE J at

551-552, after referring to the judgment of GREENBERG J in *Boshoff* v *Union Government* 1932 TPD 345, said -

> "The importance of this discussion relates to the question much debated by counsel yesterday as to whether our law relating to *res judicata* covers what has come to be called 'issue estoppel' in the Anglo-American law, i.e. where the parties or the privies are estopped from disputing an issue decided by the judgment of a court, as distinct from being estopped only from relying upon the same cause of action.
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> The judgment of GREENBERG J in *Boshoff's* case has been followed for over 30 years in the Courts of South Africa and, what is more important in this case, by this Division : see, for example, the judgment of MURRAY J in *Turk* v *Turk* 1954 (3) SA 971 (W). Indeed, in the second edition of Hoffman on the *South African Law of Evidence* at 247 the following conclusion is stated after a full discussion of this matter -
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> > 'The present state of the authorities seems to show that at least in civil cases issue estoppel has come to stay. It has been applied in a large number of cases over a period of more than 30 years, so that it is probably too late even for the Appellate Division to uproot it, although technically the matter is still open'.
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> Apart from the fact that I am in respectful agreement with the approach of GREENBERG, J, in my view, the state of the law is such that it would not be proper for a single Judge in this Division to strike out in a new or different direction. The formulation of the rule now under consideration is thus correctly reflected in the following passage from Spencer-Bower on *Res Judicata* which has been cited with approval, *inter alia*, in the *Boshoff* case *supra* and also in the dissenting judgment of CURLEWIS JA in *R* v *Manasewitz* 1933 AD 165 at 189:
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> > 'Where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; but beyond these limits there can be no such thing as a *res judicata* by implication'".

The requisites of a valid defence of *res judicata* were clearly set out by SMALBERGER JA in *Horowitz* v *Brock & Ors* 1988 (2) SA 160 (AD) at p 178-179 as follows -

> "The requisites of a valid defence of *res judicata* in Roman-Dutch law are that the matter adjudicated upon, on which the defence relies, must have been for the same cause, between the same parties, and the same thing must have been demanded. (Voet *Commentarius ad Pandectas* 44.2.3; *Bertram* v *Wood* (1893)

10 SC 177 at 180; *Mitford's Executor* v *Ebden's Executors and Others* 1917 AD 682 at 686.) The rule that the same thing must have been demanded in both actions has been held to mean

> 'that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings'

(*per* STEYN CJ in *African Farms and Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555 (A) at 562D).

The doctrine of issue estoppel does not require for its application that the same thing must have been demanded, and it is the lack of this element which distinguishes it from *res judicata*. The doctrine, although not specifically referred to by the name by which it is currently known, appears to have first found acceptance in our law in *Boshoff* v *Union Government* 1932 TPD 345."

The learned judge of appeal went on at p 179 H-180 to say -

"An issue, broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a Court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought. As pointed out by INNES CJ, in the oft-quoted passage from *Robinson* v *Randfontein Estates GM Co Ltd* 1925 AD 173 at 198,

> '(the) object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or prevent full enquiry. But within these limits the Court has a wide discretion'.

According to Beck *Theory and Principles of Pleading in Civil Actions* 5th ed at 32, one of the functions of pleadings 'is to place the issues raised in the action on record so that when a judgment is given such judgment may be a bar to parties litigating again on the same issues'. In motion proceedings the same issues appear from the affidavits filed by the parties and are crystallized in the relief sought, such relief being definitive of the essential issue(s) between the parties".

The Appellate Division again dealt with the principle of issue estoppel in

*Kommissaris van Binnelandse Inkomste* v *ABSA Bank Bpk* 1995(1) SA 653 AS. At p 657

C-F the headnote to that case reads -

"The Appellate Division pointed out that in the context of the appeal the issues in (1) and (2) above were not as such in dispute; the question was whether the Court *a quo's* conclusion in regard to Volkskas' third ground of objection was correct. (At 664A-B).) The Court remarked that it was generally accepted that the use of issue estoppel by the Provincial Courts had been established in *Boshoff* v *Union Government* 1932 TPD 345. (At 666H/I-1). In that case the defence of *res judicata* was upheld despite the fact that that which was claimed and the cause of

action had not been the same in the two actions in question. Although the decision was based to some extent on common-law principles, the Court, invoking English law, preferred an expansive application of the *exceptio rei judicata*, but did so without applying English law to the exclusion of common-law principles; the view that *Boshoff* had to be rejected because the Court had deserted the common law and imported English principles was accordingly erroneous. (At 667J-668B/C and 668D). The true significance of *Boshoff* was that the strict common-law requirements for the defence of *res judicata* (in particular *eadem res* and *eadem petendi causa*) should not be taken literally and in all cases applied as inflexible rules, but that there was, in the light of the underlying requirement of *eadem quaestio* and the defence of *res judicata*, room for the adaptation and extension thereof. (At 669F-G/H). The Court was of the opinion that there was, in the light of the above, nothing wrong with the approach adopted in *Boshoff*, but pointed out that every case had to be decided on its own facts".

The doctrine of issue estoppel has been considered in our Courts. In *Kashiri* v *Muvirimi* 1998 (1) ZLR 270(SC) at 274 D-F KORSAH JA said -

"The policy of the law, as regards issue estoppel, was succinctly stated in *Phipson on Evidence* 13 ed paras 28-46, thus:

> 'If, in litigation upon one such cause of action, any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was'.

With regard to P, precisely the same issue as that before the Community Court - sexual intercourse between the parties - arose in the present case for determination. That issue having been determined between the same parties by the Community Court, the determination of it by that court raises an issue estoppel. The parties are estopped from disputing an issue decided by a judgment of a court of competent jurisdiction".

Then, in *Willowvale Mazda Motor Industries* v *Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S), KORSAH JA again dealt with the doctrine of issue estoppel. At p 423 B-F he said -

"While the doctrine of issue estoppel may not be part of Roman-Dutch law and may not as yet have found a berth in South African law, it seems to me that this court, in the wider application of existing law in the light of current modes of thought, has found the artificiality of limiting estoppel to the same subject to be

unproductive of justice, and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation.

The doctrine is succinctly stated thus by LORD DIPLOCK in *Mills* v *Cooper* *supra* at 468 thus:

> 'A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him'".

The parties to this case, the issues and the relief sought are identical to those in the First Divorce Case. In the First Divorce Case there was no final adjudication on the issues because Ronnie withdrew her claims. However, her summons was accepted as properly founding her claims because the case proceeded to the pre-trial conference stage, which is the penultimate step before the hearing of the case. In her declaration Ronnie asserted that Edward is domiciled in Zimbabwe. That was admitted by Edward in his plea. At the pre-trial conference, the question of domicile was not put in issue by either party.

In my view, the assertion by Ronnie in the First Divorce Case that Edward is domiciled in this country, and the fact that that was accepted by both parties and by the judge before whom the pre-trial conference was held, is one that she cannot now dispute. As if that is not enough, in the Maintenance Case Ronnie also pleaded that Edward is domiciled in Zimbabwe and Edward admitted that allegation. In that case, BARTLETT J awarded her a substantial sum by way of maintenance *pendente lite* and a contribution towards costs. That order went on appeal and was dealt with by the Supreme Court. In

both courts it was accepted that Edward is domiciled in Zimbabwe. The question of his domicile was clearly fundamental to Ronnie's claim. Therefore the courts acted on the basis that Edward is domiciled in this country.

It is accepted that, although issue estoppel is a complete bar, the bar can be lifted if the equities of the case so require. It has not been argued, on behalf of Ronnie, that the equities do so require. It is not surprising that no such argument has been put forward because, if anything, it seems to me that the equities require that the case be heard in our Courts. The parties were married in this country and have lived here since 1992. Their matrimonial home is in this country and both their children were brought up here since 1992. Most of the matrimonial property, the ownership of which is in dispute, is in this country.

The Special Plea is dismissed with costs.

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