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v
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[2024] SGSAB 2

Syariah Appeal Board — Appeal No 27 of 2023

Sheik Mustafa bin Abu Hassan, Muhammad Haniff bin Hassan, Sunari bin Kateni
6 June 2024

Divorce — Matrimonial proceedings — Jurisdiction — Forum non conveniens

Case(s) referred to

Kenyo Timur Ery Respati v Mohamed Jamalludin bin Mohamed Shariff (2006)
4 SSAR 115

Legislation referred to

Guardianship of Infants Act 1934 (2020 Rev Ed)

Muslim Marriage and Divorce Rules (2001 Rev Ed) r 44

At the Appeal Board:

Clement Yap and Carrie Gill (Harry Elias Partnership LLP) for the appellant
Ahmad Nizam Abbas and Nur Anisa Azzli (Crescent Law Chambers LLC) for the respondent

Parties:

Appellant (Plaintiff – Husband)

Respondent (Defendant – Wife)

[Editorial note: The grounds of decision of the Syariah Court is reported at (2023) 9 SSAR 636.]

[Editorial note: This is the grounds of decision of the Appeal Board dated 6 June 2024.]

6 June 2024

Delivered by Sunari bin Kateni (Member, Appeal Board):

Introduction

1 This is the plaintiff husband’s appeal against the learned Senior President Guy bte Ghazali’s decision made on 5 September 2023, granting the defendant wife’s application for a stay of Syariah Originating Summons No 61576 on the basis of *forum non convenient* in favour of proceedings related to the same marriage taking place in South Africa.

Background

2 This appeal involves a pair of South African citizens, living as expatriates in Singapore. They have a son who was born in South Africa in 2012. He is studying in Singapore in an international school.

3 The parties (“Parties”) had entered into two marriages, a Muslim marriage in 2008 and a civil marriage in 2010, both of which were contracted in South Africa.

4 In August 2010 the husband (“Husband”) accepted a work assignment in Indonesia. He was joined by the wife (“Wife”) in 2011. The child was then born in South Africa in 2012. In 2014, the Husband accepted a work assignment in Singapore. The Parties and their child moved to Singapore.

5 On 22 March 2022, the Wife filed an *ex parte* “Notice of Motion for leave to institute an action against the Husband in pursuant to divorce proceedings” in South Africa. The Wife was granted leave to serve an “Edictal Citation” on the Husband to commence divorce proceedings and subsequently filed it on 6 April 2022. On 13 April 2022, the Edictal Citation was served on the Husband.

6 In response, the Husband commenced divorce proceedings in Singapore on 25 April 2022. On 8 July 2022, the Wife filed an application in the Syariah Court seeking the following order: “That Originating Summons No. 61576 and all other proceedings therein, be stayed in light of ongoing divorce proceedings in South Africa”.

7 On 7 September 2022, the Husband purported to pronounce a written *talak*. On 20 March 2023, the Muslim Judicial Council in South Africa confirmed by letter the dissolution of the Muslim marriage based on the *talak* pronounced by the Husband.

8 On 17 April 2023, the Wife filed an application in the South Africa court for interim maintenance for herself. The Wife applied for a stay of

the proceedings in Singapore. On 5 September 2023, the learned Senior President granted the stay.

9 The Husband filed a Notice of Appeal on 4 October 2023 and his Petition of Appeal on 6 November 2023.

The judgment below

10 The learned Senior President Guy bte Ghazali held that the Wife had discharged the burden of showing that the South Africa court is the more appropriate forum to hear the Parties' dispute.

11 The Husband, the Wife and their child are South African citizens. The parties married in South Africa. Their child was born in South Africa even though the parties had relocated to Indonesia at that time due to the Husband's job. The Husband is in Singapore on an Employment Pass. The Wife and the child are holding dependant's passes, pegged to the Husband's employment pass. The family has not made any application to become permanent residents of Singapore even though they have been residing here since 2014.

12 Throughout the eight years that they have been in Singapore, the family has been living in rented accommodation. They have not acquired real or immovable property in Singapore.

13 The learned Senior President found that based on the parties' actions, they did not wish for their relocation outside of South Africa to impact their legal status in South Africa. They had decided to contract the civil marriage before the Husband relocated to Indonesia so that South African law would recognise their marital status.

14 The parties also continued to preserve their roots in South Africa after their relocation to Indonesia, and then Singapore, through frequent visits and by acquiring and/or maintaining properties there.

15 In addition, the learned Senior President also considered that even if the Syariah Court here decides to exercise its jurisdiction in this matter and makes a decree dissolving the Muslim marriage contracted by the parties, it is unclear whether under South African law, this decree would be recognised as dissolving the parties' civil marriage as well.

16 Furthermore, the learned Senior President considered that it is not clear if the issue as to whether a valid *talak* has been pronounced has been determined by the appropriate authority in South Africa. The Muslim Judicial Council of South Africa had confirmed by a letter dated 20 March 2023 that the *talak* pronounced by the Husband on 7 September 2022 is "a valid Talaq (dissolvement of marriage) in accordance to Shariah Law".

17 There is no consensus on the legal effect of the talak based on the affidavits of the legal experts filed by parties. If the Muslim marriage has been terminated, there is no subsisting Muslim marriage for the Syariah Court to dissolve. Yet if, according to the Husband, the Muslim marriage has not been terminated because the Muslim Judicial Council of South Africa has no authority to confirm the validity of his *talak*, then the South Africa court is in a better position than the Singapore Syariah Court to make this determination.

18 There is also a risk that if the Syariah Court proceedings are not stayed, the two courts (namely, the South Africa civil court and the Singapore Syariah Court) may arrive at conflicting outcomes, in respect of whether the Muslim marriage has been validly dissolved and accordingly, whether there is already a foreign divorce dissolving the Muslim marriage and the ancillary issues.

19 And last, the learned Senior President noted that parties and their financial advisor had executed a trust in 2012 which holds assets in South Africa, including properties. It is a subject matter of the Wife's action in the South Africa civil court. These assets would be relevant to the issue of division of matrimonial assets unless both parties agree that the assets that are being held under the trust are not matrimonial assets.

20 Under the Singapore legal framework, where there are third party interests, separate civil proceedings will have to be instituted in the civil courts for the parties' beneficial interests in the trust properties to be ascertained before divorce proceedings can continue. The issue of whether Singapore or South Africa is the more appropriate forum may again arise in the context of these civil proceedings.

21 Hence, the learned Senior President held that South Africa would be the more appropriate forum to determine whether this is a property, trust, or matrimonial division issue, in particular against the backdrop of the South African community of property regime, and considering that these assets are situated in South Africa where various laws may apply to their determination (*eg*, property and/or trust laws, in addition to marriage and divorce laws) the South Africa court would be in a better position to determine the validity of the letter from the Muslim Judicial Council and if the Muslim marriage has already been dissolved.

Findings

22 The main issue in this appeal is first whether the learned Senior President erred in law and fact in deciding in the Syariah Court below that South Africa is the more appropriate forum and that the proceedings in Singapore should be stayed.

23 Counsel for both parties had put up well-researched arguments for and against her decision. Having considered the relevant law and all the

facts and circumstances of the case, we agree with the learned Senior President that the forum with the most real and substantial connection to the dispute points to South Africa rather than to Singapore.

24 Both parties and the child are South African citizens and were married there. The appellant Husband is on an employment pass while the respondent Wife and the child are both on dependent passes. They are not permanent residents in Singapore and no attempt has been made to apply for one. The parties own immovable properties only in South Africa. There are no immovable properties owned in Singapore.

25 A total of three properties are owned in South Africa in their personal capacities and several other properties are held under the trust to which the Husband and Wife are both trustees and beneficiaries. The trust has been joined as a third-party defendant in the divorce proceedings instituted by the Wife in South Africa.

26 We agree with the learned Senior President that with respect to the letter issued to the Wife from the Muslim Judicial Council of South Africa dated 20 March 2023 confirming the *talak* in accordance with Syariah law, the South Africa court is in a better position to determine the validity of the letter from the Muslim Judicial Council and to determine if the Muslim marriage has already been dissolved.

27 Even the Parties' foreign legal experts are unable to agree on the status of the Muslim marriage in the light of the letter from the Muslim Judicial Council and the procedures for dissolution of marriage thereof. The court is in the best position to adjudicate the legal status of the parties' Muslim and civil marriages is clearly the South Africa court.

28 Furthermore, if witnesses are required as part of this process, then the South Africa court is the better forum for these issues to be adjudicated since it involves South African substantive law.

29 We also agree with counsel for the Wife that there will be significant overlap in the issues relating to the parties' civil and Muslim marriages thereby risking conflicting judgments being made if the Syariah Court were to not stay the proceedings.

Relevant legislative provisions and Appeal Board's precedents

30 Rule 44 of the Muslim Marriage and Divorce Rules (2001 Rev Ed) ("MMDR") states that the Syariah Court may adopt the practice and procedure of the civil courts:

Practice and procedure

In matters of practice and procedure not expressly provided for in these Rules and practice directions, the registrar, the Court or the Appeal Board

may adopt the practice and procedure for the time being adopted in relation to civil proceedings in any court.

31 The Appeal Board in *Kenyo Timur Ery Respati v Mohamed Jamalludin bin Mohamed Shariff* (2006) 4 SSAR 115 (at [18]) established that the Syariah Court has the power to stay proceedings pursuant to r 44 of the MMDR:

In our view, s 35 AMLA clearly confers the Syariah Court with jurisdiction to hear the divorce as both were married in accordance with the Muslim law in Indonesia in view of the wordings used. Our view would have been otherwise if the section only referred to marriages registered under the Act. Therefore, both the Singapore and Indonesia Syariah Courts would be competent to adjudicate the matter if either party were to commence matrimonial proceedings with either of the courts. As there are now two proceedings pending, one in Singapore and the other in Indonesia, the issue of stay comes into the picture. There is no provision in AMLA on the subject of stay of proceedings other than s 36 which does not apply to this case. As such this Board would look at the practice of civil courts when dealing with such issue for assistance. (As permitted by r 44 of the Muslim Marriage and Divorce Rules (Cap 3, R 1, 2001) which provides: 'In matters of practice and procedure not expressly provided for in these Rules, the registrar, the Court or the Appeal Board may adopt the practice and procedure for the time being adopted in relation to civil proceedings in any court.')

32 We see no reason to deviate from the above finding and the Syariah Court may order a stay of proceedings on the basis of *forum non conveniens* under r 44 of the MMDR.

Effect of a stay of proceedings

33 By granting a stay of proceedings on the ground of *forum non conveniens*, it is merely on the proceedings before the Court. It is not a dismissal. There is no prejudice against the Husband when the stay is granted and the divorce is heard in the South Africa court because the divorce and ancillary issues can be heard there too.

34 Counsel for the Husband also raised the issue of the custody of the child being in limbo in the event of the divorce being heard in South Africa. We agree with the learned Senior President's finding that an application may be made thereafter under the Guardianship of Infants Act 1934 (2020 Rev Ed) if it is needed.

35 We therefore dismiss the appeal with costs.
