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v
GN

[2023] SGSYC 9

Syariah Court — Originating Summons No 61576; Application No 61576/SP/01
Guy bte Ghazali
5 October 2023

Divorce — Procedure — Jurisdiction — Stay of proceedings — Forum non conveniens

Case(s) referred to

ER v ES (2021) 8 SSAR 389

Spiliada Maritime Corporation v Cansulex Ltd [1987] 1 AC 460

Legislation referred to

Administration of Muslim Law Act 1966 (2020 Rev Ed)

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

Supreme Court of Judicature Act 1969 (2020 Rev Ed) ss 18(2), 18(3), First Schedule para 9

Family Justice Act 2014 (2020 Rev Ed) ss 22, 26

Guardianship of Infants Act 1934 (2020 Rev Ed)

At the Syariah Court:
Clement Yap and Carrie Gill (Harry Elias Partnership) for the plaintiff
Ahmad Nizam Abbas (Crescent Law Chambers) for the defendant

Parties:
Plaintiff – Husband
Defendant – Wife

[Editorial note: The Order of the Appeal Board is set out below after the grounds of decision of the Syariah Court. The grounds of decision of the Appeal Board is reported at (2024) 9 SSAR 645.]

[Editorial note: This is the grounds of decision of the Syariah Court dated 5 October 2023 (which was originally issued as an *ex tempore* judgment).]

5 October 2023

Guy bte Ghazali (Senior President, Syariah Court):

Introduction

1 This judgment centres on the doctrine of *forum non conveniens* and its application to Syariah Court proceedings.

Facts

2 The salient facts are set out below:

(a) The parties are South African citizens. The defendant (the "Defendant") holds a British passport by birth. She was born in Scotland to South African parents. The Defendant moved to South Africa in 1991 when she was eight years old. The plaintiff (the "Plaintiff") was born in South Africa to South African parents.

(b) The parties contracted a Muslim marriage in South Africa on 25 October 2008.

(c) They subsequently contracted a civil marriage in community of property in South Africa on 16 August 2010 (see also p 272 of the Plaintiff's affidavit filed on 18 October 2022 where the Plaintiff's South African court document makes reference to the parties being "married to each other in community of property"). At that time, a Muslim marriage was not legally recognised in South Africa. The Muslim marriage did not confer upon the Muslim spouse the same legal rights that spouses to a civil marriage received. As the Plaintiff was going to move to Indonesia for work, the parties entered into the civil marriage so that they would obtain legal recognition as spouses, entitling them to spousal rights under South African law. It would appear from the affidavits filed by the parties and their respective experts that there have been developments in the recognition of Muslim marriages in South Africa although parties are not in agreement as to how the present-day South Africa court would view their Muslim marriage given their different interpretation of the South African laws.

(d) The Plaintiff accepted a work assignment in Indonesia in August 2010. The Defendant moved to Indonesia to join the Plaintiff in 2011.

(e) The parties have one child (son), born in 2012 in South Africa. The child is a South African citizen who holds a British passport.

(f) In 2014, the family moved to Singapore as the Plaintiff accepted a work offer in Singapore. The Plaintiff holds an Employment Pass while the Defendant and their child are on Dependant's Passes. Since their move to Singapore, the family has been residing in rented accommodations. The child attends international school. According to the Plaintiff, the family did not apply for Singapore permanent residency as there would be "financial implications", in that, the "company benefits (housing, education, living allowance, expatriate premiums, etc)" that he has been enjoying as an expatriate would be removed if they become Singapore permanent residents.

(g) The marriage encountered difficulties when the Plaintiff discovered the Defendant's extra-marital relationship with a third party in 2019.

(h) In 2021, the Plaintiff submitted the Registration for Marriage Counselling Programme in Singapore, which is a pre-requisite for the filing of divorce application in the Syariah Court.

(i) On 22 March 2022, the Defendant filed an *ex parte* "Notice of Motion" in the High Court of South Africa (Western Cape High Court, Cape Town) for leave to institute an action against the Plaintiff by way of Edictal Citation, for a decree of divorce (in respect of the civil marriage) and ancillary relief.

(j) The Defendant's application was allowed on 23 March 2022. Among other things, the Defendant was granted leave to serve the Edictal Citation on the Plaintiff at the Plaintiff's residence in Singapore.

(k) The Edictal Citation was filed in the High Court of South Africa (Western Cape High Court, Cape Town) on 6 April 2022. The Edictal Citation was served on the Plaintiff on 13 April 2022.

(l) On 25 April 2022, the Plaintiff filed the originating summons ("Originating Summons") herein. The Originating Summons was served on the Defendant on 28 April 2022.

(m) On 6 July 2022, the Plaintiff served his South African court documents, namely, the "Claim in Reconvention" and "Special Plea and Plea of the Merits", on the Defendant's South African solicitors. The Plaintiff, *inter alia*, took the position that the South Africa court "lack[ed] jurisdiction".

(n) On 7 July 2022, the Defendant filed the present application in the Syariah Court to stay the Originating Summons proceedings.

(o) The Plaintiff pronounced a written *talak* (divorce) on 7 September 2022. The effect of the written *talak* has not been

determined or confirmed by the Syariah Court. There is however a letter dated 20 March 2023 from the Muslim Judicial Council of South Africa confirming that the *talak* pronounced by the Plaintiff on 7 September 2022 is "a valid Talaq (dissolvement of marriage) in accordance to Shariah Law".

Legal issues

3 The legal issues to be determined are as follows:

(a) Whether the Syariah Court has the power to grant an order for stay of proceedings on the ground of *forum non conveniens*.

(b) If the Syariah Court has the power to do so, what are the applicable principles to determine which is the more appropriate forum.

Issue 1: Whether the Syariah Court has the power to grant an order for stay of proceedings by reason that Singapore is not the appropriate forum

4 It is the Plaintiff's counsel's submission that the Syariah Court does not have the power to grant an order for stay of proceedings by reason of *forum non conveniens*. The Plaintiff's counsel relied on the case of *ER v ES* (2021) 8 SSAR 389. In *ER v ES*, the Syariah Court held that it did not have the power to grant a Mareva injunction as there was no provision in the Administration of Muslim Law Act 1966 (2020 Rev Ed) conferring upon the Syariah Court such power. The Appeal Board upheld the Syariah Court's decision.

5 I am unable to accept the Plaintiff's counsel's submission. A Mareva injunction is a form of equitable relief or remedy. An order for stay of proceedings on the ground of *forum non conveniens* is not a type of relief or remedy. The determination on whether proceedings should be stayed involves a consideration by the Court on whether it should be exercising the jurisdiction it already has. Where a court eventually makes an order for stay of proceedings on the ground of *forum non conveniens*, the Court is applying its discretion to decline the exercise of its jurisdiction on the basis that there is another forum that is more appropriate to hear the dispute.

6 In *ER v ES*, the Court made reference to r 44 of the Muslim Marriage and Divorce Rules (2001 Rev Ed). Rule 44 reads:

Practice and procedure

44. 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.

7 Rule 44 is not applicable to a Mareva injunction as the powers to grant relief or remedy are not "matters of practice and procedure". However, the exercise of discretion by the Court to decline the exercise of its jurisdiction is a matter of practice and procedure. In the circumstances, rule 44 allows the Court to adopt "the practice and procedure for the time being adopted in relation to civil proceedings in any court".

8 In this regard, the Plaintiff's counsel has highlighted that the civil courts have the power to stay proceedings "by reason of a court in Singapore not being the appropriate forum" (s 18(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA") read with para 9 of the First Schedule of the SCJA, and s 18(2) of the SCJA read with s 18(3) of the SCJA read with ss 22 and 26 of the Family Justice Act 2014 (2020 Rev Ed)). The Syariah Court adopts the same practice and procedure by way of r 44 of the MMDR.

Issue 2: Applicable principles to determine whether Singapore is the appropriate forum

9 It is trite that when determining whether a stay ought to be granted on the ground of *forum non conveniens*, the Court should direct its mind to the two-stage test enunciated in the leading case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"), which has been applied and endorsed locally. First, the party seeking the stay (in this case, the Defendant) must show that there is another available forum that is clearly or distinctly more appropriate than Singapore to determine the dispute. In so doing, the court will take into consideration the connecting factors which would point to the forum that has the most real and substantial connection to the case. Secondly, if there is another forum which is *prima facie* more appropriate, the court would ordinarily grant a stay unless there are special circumstances warranting a refusal of stay. At this stage, the burden shifts to the Plaintiff.

10 Having considered the evidence before me, I am satisfied that in respect of the first stage, the Defendant has discharged her burden of showing that South Africa is the more appropriate forum to hear the dispute for the below reasons:

> (a) First, it cannot be said that Singapore is the family's domicile, as compared to South Africa. The Plaintiff, the Defendant 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 Plaintiff's job. The Plaintiff is in Singapore on an Employment Pass. The Defendant and the child are holding Dependant's Passes, pegged on the Plaintiff'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. In fact, this is a deliberate and conscious decision by the Plaintiff to retain the family's expatriate status as the family receives financial benefits by virtue of such status, and which entitlements will cease should they become permanent residents of Singapore. The Plaintiff cannot be allowed to have his cake and eat it. He cannot seek to retain the benefits of his expatriate status yet claim to have given up his domicile in South Africa in favour of Singapore. Throughout the eight years that they have been in Singapore, the family has been living in rented accommodations. They have not acquired real or immovable property in Singapore, unlike in South Africa.

(b) Secondly, it would appear from the parties' actions that they did not wish for their relocation outside of South Africa to impact their legal status in South Africa. This is evidenced by the parties' decision to contract the civil marriage before the Plaintiff relocated to Indonesia so that the South African law would recognise their marital status. 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 (as compared to Singapore where they do not hold any real or immovable property).

(c) Thirdly, even if the Syariah Court 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. In this regard, the Plaintiff's expert, Prof Fareed Moosa, has stated in his affidavit filed on 31 October 2022 that the parties' "civil marriage can only be dissolved in a South African court under the Divorce Act, 1979" (at para 5) and "when a divorce takes place between couples married under South African civil law and under Syariah law, it is necessary that they be divorced both under South African law and under Syariah law" (at para 18). On the other hand, the Defendant's expert, Mr Mahomed Shoaib Omar, a South African legal practitioner, took the view that "[o]nce the parties chose to conclude a civil marriage, it became the only marriage recognised by the law of South Africa" and "the personal and proprietary consequences of this marriage were accordingly governed by the civil law, and not by the Shariah law" by operation of South African law (at para 3.3 of his affidavit e-filed on 13 February 2023).

(d) Even where the Muslim marriage is concerned, 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. In this regard, the Muslim Judicial Council of South Africa has confirmed by letter dated 20 March 2023 that the talak pronounced

by the Plaintiff on 7 September 2022 is "a valid Talaq (dissolvement of marriage) in accordance to Shariah Law". Prof Fareed Moosa has stated in his affidavit filed on 31 October 2022 at [21] that Muslim couples who wish to terminate their Muslim marriages "can do so either by approaching one of the Muslim organisations in South Africa who facilitate the Islamic divorce by way of Talaq or Fasakh (such as, the Muslim Judicial Council of South Africa), or by applying to a civil court to terminate the Islamic marriage". If the Muslim marriage has been terminated, there is no subsisting Muslim marriage for the Syariah Court to dissolve. If the Plaintiff takes the view that 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*, the South Africa court is in a better position than the Singapore Syariah Court to make this determination and provide the necessary elucidation on the legal status of the Muslim Judicial Council of South Africa based on South African laws. This Court further notes that the Plaintiff's expert has suggested that a party may also apply to the South African civil court to dissolve the Muslim marriage (in lieu of "one of the Muslim organisations"). The civil court in South Africa would therefore be the more appropriate forum to determine whether: (1) the dissolution of the civil marriage would automatically dissolve the Muslim marriage; (2) if it does not, whether there is already a termination of the Muslim marriage by way of the letter dated 20 March 2023 by the Muslim Judicial Council; and (3) if the answer to (2) is in the negative, it would appear from Prof Fareed Moosa's evidence that the civil court in South Africa would also have the jurisdiction to dissolve the Muslim marriage. Although there is no current application in the South Africa civil court to dissolve the Muslim marriage, the question on whether there is a need for the South Africa court to do so hinges on the outcome of the issues at (1) and (2).

(e) In light of the above legal considerations, there is 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 (i) whether the Muslim marriage has been validly dissolved and accordingly, whether there is already a foreign divorce dissolving the Muslim marriage; and (ii) the ancillary issues. It must be borne in mind that even if these Syariah Court proceedings are not stayed, the legal issue on whether the Muslim marriage has been dissolved by way of a foreign divorce remains a live issue to be determined by the Syariah Court at the final hearing (*ie*, there remains the possibility that the Syariah Court may adopt the position that there is no subsisting marriage to be dissolved in light of the position taken by the Muslim Judicial Council in South Africa).

(f) Finally, this Court notes that a subject matter of the Defendant's action in the South Africa civil court is the Karriem Familie Trust ("the Trust") executed by the parties and their financial advisor in 2012. The Trust holds assets in South Africa, including properties. These assets are 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. As pointed out by the Plaintiff's counsel, under the Singapore legal framework, where there are third party interests, separate civil proceedings (*ie*, distinct from family 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. In the circumstances, South Africa would be the more appropriate forum to holistically determine whether this is a property, trust, or matrimonial division issue, in particular against the backdrop of the 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).

(g) In the interest of completeness, I would add that the Plaintiff has indicated that he wishes to call the third party (whom the Defendant had a relationship with) and his spouse as witnesses to the divorce proceedings. They are residing in Singapore. I am of the view that this is a neutral factor. Even if the Syariah Court proceedings are not stayed, there will be the involvement of foreign experts (from South Africa) as we have witnessed in this application. Also, it would appear from the affidavits that the Defendant is not disputing the fact that she was involved with a third party. A *talak* has also been pronounced by the Plaintiff.

11 At this stage, the burden shifts to the Plaintiff. Am I satisfied that there are special circumstances warranting a refusal of stay? In my view, there is none. With regard to the Plaintiff's position that the South Africa court will not make an order in respect of the child who is situated outside the jurisdiction of South Africa, even if the Syariah Court proceedings are stayed, the parties are at liberty to seek orders in respect of the child from the Family Justice Courts under the Guardianship of Infants Act 1934 (2020 Rev Ed).

12 I am therefore ordering that the proceedings herein be stayed in view of the ongoing proceedings in South Africa.

Costs

13 In light of the outcome of this application, the Defendant has sought costs in the sum of $5,000.00. The Plaintiff's counsel has submitted that there should be no order on costs given that these are matrimonial proceedings and the legal issue on whether the Syariah Court has the power to grant stay of proceedings on the ground of *forum non conveniens* is a novel one.

14 I am of the view that it is reasonable for costs to follow the event. This is an application involving civil procedure and the principles relating thereto. I do not accept the Plaintiff's counsel's argument that there has been a novel legal issue to be determined. In the circumstances, I am ordering costs in the sum of $1,500 to be paid by the Plaintiff to the Defendant forthwith.

[Editorial note: This is the order of the Appeal Board (comprising Sheik Mustafa bin Abu Hassan, Muhammad Haniff bin Hassan, Sunari bin Kateni) dated 29 January 2024.]

ORDER OF APPEAL BOARD

1. **UPON THE APPEAL** No 27/2023 **AND UPON HEARING** Counsel for the Appellant and Counsel for the Respondent, it is **ADJUDGED THAT** the appeal be and is hereby dismissed.

2. It is further ordered that the Appellant shall pay the Respondent $5,000.00 as the costs of the appeal.

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)
