

Republic of South Africa



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 19109/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 26 October 2021
Judgment: 2 November 2021

In the matter between:

R[....] D[....] S[....]

Applicant

and

**S[....] B[....] S[....]
GLYNN MARAIS INCORPORATED
REGISTRAR OF DEEDS, CAPE TOWN**

First Respondent
Second Respondent
Third Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant, who currently lives in Senegal, has applied for the recognition in this jurisdiction of an order that she obtained in the Senegalese courts dissolving the bands of marriage between herself and the first respondent (to whom I shall hereafter refer simply as ‘the respondent’). The order directed that an equal division of the parties’ property should follow in accordance with what the Senegalese court apparently accepted had been the

parties' marriage in community of property.¹ The significance of the order locally concerns its bearing on the disposal of the proceeds of a property in Constantia formerly registered in the respondent's name that has recently been sold. The applicant lays claim under the Senegalese order to half of those proceeds. An order was taken by agreement in this court earlier this year sequestering the proceeds pending the determination of the application for the recognition of the Senegalese judgment.

[2] The applicant explained in her founding papers that the divorce order was taken 'by default' after the respondent, who lives in Nigeria, allegedly evaded service of the process instituting the proceedings. She averred that the Senegalese court was prepared to grant the order after being furnished with evidence establishing that the respondent and his legal representatives were aware of the divorce proceedings and had withheld their cooperation concerning service of the papers. The Senegalese order was issued at a time when there were also pending divorce proceedings instituted by the respondent against the applicant in the Nigerian courts.

[3] The respondent is opposing the application for the recognition order. He, however, failed to deliver his answering papers in time, and it became necessary for the applicant to obtain an order through the chamber book putting him to terms. His answering papers were put in a day after the expiry of the period afforded to him in the order made in the chamber book. The applicant refused to accept the answering papers out of time, and it accordingly became necessary for the respondent to apply for condonation for their late delivery.

[4] The respondent set down the application for the recognition order for hearing when the applicant had not herself taken any steps to enlist the application after the time for allowed for the delivery any replying papers had elapsed. He gave notice that he would move his application for condonation at the hearing of the main application. The applicant continued to withhold her replying papers, taking the position that she was under no obligation to do so until after the applicant had been granted condonation for the late delivery of his answer.

[5] The applicant did not oppose the respondent's application for condonation.² She, however, applied for a postponement of the hearing of the recognition order application. She

¹ The parties were married in South Africa without an antenuptial contract. The respondent denies that he was domiciled in South Africa at the time and disputes the applicant's contention that the proprietary consequences of the marriage were governed by South African law.

² The application for condonation was granted at the commencement of the hearing on 26 October 2021.

appeared to take the attitude that an appeal lodged by the respondent in the Senegalese jurisdiction against the divorce order granted there impelled a stay of the pending proceedings for the recognition of that order in this court. The postponement sought by the applicant was therefore for an indeterminate period, until after the final completion of the appellate proceedings in Senegal.

[6] The respondent opposed the applicant's application for a postponement. He contended that the postponement application was not bona fide and that the applicant had not satisfied the general requirements for the indulgence rehearsed in *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmSC) amongst others, more particularly the application for a postponement had not been made timeously and was not bona fide. The respondent argued that the applicant had only herself to blame for not having filed replying papers and that the recognition application should be decided on the papers as they are. In the alternative, and if the application were nevertheless to be postponed, he asked that it should be on fixed terms as to the further exchange of affidavits by way of supplementary answering papers and the delivery thereafter by the applicant of her replying papers. The respondent's position was that in either case, there was no need for the determination of the recognition order application to await the outcome of the further proceedings in Senegal.

[7] In his answering papers the respondent contended that the application for recognition of the Senegalese order fell to be dismissed for failing to comply with the requirements for recognition identified in *Jones v Krok* 1995 (1) SA 677 (A) at 685B-D. The appeal court stated in that case a foreign judgment will be enforced by our courts 'provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended'.

[8] The respondent contended in his answering papers that the recognition application was stillborn because the Senegalese order was not final and conclusive by virtue of the fact that it was subject to a pending appeal and also that it would be contrary to public policy to

recognise an order obtained against him in proceedings of which he had not been given formal and proper notice. The respondent's first mentioned contention is not supported by the judgment in *Jones v Krok*, which broadly endorsed the approach followed in English law that 'the requirement of finality means that the judgment must be final in the particular court which pronounced it. Such finality is not affected by the fact that the judgment is liable to be reversed on appeal or even by the fact that there is an appeal pending, unless a stay of execution has been granted in the foreign country pending the hearing of the appeal'.³

[9] In *Jones v Krok* supra, at 692B-G, Corbett CJ expressed the general principles and rules which our courts should apply in regard to proceedings for the enforcement of a foreign judgment which is subject to appeal as follows:

'(1) The fact that the judgment is subject to appeal or even that an appeal is pending in the foreign jurisdiction does not affect the finality of the judgment, provided that in all other respects it is final and conclusive.

(2) Where, however, it is shown that the judgment is subject to such an appeal or that such an appeal is pending, the Court in this country which is asked to enforce the judgment enjoys a discretion and in the exercise thereof may, instead of giving judgment in favour of the plaintiff, stay the proceedings pending the final determination of the appeal or appeals in the foreign jurisdiction.

(3) Although the onus of proving that a foreign judgment is final and conclusive rests upon the party seeking to enforce it, ... it seems ... that, where this onus has been discharged, it is up to the defendant to place before the Court the facts relating to the impending appeal and such other relevant facts as may persuade the Court to exercise its discretion in favour of granting a stay of proceedings.

(4) In exercising this discretion the Court may take into account all relevant circumstances, including (but not confined to) whether an appeal is actually pending, the consequences to the defendant if judgment be given in favour of plaintiff and thereafter (possibly after the judgment has been satisfied) the appeal succeeds in the foreign jurisdiction and whether the defendant is pursuing the right of appeal genuinely and with due diligence. As a rule, however, the Court will refuse to assess the merits and demerits of the appeal and its prospects of success in the foreign Court.'

³ *Jones v Krok* supra, at 689C-690F.

[10] In argument, the respondent's counsel submitted that it was also evident on the facts that the Senegalese court did not have jurisdiction to entertain the divorce action according to the principles of our law with reference to the jurisdiction of foreign courts. Mr *Rosenberg* SC said this was because the respondent had not been resident in Senegal when the proceedings were instituted, and he had not submitted to the jurisdiction of the courts there. The first point seems to be established, but in the context of the appeals that the respondent lodged against the judgment the question whether there was a submission to jurisdiction appears to be an arguable one. There is also some lack of clarity as to juridical character of the respondent's appeals. Obtaining clarity could be relevant for determining any argument whether the respondent did submit to the Senegalese jurisdiction. These are matters on which more evidence might helpfully shed light.

[11] It would also be useful for a court seized of determinatively deciding the recognition application to know how the Senegalese courts entertain cases where there has been no direct service on the defendant in circumstances in which there is evidence that he or she has been evading service. Evidence on the point could influence the decision whether it would be contrary to public policy to recognise the judgment because of an apparent lack of due process.

[12] These are in summary the considerations that weighed with me against accepting the respondent's invitation to adjudicate the recognition application on the papers in their current state of development.

[13] I however agree with the respondent's counsel that there is no reason why the determination of the recognition application should be deferred until after the appeal proceedings pending in Senegal have been finally decided. The appeal court's decision in *Jones v Krok* demonstrates that it would be competent for this court to decide the application before the Senegalese appellate procedures have been exhausted. If the Senegalese divorce order were recognised, this court would make an appropriate ruling to avoid any consequent prejudice to the respondent pending the exhaustion of his rights of appeal against the order in Senegal. If, on the other hand, the recognition application were refused, the interim interdict in respect of the disposal of the proceeds of the sale of the Constantia property could be discharged sooner rather than later.

[14] The parties each sought costs against the other in respect of the hearing on 26 October 2021. In my view, save for the respondent's application for the condonation of the late

delivery of its answering papers, liability for the costs incurred in connection with the hearing on 26 October in respect of the recognition application and the applicant's application for a postponement thereof should stand over for determination when the recognition application is decided after the exchange of further papers to be permitted by the order I propose to make consistently with the draft order that I requested the parties to prepare for the further conduct of the principal application. There will be no order as to costs in respect of the respondent's application for condonation.

[15] An order will issue as follows:

1. The application is postponed for hearing on the opposed motion roll in the Fourth Division on Wednesday, 11 May 2022 (being a date assigned by the Registrar);
2. The first respondent is granted leave to deliver supplementary answering papers to update the evidence in respect of the facts of the matter as they have developed since his answering affidavit was delivered.
3. The first respondent is directed to deliver such supplementary answering papers, if any, on or before Monday, 31 January 2022.
4. The applicant is granted leave to deliver replying affidavit(s).
5. The applicant is directed to deliver her replying papers, if any, on or before Thursday, 31 March 2022.
6. The applicant shall deliver heads of argument no fewer than 15 days before the hearing date.
7. The first respondent shall deliver heads of argument no fewer than 10 days before the hearing date.
8. There shall be no order as to costs in respect of the first respondent's application for condonation of the late delivery of his answering affidavit.
9. Save as provided in paragraph 8, liability for the costs incurred in respect of the hearing on 26 October 2021, including the costs of the applicant for a postponement, shall stand over for determination by the court in the principal application.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES**Applicant's counsel:****F. Bezuidenhout****Applicant's attorneys:****Kampel Kaufman Inc
Houghton, Johannesburg****Abrahams & Gross Inc.
Cape Town****First respondent's counsel:****S.P. Rosenberg SC
T.R. Tyler****First respondent's attorneys:****Lamprecht Attorneys
Cape Town**