DIVORCE IN DUBAI OR PRETORIA – DOMICILE, JURISDICTION, APPLICABLE LAW, ANTI-SUIT INJUNCTION

AV v WV [2017] ZAGPPHC 324 (case no 5881/17) (6 July 2017) (GDP)

1 Introduction

Many South Africans work and live in the United Arab Emirates, especially in Dubai, which is one of the seven emirates. The emirate of Abu Dhabi is the seat of the federal government and the emirate of Dubai is the commercial and financial centre of the country (see Krüger "Zur Praxis des Internationalen Privatrechts in den Vereinigten Arabischen Emiraten" in Mansel, Pfeiffer, Kronke, Kohler, Hausmann (eds) *Festschrift für Erik Jayme* (2004) vol 1 477). Numbers of South Africans in Dubai alone run into the tens of thousands. South Africans often move there to avoid crime in their home country and are enticed by the generally higher salaries. Nevertheless, most South Africans do not intend to settle in the United Arab Emirates permanently (see "South Africans in the United Arab Emirates" https://en.wikipedia.org (accessed 2017-08-21)). Conflicts of family and succession law may readily ensue. Private international law has the function to delineate and harmonise the roles of domestic legal systems in this regard (see, in general, Glenn "La conciliation des lois" (Cours général de droit international privé (2011)) in Académie de Droit International *Recueil des Cours / Collected Courses of the Hague Academy of International Law* (2014) vol 364 187).

AV v WV ([2017] ZAGPPHC 324) is typical in this regard. The case deals with the intended divorce of two South African parties resident in Dubai. Husband and wife are citizens of the Republic of South Africa and their domicile of origin was South African (par 14, 18 and 21). After an armed robbery, the parties moved to Dubai, where the husband found employment as a pilot (par 5, 15 and 17.3). Approximately eight or nine years later (par 7, 15 and 17.7), the wife initiated divorce proceedings in the Gauteng Division, Pretoria, of the High Court of South Africa (hereinafter "the Pretoria High Court") (par 3, 5 and 8). However, the husband instituted divorce proceedings in Dubai (par 8) and contended that the Pretoria High Court did not have jurisdiction, as the parties were not domiciled in its area of jurisdiction (par 7 and 14). The wife petitioned the Pretoria High Court to interdict the husband from proceeding with the divorce in Dubai (par 1). PM Mabuse J came to the conclusion that the Pretoria High Court had jurisdiction in the divorce proceedings between the parties and issued an interdict against the respondent, the husband, to refrain from proceeding with the divorce action in Dubai (par 2).

The case was marked as "not reportable" by the judge, being "not of interest to other judges". However, it is suggested that the decision is of substantive social and legal interest and deserves a wide readership. The case discussed is the revised version, as reported on the Saflii website (www. saflii.org (accessed 2017-08-21)).

2 Jurisdiction and applicable law in the courts of Dubai

The husband initiated divorce proceedings in Dubai (par 8) and, indeed, the courts in Dubai would have jurisdiction in the matter. According to the official website of the government of the United Arab Emirates, residents who are nationals of other countries are entitled to divorce in the Emirati courts ("Divorce Laws for Muslim Couples" and "Divorce Laws for Non-Muslim Couples" https://government.ae/en (accessed 2017-08-21)). Moreover, the parties, or one of the parties, would *in casu* be entitled to invoke South African law (art 1(2) of Federal Law 28 of 2005 on Personal Status) as the law of the nationality of the husband at the time of marriage (art 13(1) of Federal Law 5 of 1985 on the Civil Transactions Law of the United Arab Emirates (Civil Code)). (For introductions to Emirati private international law, see Elhawary "Regulation of Conflict of Laws in the United Arab Emirates" 2013 *Arab Law Quarterly* 1; Krüger in Mansel *et al* (eds) *Festschrift für Erik Jayme* 477.)

However, it could be that certain aspects of the divorce proceedings, for instance, claims for maintenance, would be governed by the law of the United Arab Emirates. The law in this country is based on (a mainly Malikite interpretation of) Islamic law (see art 1 of the 1985 Law and art 2(3) of the 2005 Law). The official website of the government of Dubai reads in this regard: "Non-Muslims and other expatriates can file for divorce either in their home country (domicile) or in the UAE. Non-Muslims who got married in the UAE can divorce under their own country's laws. In case they choose to divorce from Dubai Courts, then the Sharia law will prevail, when it comes to child support and child custody, alimony or division of assets" ("Legal Procedures for Divorce" www.dubai.ae/en (accessed 2017-08-21)).

It is true that article 15 of the 1985 Law provides that maintenance obligations arising from family relationships shall be determined in accordance with the law of the debtor. This refers to the law of nationality of the party who has to pay maintenance (see the translation by Krüger and Küppers in Kropholler, Krüger, Riering, Samtleben, Siehr *Außereuropäische IPR-Gesetze* (1999) 998 (in light of the nationality principle in art 11(1) of the 1985 Law): "Für die Unterhaltspflicht unter Verwandten gilt das [Heimat]recht des [Unterhalts]pflichtigen"), which would *in casu* be South African law as the husband's *lex patriae.* Nevertheless, case law from Dubai in the past indeed applied Islamic law to the maintenance of spouses, irrespective of the husband's nationality, on the basis of public policy as inspired by Islamic law (see art 3 and 27 of the 1985 Law) (although there seems to be a recent tendency to less readily invoke public policy in this regard – see Krüger in Mansel *et al* (eds) *Festschrift für Erik Jayme* 478–481). (If the parties were South African Muslims, which is not clear from the reported case, it seems

that Islamic law in respect of maintenance would have applied and not South African law, irrespective of whether they were married in terms of the Marriage Act 25 of 1961 or solely in terms of a religious ceremony – see the web page of the government of the United Arab Emirates, referred to above. "Islamic law" in this context would probably be the interpretation of Islamic law to which the husband is most closely related (see Krüger in Mansel *et al* (eds) *Festschrift für Erik Jayme* 480) – for South Africans often the Shafi'i or Hanafi interpretation of Islamic law. On Islamic law in South Africa, see Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* (2011). Also, see Neels "Constitutional Aspects of the Muslim Marriages Bill" 2012 *TSAR* 486; Neels "The Positive Function of Public Policy in Private International Law and the Recognition of Foreign Muslim Marriages" 2012 *SAJHR* 219.)

The possibility of the application of Islamic law caused the wife to approach the Pretoria High Court to interdict the husband from proceeding with the case in Dubai:

> "[T]he divorce law that the Court in Dubai will apply to [the] divorce action will be highly prejudicial to her as a woman by reason of the fact that she will not be able to claim spousal maintenance for a period in excess of three months after the order of the divorce action in Dubai" and "[T]he law that applies in Dubai, a wholly Muslim country, is Sharia law in terms of which there is no equality between man and woman and in particular in terms of which a woman's rights are subordinate to a man's rights" (par 9).

3 Islamic and South African law of maintenance

It seems to be generally agreed that under Islamic law the husband is indeed obliged to pay maintenance after divorce only in specific instances, for example during the period that the ex-wife has custody of any children of the parties and during the mandatory waiting period after divorce called *'iddah* (see Agrawal *Family Law in India* (2010) 217; El Alami and Hinchcliffe *Islamic Marriage and Divorce Laws of the Arab World* (1996) 23; Esposito and DeLong-Bas *Women in Muslim Family Law* (2001) 25 and 35; Hallaq *Sharī'a. Theory, Practice, Transformations* (2009) 288; Khan and Khan (eds) *Encyclopaedia of Islamic Law, Law of Marriage and Divorce in Islam* (2006) vol 6 316 and 319; Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* 117; Moosa and Karbanee "An Exploration of *Mata'a* Maintenance in Anticipation of the Recognition of Muslim Marriages in South Africa: (Re-)opening a Veritable Pandora's Box?" 2004 *Law, Democracy and Development* 267 269–270; Nasir *The Islamic Law of Personal Status* (2002) 142–144; Pearl and Menski *Muslim Family Law* (1998) 203; Rohe *Das islamische Recht. Geschichte und Gegenwart* (2009) 90). A Muslim woman is not allowed to remarry after divorce or the death of her husband for the period of *'iddah*, which usually lasts for three to four months or, when pregnant, until the time the child is born (see Agrawal *Family Law in India* 113; El Alami and Hinchcliffe *Islamic Marriage and Divorce Laws of the Arab World* 14–15; Esposito and DeLong-Bas *Women in Muslim Family Law* 20, 30, 34 and 37; Hallaq *Sharī'a. Theory, Practice, Transformations* 283; Khan and Khan (eds) *Encyclopaedia of Islamic Law, Law of Marriage and Divorce in Islam* vol 6 34–35; Moosa *Unveiling the Mind. The Legal Position of Women in Islam – A South African Context* 115–

116; Nasir *The Islamic Law of Personal Status* 65–66; Pearl and Menski *Muslim Family Law* 147–148, 183–184 and 203; Rohe *Das islamische Recht. Geschichte und Gegenwart* 82; for the United Arab Emirates, see art 69 and 139 of the 2005 Law).

In contrast, under South African law, an ex-wife married under customary law (s 8(4) of the Recognition of Customary Marriages Act, *inter alia* referring to s 7 of the Divorce Act 70 of 1979) or the Marriage Act may, if she has the need and the ex-husband has the means (and taking all other factors into account), claim maintenance until death or remarriage (see s 7(2) of the Divorce Act; Neels 2012 *TSAR* 500–502). It could, therefore, have been detrimental to the wife to have the divorce case disposed of by an Emirati court. (Although marriages concluded under the tenets of a religion only are not currently recognised fully in South Africa, ex-spouses under either monogamous or polygynous Muslim marriages may claim maintenance in terms of the common-law: see *Khan v Khan* 2005 (2) SA 272 (T); *AM v RM* 2010 (2) SA 223 (ECP)).

4 Relevance and determination of the domicile of the parties

The court had to determine the domicile of both parties to establish its jurisdiction in the current case. Section 2(1) of the Divorce Act determines:

> "A court shall have jurisdiction in a divorce action if the parties are or either of the parties is – (a) domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or (b) ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date."

As the wife had not been ordinarily resident in South Africa for the past year (and much longer), the Pretoria High Court would be competent to entertain her petition for divorce only if she was domiciled in the area of jurisdiction of the court (physical presence – or residence – is not required: see par 11 and 19 of the decision). Also, the husband could be interdicted from proceeding with the divorce in Dubai only if he were domiciled in the area of jurisdiction of the court (see Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2012) 249; *Metlika Trading Ltd v Commissioner for the South African Revenue Service* 2004 ZASCA 97 par 49).

The content of the connecting factor of domicile for the purposes of jurisdiction (or applicable law) must be determined according to the rules and principles of the local law (the *lex fori*) (*Ex Parte Jones: in re Jones v Jones* 1984 (4) SA 725 (W); and *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) 1093). The parties were originally domiciled in South Africa, more specifically in Pretoria (par 17.1–2). The court formulates the relevant requirements for a change in domicile as follows: "In order to acquire a domicile of choice, […] a person must[,] firstly, have taken up residence at the place concerned and[,] secondly, […] have formed the intention to reside permanently at that place" (par 14; also see par 13, 16, 17.3 and 17.4). However, this was the common-law test (see *eg Eilon v*

Eilon 1965 (1) SA 703 (A) 721), which was replaced (non-retrospectively as from 1 August 1992) by section 1(2) of the Domicile Act 3 of 1992: "A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period." The requirement of an intention to reside permanently has therefore been replaced by an intention to reside indefinitely. (This was also not realised by the courts in *Grindal v Grindal* 1997 (4) SA 137 (C) 140, *Toumbis v Antoniou* 1999 (1) SA 636 (W) 639, *Sadiku v Sadiku* case no 30498/06 (26-01-2007) (T) per www.saflii.org par 9 (see Neels and Wethmar-Lemmer "Constitutional Values and the Proprietary Consequences of Marriage in Private International Law – Introducing the *Lex Causae Proprietatis Matrimonii*" 2008 *TSAR* 587 592) and *Berrange v Hassan* 2009 (2) SA 339 (N) 371. In *Lenferna v Lenferna* 2013 ZASCA 204 the common-law test was correctly applied, as the relevant moment in time was the conclusion of the marriage in 1983. See the discussion in Neels and Fredericks "The Proper Law of the Proprietary Consequences of Marriage: Mauritian Law in the South African Supreme Court of Appeal" 2015 *TSAR* 818 924–925.) The new test is more readily complied with than the common-law criterion, as the intention to settle for an indefinite period "does not require an intention to remain permanently" (*Chinatex Oriental Trading Co v Erskine supra* 1094; the correct test is also stated in *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) 823).

In casu, the court concluded that both the husband and the wife were domiciled in the area of jurisdiction of the Pretoria High Court. The court, therefore, had jurisdiction in divorce proceedings between the parties and it also had jurisdiction to interdict the husband from proceeding with the divorce in Dubai (par 2). Although the parties had been living outside of South Africa for approximately eight or nine years (par 7, 15 and 17.7) (the length of time spent in a particular country is an important determinative factor: see, for instance, *Chinatex Oriental Trading Co v Erskine supra* 1094; and *Erskine v Chinatex Oriental Trading Co supra* 823; *cf Toumbis v Antoniou supra* 639), the parties emigrated for work purposes and not to stay in Dubai permanently (par 13 and 17.3; see *Erskine v Chinatex Oriental Trading Co supra* 823). The respondent obtained an employment visa but the parties did not acquire a permanent residence visa for Dubai (par 17.3 and 18; *cf Toumbis v Antoniou supra*). (The United Arab Emirates do not offer permanent residency to foreigners, but this may change for exceptional cases in future – see Shahine "UAE to Adopt System Seeking to Lure Top Foreign Talent" www.bloomberg.com/news/articles/2017-02-05 (accessed 2017-09-12)). If the respondent were to lose his employment, he (and the applicant) would have to return to South Africa; at the latest, they would have to return upon the husband's retirement at 60 (par 18). There was no evidence before the court that they had the intention to abandon their South African domicile and live permanently in Dubai (par 17.4, 17.6, 17.8 and 21). They, therefore, remained domiciled in South Africa (see par 18). (On the role of the statement of the wife's attorneys in a letter, see par 15, 16 and 21.)

It is submitted that the same outcome might have been reached with the test as prescribed in section 1(2) of the Domicile Act ("the intention to settle … for an indefinite period"). The period of residence in Dubai would at the

latest have come to an end with the respondent's retirement, and could therefore not be said to be for an indefinite period (*cf* the example of the football player in par 17.7, who plays on contract in the United Kingdom for ten years: his residence would not be for an indefinite period of time, however long; and see *Erskine v Chinatex Oriental Trading Co supra* 823). The parties did not have the intention to remain in Dubai forever (permanently – the common-law test), nor did they have the intention to settle there for an indeterminate (indefinite – the statutory criterion) period of time. They had the intention to remain resident in the United Arab Emirates for an *a priori* determined period of time (probably due to the non-availability of a permanent residence visa for them) and therefore did not obtain domicile in that country.

5 Interdict (anti-suit injunction)

The court interdicted the husband from proceeding with the divorce case in Dubai. (On interdicts, in general, see Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (2009) 1454–1494; Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 246–249; Pistorius *Pollak on Jurisdiction* (1993) 115–120.) In English law this remedy would be called an anti-suit injunction. (See Briggs *Private International Law in English Courts* (2014) 390–405; Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* (2012) 534–535, 583–599, 856, 867–873 and 1112; Fentiman *International Commercial Litigation* (2015) 532–540; Mosimann *Anti-suit Injunctions in International Commercial Arbitration* (2010); Raphael *The Anti-suit Injunction* (2008).) The "clear right" requirement for the purposes of an interdict in South African law (*Setlogelo v Setlogelo* 1914 AD 221 227) (or "*prima facie* right" in an interlocutory context) would have been "[a] right not to be sued in the foreign court" (Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* 585) (the requirements for an interdict are not considered *in casu*). This terminology could be appropriate in the context of, for example, an arbitration clause in an international commercial contract, but sounds rather artificial in the current family law context. Perhaps the courts could in future consider the test used in English law today in the context of anti-suit injunctions, namely that a "court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court … where it is necessary in the interests of justice for it to do so" (Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* 534–535). The facts *in casu* indeed indicated that the granting of a prohibitory interdict against the husband would be in the interests of justice: the parties were domiciled in South Africa and, as such, the South African court was the natural forum (*forum conveniens*) for the divorce proceedings; the divorce proceedings were already pending before the South African court; and the Court in Dubai would perhaps not have made sufficient provision for spousal maintenance after divorce (application of Emirati law would have been "inappropriate" – see Raphael *The Anti-suit Injunction* 127, who, however, states that "[t]he concept of an 'appropriate' law is not yet developed" (127 fn 26)).

6 Applicable law in the South African courts

As indicated, it was decided that the Pretoria High Court had jurisdiction in the matter. In a South African court, in the absence of an antenuptial contract, the law of the common domicile of the parties at the conclusion of the marriage would apply to the proprietary consequences of the marriage, *in casu* South African law (see Neels and Fredericks 2015 *TSAR* 921; on the constitutional issues in the scenario where the parties are not domiciled in the same country at the conclusion of the marriage, see Neels "The Law Applicable to the Proprietary Consequences of Marriage in South Africa – the Influence of German Private International Law" in Möllers and Hugo (eds) *Transnational Impacts on Law – Perspectives from South Africa and Germany* (2017) 117). In the absence of an antenuptial contract, the parties would, therefore, share the joint estate equally. If the parties were married out of community of property by antenuptial contract, and the other requirements for the application of section 7(3)–(4) of the Divorce Act were met, either one of the parties (here probably the wife) could request redistribution of assets at divorce, irrespective of the classification of redistribution as a divorce issue, a proprietary issue or a hybrid proprietary/divorce issue, as both the *lex fori* and the proper law of the proprietary consequences of marriage would be South African law. (See on redistribution of assets on divorce, Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 307–311; Neels "Die Internasionale Privaatreg en die Herverdelingsbevoegdheid by Egskeiding" 1992 *TSAR* 336; Neels and Fredericks 2015 *TSAR* 818; Neels and Wethmar-Lemmer 2008 *TSAR* 587; Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) 86–91; Schulze "Conflict of Laws" in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* (2014) 631 654–657. S 7(9) of the Divorce Act would not be relevant, as the proper law of the proprietary consequences of the marriage would be South African law.) A claim for maintenance would be governed by the *lex fori*, South African law (see s 2(3) of the Divorce Act; Neels "Classification as an Argumentative Device in International Family Law" 2003 *SALJ* 883 887 with references; and Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* 92; on maintenance in domestic South African law, see Clark *Handbook of the South African Law of Maintenance* (2016)).

7 Concluding remarks

The decision emphasises the role of (an application for) a permanent residence visa (the same would apply in respect of nationality) in determining the intention of the parties in the context of domicile. Concluding an employment contract for a fixed number of years, or even an employment contract which might last until the date of retirement, is not sufficient to indicate the intention to remain indefinitely in the new country. Perhaps the fact that both parties had their domicile of origin in South Africa (and are South African citizens) (see par 14, 18 and 21) also played a role in this regard.

If the parties at any stage obtained a permanent residence visa for (or

citizenship of) the United Arab Emirates (as opposed to a mere employment visa), the South African court may readily have come to the conclusion that the parties acquired a domicile of choice in that country, having the *animus non revertendi* in respect of South Africa (*cf* par 14 and 15) and the intention to settle in the United Arab Emirates for an indefinite period. This would have excluded the divorce jurisdiction of the South African courts. (On the recognition of foreign divorce orders (including these of Emirati courts) in South Africa, see s 13 of the Divorce Act; Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 444–449; Schulze in Heaton (ed) *The Law of Divorce and Dissolution of Life Partnerships* 661–664.) However, the plaintiff could perhaps have moved back to South Africa with the intention to stay here for an indefinite period of time (or merely remain an ordinary resident in the country for a year). The divorce jurisdiction of the local courts would then have revived (only one of the parties needs to be domiciled or ordinarily resident in South Africa – s 2(1) of the Divorce Act).

As far as the current author could determine, the decision introduces for the first time into South African law the (interlocutory) prohibitory interdict in the form of a common-law-style anti-suit injunction (but without using this terminology). (The reference to an anti-suit injunction in *Owner of the MT Tigr v Transnet Ltd t/a Portnet* (214/97) [1998] ZASCA 40 p10) is to an English procedure attempting to restrain the respondent from pursuing action in South Africa.) The function and requirements for this remedy in South African law should be investigated fully. Australian (see Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* (2014) 218–234), Canadian (see Pitel and Rafferty *Conflict of Laws* (2016) 145–161), English (see Briggs *Private International Law in English Courts* 390–405; Collins (gen ed) *Dicey, Morris and Collins on the Conflict of Laws* 534–535, 583–599, 856, 867–873 and 1112; Fentiman *International Commercial Litigation* 532–540; Mosimann *Anti-suit Injunctions in International Commercial Arbitration* (with references to American and Swiss law); Raphael *The Anti-suit Injunction*), Indian (*Modi Entertainment Network v WSG Cricket PTE Ltd* 2003 4 SCC 341) and Nigerian (Oppong *Private International Law in Commonwealth Africa* (2013) 426–427) law could be utilised as comparative models in this regard.

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