CIV/APN/327/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

ACHAMAT ESSACK ADAM — APPLICANT

AND

MAIROON ADAM (Previously KHAN born DAMBHA) — RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 19th day of December, 1994.

On the 12th November, 1994 Mr. Roberts for Applicant applied for judgment in terms of the Notice of Motion. Mr. Mohau, counsel for Respondent, said he did not have enough instructions.

Respondent was served with the application and filed of record a Notice of Intention to Oppose dated 11th November, 1994. She had therefore had over 30 days to answer applicant's averrments. On the 7th December, 1994 Respondent's attorneys received the Applicant's Notice of Set-down putting this matter on the roll. As Applicant did

/...

not even ask for costs, the matter proceeded because I was satisfied that Respondent knew of this date and had been given sufficient time to prepare her defence.

This application is for an Order:

"1. Declaring the Final Order of Divorce granted in the Supreme Court of South Africa, Cape of Good Hope Provincial Division, together with Consent Paper marked "B" under case number 462/92 to be an enforceable foreign judgment in the Kingdom of Lesotho.

2. Costs of Suit.

3. Further and/or alternative relief."

I invited Mr. Roberts, Counsel for the Applicant to address me on the law and procedure that I should follow. In order to enable Mr. Roberts to prepare, the matter was postponed to the 13th December, 1994. That day Mr. Moiloa appeared for Applicant and filed heads of argument. I reserved judgment to the 19th December, 1994.

A judgment of any court of competent jurisdiction whether domestic of foreign may be sued on in our courts subject to the following conditions:

1. The judgment must be final.

2. The foreign judgment must not be repugnant to our law.

3. That Court must be of a court of competent jurisdiction according to our law.

See Jacob & Ors. *The Supreme Court Practice* 1982 volume I 6/2/8. (An English Law Book).

As Forsyth and Bennet in *Private International Law* page 323 have shown,

> " A plaintiff may sue in one country and hear with pleasure judgment given in his favour; then he may discover to his dismay, that the defendant, with his assets has absconded to another country. Plaintiff's judgment has become *brutum fulmen* in the country which pronounced it.."

In *Duarte v Lissack* 1973 (3) SA 615 dealing with

recognition of foreign judgment out of comity of nations Shearer J. at page 621 said:

> "Now I consider it clear that the recognition of foreign judgments by our courts takes place *ex comitate*. This involves the recognition that the merits of the case have been argued and determined if the Court is one of competent jurisdiction. Our courts will not sit as if in appeal, on a foreign judgment. If a party is aggrieved at proceedings in the foreign court, then he must resort to the appellate procedure there."

Such a judgment of course must not be:-

> "in respect of a cause of action which for reasons of public policy or for some similar reason could not have been entertained" by the Courts of Lesotho. See *Section 3* of the *Reciprocal Enforcement of Judgment Proclamation 2* of 1922.

This Section embodies the common law and applies with even greater force to countries with no reciprocity with Lesotho.

The Republic of South Africa is not among the countries with which Lesotho enjoys a reciprocal enforcement of judgment status. This could have happened if the legislature of the then Union of South Africa had

made a law facilitating the enforcement of Lesotho judgments within its courts. Lesotho by similar legislation would have done the same. In terms of *Section 6(4)* of the *Reciprocal Enforcement of Judgments Proclamation 2* of 1922 this would be done by publication of a Notice in the Gazette declaring that Proclamation extends to that country.

This problem is not insurmountable because it can be dealt with through the Common Law. Nevertheless as Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 3rd Edition Page 647 have stated:-

> "A foreign judgment has, *per se* no direct operation on its own force in this country, owing to the principle of territorial sovereignty."

According to our private internal law in cases of divorce "the crucial test is whether the domiciliary law was applied". See Hahlo *Husband and Wife* 4th Edition, page 645. The courts of the country in which the parties are domiciled are traditionally the ones that have jurisdiction to entertain divorce actions. A husband is the one who determines the domicile of the parties. Spiro in *Conflict of Laws 1st Edition* at page 20 puts it as follows:

/...

> "In actions for both divorce and nullity in respect of a voidable marriage the jurisdiction depends upon the domicile of the husband at the date of the institution of the proceedings."

Our international private law rules like the South African ones do not differ from English law. See *Webber v Webber* 1915 AD 239 at page 258 where de Villers A.J. says our law in this respect does not differ from English law.

In this case the husband seems to have been domiciled in South Africa when he as Plaintiff brought divorce proceedings which are the subject of this application. But the marriage that was dissolved by the South African courts was entered into in Lesotho. I read the consent paper signed by Applicant and Respondent it states Applicant left Lesotho and now permanently resides in South Africa. Although Applicant's application did not dwell on the question of domicile at length, I am satisfied that Applicant must have been domiciled in the Republic of South Africa, otherwise Applicant would have challenged Applicant's domicile and the jurisdiction of the court that granted the divorce order.

The common law principles that govern the recognition and enforcement of foreign judgments are also included in

Section 3(2) of the *Reciprocal Enforcement of Judgments Proclamation* of 1922. Among these is that the Defendant must have been duly served with the original process of the foreign court. See Section 3(2)(c) of the *Reciprocal Enforcement of Judgments Proclamation* of 1922. The reason being that as stated in the case of *Joyce v Joyce and O'Hare* [1979] 2 All ER 156, it would be contrary to public policy to recognise a foreign decree of divorce where one spouse had no reasonable opportunity to take part in the foreign proceedings. In the case before me Respondent was not only served but actually took part in the proceedings before the Cape Provincial Division of the Supreme Court of South Africa by consenting to the divorce and signing a paper embodying agreement between the parties which was made an order of court. Respondent was represented by attorneys Messrs. Abe Swersky & Associates of Cape Town. See the consent paper signed by the parties dated 3rd June, 1993.

According to our Common Law the only court that has international competence to issue decrees of divorce that will be recognised in Lesotho is the court of a country in which the parties are domiciled; *Sauber v Sauber* 1949(2) SA 769 at page 772. Because the divorce was granted by the

Court of Domicile of the parties this Court has no problem with this divorce because, among other things, the grounds for divorce rest upon the general principles that are recognisable under the law of Lesotho whose roots like South African law are Roman-Dutch law as received from the Cape of Good Hope.

In my view the grounds of divorce need not always coincide with those of Lesotho. The reason being that to do so might punish our own inhabitant when the person who is domiciled in a foreign jurisdiction has been freed from a marriage that has become intolerable to him. In *Baindail v Baindail* [1946] 1 All ER 342 the English Court was forced to recognise polygamy as a marriage. It had to realise that marriage is not only marriage as understood in christendom. It seems to me with divorce too, the same principle has to apply because a person's status according to our law is determined by the law of his country of domicile. This problem does not arise here because in Lesotho divorce is either based on desertion or adultery. In South Africa the sole ground of divorce is irretrievable breakdown of marriage, desertion and adultery being treated as being among several symptoms of the breakdown of the marriage.

/...

Having recognised that Applicant and Respondent are divorced the next problem is whether the ancillary prayers of the South African divorce court have to be given effect to. Unfortunately Applicant has not asked for the remedy his papers entitle him to. What he wants is access to his child Luqman aged 6 years. He should have asked the Court to help him have that. Forsyth and Bennet *Private International Law* page 324 have quoted the following words from Wolff *Private International Law* 2 Ed London OUP·1950:-

> "There can be no enforcement of a judgment without recognition; but there may be recognition without enforcement."

In dealing with ancillary orders to a divorce order, such as custody of minor children and access to minor children, the court of domicile of the parents does not always have to prevail. Indeed orders of access to or custody of minor children do not appear (in their nature) to be final because they can be varied from time to time if the interests of the minor children make such a course necessary. I can only add that, in enforcement too, the interest of the minor child cannot be disregarded.

Among judgments that cannot be enforced in terms of

Section 3(2) of the *Reciprocal Enforcement of Judgment Proclamation* of 1922 are judgments that are not final. As already stated it is a fundamental principle of our common law that a foreign judgment that is being enforced must be a final. The test of whether a judgment is final or not is whether fresh proceeding can successfully be object to as being *res judicata* if the same proceedings are brought on the same subject matter between the same parties. A custody or access order can brought again within weeks if it can be alleged that it is in the interests of the minor child to do so. It will be extremely difficult to argue that the fresh legal proceedings are *res judicata*.

In *Hubert v Hubert* 1960 (3) SA 181 at page 183G to 184C Williamson J. said although the court of the father's domicile has jurisdiction to make an order for custody it does not have an exclusive jurisdiction. The court in whose jurisdiction the child resides is entitled to hold an enquiry before giving effect to the custody order of the court of the domicile of the parents of the child. Morton J. in *Ferrers v Ferrers* 1954 (1) SA 514 at page 517D therefore said:

> "I consider it to be my duty to form an independent judgment on the evidence now before

> me in the course of doing so to give due weight to the order of the English Court."

This Court following the Cape Provincial Division full bench decision of *Riddle v Riddle* 1956(2) 739 at 749G feels (even if applicant had specifically asked this Court to give effect to the access order in the present case) it would have been obliged to conduct an independent enquiry of its own in order to form an independent judgment of what would promote the welfare and happiness of the child in endeavouring to give effect to the order of the court of domicile.

I.D. Schäffer in *The Law of Access to Children* at page 119 says:

> "It is one thing for the courts to grant an order of access but it is entirely a different matter to enforce one."

The problem according to Schäffer is compounded by the fact that the antagonism felt by a custodian parent who is forced unwillingly to obey a court order, is certain to rub off on the child, and spoil visits.

Courts for the benefit of the children never allow one

of the parents of the children to deny the non-custodian parent access to the children. The reason being that access to a parent is the children's rights. A parent who influences children might because of that (among other things) be found to be not fit to be a custodian parent. It is not good for the development of the child to grow up believing that the other parent does not like the child. In *Makoala v Makoala* CIV/APN/25/82 (unreported) one of the children was put under such pressure by a grandparent who was influencing the child against the mother that the child went mad. The Court directed that grand parent not to go anywhere near the children for a year or two.

The Court will do whatever it considers to be in the best interests of the children. In *Horsford v de Jager* 1959(2) SA 152 the Court awarded custody to a parent although the children had been influenced to hate that parent by the other parent. The Court still permitted the other parent access because it is in the best interests of the child to maintain contact with both parents.

In *Hodgkinson v Hodgkinson* 1949(1) SA 52 the court deplored the custodian parent's mistaken view that the non-custodian parent had no legal right of access. This was

because the custodian parent had arrogated unto himself the right to grant or withdraw access as a favour depending on his mood. I have therefore to emphasise access is the non-custodian parent's right as well as that of the minor child. Access of the child to both parents has been accepted over the years as being beneficial to the child.

In *Richies v Richies* 1981(1) PHB 84 Van den Heever J. dealing with the trauma children have to contend with and the denial of access of one parent by the custodian parent said:

> "The parent who unnecessarily deprives a child of the opportunity to experience the affection of its other parent, and breaks down the image of the other parent in the eyes of the child, is a selfish parent; robbing the child of what should be its heritage in order to salve [his] own wounds. And, regrettably often parents wounded by the marital conflict lose their objectivity and use, as very effective clubs with which to beat the foe, the objects they profess to love more than life itself, their children, who suffer trauma in the process."

I think I am obliged to compel Respondent to attend Court, since this has to be done for the benefit of the child.

I am particularly mindful of the fact that the following order concerning custody and access was made with

Respondent's own consent and participation:

> "Defendant shall have custody of the minor son born of the marriage, but plaintiff shall be entitled to reasonable access of such child at all reasonable times.
>
> Included in Plaintiff's rights of reasonable access shall be:
>
> (a) the right to have the child to spend alternative weekends with him 6 pm on Friday until 6 pm on Sunday;
>
> (b) the right to have the minor child spend alternative long and short school holidays."

As guardian of all minors this court is obliged to investigate what is going on. I cannot just accept that Respondent is so perverse as to set the police upon applicant merely because he wants to have access to his child in terms of a valid Court Order. It is very common for husband and wife to engage in unfair and unjust accusations against each other. I must hear both of them in the interests of their minor child. I will at the end of the day make an appropriate order as to costs after hearing Respondent. Her failure to respond to Applicant's allegations does not at this stage create a good impression.

I therefore make the following order:

(a) Declaring that the Final Order of divorce granted by the Cape of Good Hope Provincial Division of the Supreme Court of South Africa in Case Number 462/92 terminates the marriage between Applicant and Respondent according to the law of Lesotho because that court is the court of domicile of the parties;

(b) That the consent paper signed by Applicant and Respondent and by agreement made part of the final divorce order is recognised as a valid part of the Divorce Order by the Courts of Lesotho.

(c) Respondent is directed to show cause on the 9th January 1995 at 9.30 a.m. why she shall not be compelled to comply with that Divorce Order insofar as it deals with the issue of applicant's access to minor child Luqman;

(c) that costs be costs in the cause.

.....
W.C.M. MAQUTU
JUDGE

/...

For the Applicant : Mr. K. *Mohau*
For the Respondent : Mr. D.G. *Roberts*