

MAKGEKGENENE v MAKGEKGENENE 2012 1 BLR 741 HC

Citation: 2012 1 BLR 741 HC

Court: High Court, Lobatse

Case No: Misca No 84 of 2011

Judge: Lesetedi J

Judgement Date: 13 June 2012

Counsel: K Modise for the appellant M W Makuyana for the respondent

Flynote

Practice and procedure—Foreign judgment or order—Enforcement—Application for registration under the Judgments (International Enforcement) Act (Cap 11:04) or enforcement under common law—Proof of foreign judgment or order—Applicant to adduce authenticated copy of foreign judgment or order—'Authenticated' meaning sealed with court seal or signed by judge who attached statement in writing on copy that court had no seal—Failure to properly authenticate copy fatal to application—Judgments (International Enforcement) Act (Cap 11:04). Practice and procedure—Foreign judgment or order—Enforcement—Registration in High Court—Exclusions from registration—Matrimonial matters—With exception of maintenance orders, orders relating to matrimonial matters not registrable—Judgments (International Enforcement) Act (Cap 11:04), Part III.

Headnote

The applicant applied for the registration of an English court order, made following her divorce from the respondent, which settled their property claims and provided for maintenance of their minor children. The respondent resisted the application, arguing that it was fatally defective in that, first, it was not competent under the Judgments (International Enforcement) Act (Cap 11:04) as it was a matrimonial cause and, second, the order had not been properly authenticated: proper authentication being to prove the order as a fact under the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act (Cap 10:03). Held: (1) Only those portions of the English order which related to maintenance were registrable under Part III of the Judgments (International Enforcement) Act. In terms of s 2(2) of the Judgments (International Enforcement) Act, judgments and orders relating to other matrimonial matters could not be registered, and thus enforced, in Botswana. (2) In terms of s 3(b) of the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act, an applicant who sought to register a foreign judgment under the Judgments (International Enforcement) Act, or to enforce it under the common law, was required, inter alia, to prove the judgment by producing an authenticated copy of the judgment. The section defined 'authenticated' as meaning that it was sealed with the court seal or signed by the judge, in which case he attached a statement in writing on the copy that the court had no seal. (3) The applicant had failed to produce a properly authenticated copy of the maintenance order she sought to register. Mere authentication through a notarial certificate did not comply with the statutory requirements. That was fatal to the application.

Case Information

Cases referred to: Jones v Krok 1995 (1) SA 677 (A) Mtui v Mtui [2000] 1 BLR 406 Mtui v Mtui [2001] 2 BLR 333, CA 2012 (1) BLR p 742 APPLICATION for registration of a foreign court order. The facts are sufficiently stated in the judgment. K Modise for the appellant M W Makuyana for the respondent

Judgement

LESETEDI J: The parties were divorced from each other by the Family Division of the High Court in England on 15 February 2007. The decree for divorce was made absolute on 2 August 2007. Subsequently, a consent order was made by the same court on 27 May 2008 settling property claims between the parties and providing for the educational expenses and upkeep and financial needs of the minor children of the marriage. On 11 February 2011, the applicant launched these proceedings in which she seeks that: (a) The court order of 27 May 2008 be registered in this honourable court's jurisdiction; (b) The registered court order shall have the same force and effect as an order made by the High Court of Botswana; (c) The respondent pay the legal costs of this application on an attorney and own client scale. The respondent opposes the application and has also raised preliminary points of law and procedure. It is not

necessary to deal with the points raised ad seriatum and it shall suffice to deal with them in what I consider to be their order of their importance in the context of the present matter. I must first observe in passing that one of the points raised by the respondent was that the order which is sought to be recognised by this court was not certified at all. The copy filed in the judge's court record, however, bears the authentication seal of a Notary Public. This, however, has no bearing on the main issue that I now proceed to consider. It was argued by the respondent that the application is fatally defective for non-compliance with the statutory requirements or the common law. It is widely recognised around the world that a judgment rendered by the courts of one country may be recognised and enforced in another country, provided certain conditions are met. See C F Forsyth *Private International Law — The Modern Roman-Dutch law including the jurisdiction of the Supreme Court* (4th ed Juta & Co Ltd Cape Town 2003) at p 389. See also, *Mtui v Mtui* [2000] 1 BLR 406 at p 411, confirmed by the Court of Appeal in *Mtui v Mtui* [2001] 2 BLR 333, CA at p 337. One of these is that the court will recognise and enforce a judgment of a foreign court if such court was itself of competent jurisdiction. The argument raised by the respondent above is that firstly, the application is not competent under the Judgments (International Enforcement) Act (Cap 11:04) in that it is a matrimonial cause and secondly, that, in any event, the order was not properly authenticated. It was submitted that the proper authentication, if the application was brought under the common law, would be to prove such 2012 (1) BLR p743 LESETEDI judgment as a fact under the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act (Cap 10:03). The Judgments (International Enforcement) Act is a piece of legislation relating to the enforcement in Botswana of judgments given in countries which accord reciprocal treatment to judgments given in Botswana, for facilitating the enforcement in other countries of judgments given in Botswana and any other purposes connected therewith. In terms of the Act, a foreign judgment must first be registered or confirmed in the High Court (or where appropriate under Part III of the Act, a magistrate's court) before enforcement. Registration or confirmation of the foreign judgment is conferment of recognition on such a judgment. Section 5(1) of the Act provides for the registration of a foreign judgment by a judgment creditor for a judgment which is wholly or partially unsatisfied in respect of the unsatisfied part of the judgment. Save for maintenance matters, which are specifically provided for under Part III of the Act, matrimonial matters and other specified actions in personam are, under s 2(2) of the Act, expressly excluded from recognition and enforcement through the procedures laid out by the Act. It thus appears evident that the Act is intended to facilitate recognition and enforcement of foreign judgments and orders in selected fields. The order which is being sought to be registered by the applicant is an order in a matrimonial matter pertaining to the divorce proceedings between the parties. Only paras 3 and 4 of the foreign order relate to provision for maintenance of the minor children. For that part of the Order to be recognised through the statutorily outlined process, the applicant must also have met the requirements of Part III of the Act which provides for registration or confirmation of foreign maintenance Orders. The relevant provision is s 21 which reads: '21. Any document purporting to be signed by a judge or officer of a court in a country to which this Part applies shall, until the contrary is proved, be deemed to have been so signed without proof of the signature or judicial or official character of the person appearing to have signed it, and the officer of a court by whom a document is signed shall, until the contrary is proved, be deemed to have been the proper officer of the court to sign the document.' The language of the above provision does not appear to be prescriptive of the manner of proving a foreign judgment or order for purposes of registration or confirmation. All it does is to prescribe sufficient rebuttable proof of such a document when purporting on the face of it to be signed by a judge or officer of the court that issued it. That would not exclude the document being proved in any other acceptable manner. However, the applicant seemed to admit during argument that she was not coming under the Act and, in any event, she does not say in her application that she seeks only to have that part of the order relating to maintenance registered, if she seeks to enforce it at all. There would be no purpose of registering an order such as this except for purposes of enforcing it. It appears that under the common law, a foreign judgment is not directly enforceable but constitutes a cause of action: '... and 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; . (See, generally, *Law of South Africa* (op cit vol 2 (first reissue) paras 477 and 478); Forsyth *Private International Law* 2nd ed at 336 et seq and the authorities cited.) Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law (*Joffe v Salmon* 1904 TS 317 at 319; *Law of South Africa* (op cit vol 2 (first reissue) para 476)).' *Corbett CJ in Jones v Krok* 1995 (1) SA 677 (A) at p 685B-E. I believe the above common law factors reflect our law as well. Taking the common law approach set out above, the applicant would have been required to prove the foreign judgment or court order as a fact of her cause of action. It is here that the applicant would have had to annex to her papers, as evidence of her cause of action, a copy of the foreign judgment or order she relies upon. And it is here that the provisions of ss 2 and 3 of the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act have relevance. Section 2 provides that: 'All ... judgments, decrees, orders and other judicial proceedings of a Commonwealth or a foreign court and affidavits, pleadings and other legal documents filed or deposited in such court, may be proved in any court in Botswana .' Section 3(b) sets out the method of such proof as follows: '(b) a judgment, decree, or order or other judicial proceeding of any Commonwealth or foreign court, ... for the authenticated copy to be admissible in evidence, it must purport either to be sealed with the seal of the Commonwealth or foreign court to which the original document belongs, or if the court has no seal, then it must be signed by the judge or one of the judges of the court, whom must attach a statement in writing on the copy that the court has no seal.' (my emphasis to show the mandatory nature of the requirements.) The applicant has not complied with any of the requirements of s 3(b) above. That is, in my view, fatal to the application. Mere authentication through a notarial certificate does not comply with the statutory requirements set out above. The reason for such statutory requirements to prove such documents are not far to discern. A judgment decree or order of a court is issued by a judge. The record of

such a case would normally be in the custody of an official of the court who can certify a copy from the primary source of which he or she is the official custodian. It is also worth noting that the definition of 'document' under s 2 of the Authentication of Documents Act (Cap 14:02), although not exhaustive and is in general terms, makes specific mention of certain documents which may be of a legal nature, for instance, power of attorney and affidavit, but there is no mention of a judgment decree or order of court. Having regard to the specific nature of the provisions of the Evidence (Commonwealth and Foreign Acts of State and Judgments) Act as against the general application of the Authentication of Documents Act and its definition of what constitutes a 'document', I am satisfied that the applicant's argument that compliance with the latter Act was sufficient to authenticate a judgment or order of a commonwealth or foreign court cannot hold. A finding in the respondent's favour on this point is decisive of these proceedings. The application being fatally defective, the appropriate order to make is to strike it out. The costs must, as is the general rule, follow the event. The following order is therefore made: (a) the application, being fatally defective, is struck out; (b) the applicant to bear the costs of these proceedings. Application struck out. 2012 (1) BLR p745