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Private international law: Lesotho High Court assumes South Africa's High Court jurisdiction – *Sello Ramalitse v Mpeesa Ramalitse*

1. Introduction

Sello Ramalitse v Mpeesa Ramalitse is a divorce case involving two South Africans, resident in South Africa.[1] The *Ramalitse* case was brought by the applicant before the High Court of Lesotho wherein he requested the Court to grant him a divorce against the respondent and to award him sole custody of their minor child N aged six. Before the parties married, the respondent was a citizen of Lesotho. Upon marriage to the applicant, the respondent took the applicant's citizenship and residence, which is that of South Africa.[2] Ever since her marriage to the applicant, the respondent resided in South Africa with the applicant and the couple had a child born of their marriage. The child is a South African born of South African parents and is resident in South Africa with his parents.[3] The couple has movable and immovable property in South Africa and also work in South Africa.[4] The case was heard before Justice Kelello Guni of the High Court of Lesotho (also Judge of the African Court of Human and Peoples Rights 2006-2010)[5] who then granted divorce as requested by the applicant in his prayers. The Judge, however, denied the applicant sole custody of the child. Rather, she ordered joint custody and further ordered the applicant to pay monthly maintenance towards the minor child, N.[6]

Before going into the merits of the case, the lawyers for the respondent raised questions of the Court's jurisdiction reasoning that the respondent has already instituted divorce proceedings in the Free State High Court in South Africa; both the applicant and the respondent as well as their minor child are South African citizens domiciled in South Africa; the couple has movable and immovable matrimonial property in South Africa comprising of, notably, three houses in the towns of Ficksburg, Virginia and Welkom;

1 *Sello Ramalitse v Mpeesa Ramalitse* unreported case (HC) no 34/08 of 14 June 2011.
2 *Ramalitse v Ramalitse*:5.3.
3 *Ramalitse v Ramalitse*:5.3.
4 *Ramalitse v Ramalitse*:5.4.
5 Judges of the African Court. http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=31%3Aafr-court-judges&catid=14%3Aafrcourt-judges&Itemid=30&lang=en (accessed on 6 April 2012).
6 *Ramalitse v Ramalitse*:1-4.

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other proceedings regarding maintenance of their minor child and the matrimonial property that the applicant unlawfully removed from their matrimonial home in Virginia, South Africa, are pending before South African courts.[7] However, the Judge ruled that the Lesotho High Court has jurisdiction, *without giving reasons at all*, and proceeded with the hearing. The Judge granted the divorce order together with the maintenance order in respect of the minor child.

On the basis of the above, this note seeks to analyse whether or not the Lesotho High Court had jurisdiction to preside over the divorce matter between the applicant and the respondent and to award custody of the minor child. Thereafter, the note discusses the implications of the orders granted by the Lesotho High Court. In carrying out the analysis, the author will first examine both the Lesotho and South Africa's law regarding domicile of the parties concerned and jurisdiction of the respective courts. This will be followed by the discussion of the case. Lastly, the author will discuss the implications of the orders granted by the Lesotho High Court and provide recommendations.

2. The legal framework in Lesotho and South Africa

It is important to note that both Lesotho and South Africa share the same common law, namely the Roman-Dutch law. This is particularly interesting in that South African jurisprudence plays a decisive role in the Lesotho courts, even though it is theoretically argued that South African decisions are only persuasive in the Lesotho courts.[8] Nonetheless, the only differences in law between Lesotho and South Africa are brought by the statutes that the respective parliaments enacted to alter the common law. To this end, South Africa has gone to the greater lengths to protect the rights of women in South Africa, whereas Lesotho is less protective of women's rights. Specifically, women's rights are embedded in the *Constitution of South Africa* through equality clause.[9] Other than that, there is a plethora of other statutes, which safeguard women's rights. For example, the South African *Domicile Act* changed the common law position to give a married woman a choice to have domicile different from that of her husband; this is not the case in Lesotho as Lesotho still upholds common law position on domicile;[10] the South African *Recognition of Customary Marriages Act*[11] safeguards customary marriage, whereas in Lesotho women married under customary marriage still face difficulty in proving their marriage since there are no marriage certificates with customary marriages. Customary rule on primogeniture which was declared discriminatory in South Africa[12] is still

7 *Ramalitse v Ramalitse*:5.2-5.6.
8 Forere 2012:119.
9 *Constitution of South Africa* 1996, section 9.
10 *Domicile Act* 3/1992:section 1.
11 120 of 1998.
12 *Moseneke and Others v Master of the High Court* 2001 (2) SA 18 (CC); 2001(2) BCLR 103 (CC).

practised in Lesotho.[13] This is despite the fact that Lesotho is a party to the following treaties: United Nations Convention on the Elimination of Discrimination against Women (CEDAW);[14] African Protocol on Women's Rights,[15] and SADC Protocol on Gender and Development signed in 2008. The *Legal Capacity of Married Persons Act* 9 of 2007, which Lesotho, a dualist state, enacted to give effect to CEDAW and AU Protocol on Women's Rights, only provides a handful of rights instead of holistic rights and protections that these international instruments safeguard. Indeed, as the title denotes, the *Act* simply abolished the marital power of the husband and minority status of women.

Nonetheless, the following subsections will provide the position of the law in both Lesotho and South Africa regarding the domicile of the parties under private law with a view to determine jurisdiction of the courts and the applicable laws. In *Ex Parte Oxton*, the Court held that:

> It is now firmly established that in our law in all matters affecting status, in the absence of express statutory power, the exercise of jurisdiction is confined to the Court of the domicile of the parties at the time when the action commenced; and the fact that a party submits to or fails to object to the jurisdiction of the Court does not confer jurisdiction in respect of such matters or absolve the Court from satisfying itself as to the true domicile of the parties.[16]

Clearly, domicile is very important for both South African and Lesotho courts. An enquiry regarding jurisdiction should precede the merits of the case. In addition, it is evident from the quotation above that jurisdiction of the court is determined by the domicile of the parties (unless the applicable statute provides otherwise). It is from this quote that, in the absence of legislation altering the common law position in Lesotho, jurisdiction of the court is determined by the parties' domicile.[17] On the other hand, South Africa has changed its common law through the enactment of the *Domicile Act*. One begs the question: What is domicile? Domicile has been defined as "the place where a person is legally deemed to be constantly present for the purpose of exercising his or her rights and fulfilling his or her obligations, even in the event of his or her factual absence."[18] There are three kinds of domicile under common law: domicile of origin, domicile of choice and domicile by operation of the law.[19] However, as far as South Africa is concerned, and through the enactment of the *Domicile Act* 3 of 1992, only domicile of choice and domicile by operation of the law remain. In South Africa, domicile of origin is merely an example of domicile by

13 *Chieftainship Act* 1968:section 10.
14 Adopted on 18 December 1979, 1249 U.N.T.S 13, entered into force on 3 September 1981.
15 Adopted by the 2nd Session of the Assembly of AU, CAB/LEG/66.6 (13 September 2000), entered into force on 25 November 2005.
16 *Ex Parte Oxton* 1948 (1) SA 1011 (C):1015.
17 *Ex Parte Oxton* 1948 (1) SA 1011 (C):1015.
18 Heaton 2008:42.
19 Dicey & Morris 1980:chapter 7.

operation of the law, since its salient feature (automatic revival when one loses one's domicile of choice or by operation of law) has been done away with.[20] Briefly, the requirements for a person to acquire domicile of choice in South Africa as laid down in sections 1 and 2 of the *Domicile Act* are as follows: One must be above 18 years or have a status of a major; one must have the necessary mental capacity to make rational decision; one's presence in South Africa must be lawful and one must have an intention to settle there for an indefinite period. One's sex and marital status have no bearing on a person's capacity to acquire domicile of choice. Domicile by operation of the law is conveyed to those who cannot make rational choices or who are below the age of 18 and do not have the status of a major. As such, their domicile will be the place with which they are closely connected in accordance with section 2 of the *Domicile Act*.

With regard to married women, in particular, the common law position, which still exists in Lesotho, is that, upon marriage, a woman takes up her husband's domicile under the unity principle.[21] It does not matter that at a later stage the woman is deserted by her husband – the woman's domicile of dependence continues as long as the marriage subsists.[22] However, this position has changed in South Africa, as section 1(1) of the *Domicile Act* provides everyone above the age of 18, regardless of sex or marital status, a right to choose his/her domicile. In this regard, a married woman in South Africa can decide to retain her domicile or choose domicile different from that of her husband, which is a significant improvement to the common law. However, as far as the matrimonial property regime is concerned, the common law position is that the matrimonial property regime, in both South Africa and Lesotho, is determined by the law of the place where the husband is domiciled at the time of marriage, and this is not affected by the subsequent change of the husband's domicile.[23] However, given the constitutional dispensation in South Africa, which guarantees equality between men and women, it is likely that this position, if raised in court, can be changed on constitutional grounds.

Regarding disputes in court, the common law in both countries is that the plaintiff must generally sue the defendant in a court within the area where the defendant is domiciled (*forum domicile*).[24] However, the exception has been granted in matrimonial disputes in both Lesotho and South Africa. To this end, in Lesotho, since a married woman takes up her husband's domicile by operation of the law, it follows that, regardless of whether the woman is a plaintiff or the defendant, the case will be heard where the husband is domiciled. With regard to South Africa, the plaintiff can sue the defendant in an area of jurisdiction of the court where either of the parties is domiciled.[25] Alternatively, the case can be heard in the area

20 *Domicile Act* 3/1992:section 1.
21 *Frankel's Estate v The Master* 1950 (1) All SA 347 (A): 359-360, 362 & 364.
22 Palsson 1978:122.
23 *Frankel's Estate v The Master*:369.
24 *Ex Parte Oxton*:1015.
25 *Divorce Act* 70/1979:section 2(1)(a).

of jurisdiction of the court where either of the parties is ordinarily resident, and have been ordinarily resident in South Africa for a period not less than one year.[26]

In matrimonial disputes involving children, the common law provides that only the courts where the child is domiciled will have jurisdiction to decide on issues of care and custody of the child involved.[27] This position has been widely recognised even in other jurisdictions such as Zimbabwe, the United Kingdom and elsewhere.[28] In a case where an order of divorce is granted by the foreign court, section 13 of the *Divorce Act* provides that the South African courts can only recognise the validity of such order and enforce it provided:

> On the date on which the order was granted, either party to the marriage was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory; was ordinarily resident in that country or territory; or was a national of that country or territory.

Whereas Lesotho's legal position regarding recognition of foreign judgments is not relevant for this case, since the judgment was issued in Lesotho, it is interesting to note, however, that in Lesotho, foreign judgments can only be registered and enforced provided:

> The original court had jurisdiction to hear the matter, the defendant was a person carrying business or ordinarily resident within the jurisdiction of the original court and did not object to the jurisdiction of the original court.[29]

This means that, even in Lesotho, the question of jurisdiction is highly crucial and it must not be taken for granted. Overall, for both Lesotho and South Africa, the court must determine that it has jurisdiction to preside over the matter; it should not only rely solely on the objections of the parties.[30] In fact, this is not only the practice in Lesotho and South Africa; it is international practice for the courts, even the extraterritorial courts – *compétence de la compétence.*[31]

Having outlined both the position of the law regarding domicile of the parties to the lawsuit and jurisdiction of the court in Lesotho and South Africa, the note turns to determine whether in the present case, the Lesotho High Court had jurisdiction or not. In so doing, the note determines the domicile of the respondent, the applicant and the minor child involved in accordance with the Lesotho law where the case was lodged. In addition,

26 *Divorce Act* 70/1979:section 2(1)(b).
27 *Littauer v Littauer* 1973 (4) SA 290 (W):294.
28 See, for instance, *Juliet Chikwenengere v George Chikwenengere* HC 747/05 (Zimbabwe).
29 Reciprocal Enforcement of Judgments, Proclamation 2 of 1922 (Lesotho): section 3(2).
30 *Ex Parte Oxton*:1015.
31 See, for instance, Rosen 1993.

the note discusses the possibility of the enforcement of Lesotho's judgement in South Africa against the backdrop of the principles of *forum non conveniens* and *lis alibi pendens*, both being the rules for declining jurisdiction. It is important at this stage to mention that Lesotho is not a party to any of the The Hague Conventions on Private International Law; therefore, *forum non conveniens* and *lis alibi pendens* will strictly be confined to common law.

3. Discussion of the case

3.1 Domicile of the respondent and applicant: Matrimonial domicile

The question of determining jurisdiction of the Lesotho courts to preside over this case is a matter of Lesotho law. Therefore, this section will analyse Lesotho laws to the exclusion of South African law. As indicated earlier, the position of law in Lesotho is that the plaintiff must generally sue the defendant in an area of jurisdiction of the court where the defendant is domiciled or ordinarily resident. However, in matrimonial disputes, the civil suit can only be lodged with a court in whose jurisdiction the husband is domiciled. The reason for this is that, when a woman gets married, she automatically acquires her husband's domicile by operation of the law (unity principle) in accordance with the Lesotho common law, which has not been changed by any statute.[32] Therefore, matrimonial domicile (domicile of the husband) is the only ground in determining the court's jurisdiction in matrimonial disputes. It thus follows from the unity principle under the Lesotho common law that the respondent acquired domicile of her husband. From this conclusion, it would have been important for the Lesotho court to have ascertained domicile of Mr Ramalitse to determine whether the court had jurisdiction or not. Assuming that the court did, it clearly did so on the basis of incorrect law, because the correct Lesotho law could have pointed otherwise, given the facts surrounding this case.

The facts indicate that Mr Ramalitse is a South African citizen who resides in South Africa at all times. In addition, he works and owns three houses with the respondent in South Africa. As a result, it can be concluded that Mr Ramalitse is domiciled in South Africa or resident in South Africa, and this makes the respondent's domicile to be South Africa. As a result, the South African courts are the appropriate courts to hear the matter in accordance with the Lesotho law. The facts have also revealed that the applicant had been successfully sued in the South African courts for child maintenance and the joint property that he unlawfully removed from their matrimonial home in Virginia, South Africa,[33] thereby indicating that the applicant's residence or domicile is in South Africa. Overall, there

32 *Frankel's Estate v The Master*:362.
33 *Ramalitse v Ramalitse*:5.6.

is no indication from the facts that Mr Ramalitse has anything to do with Lesotho except his own self-description in his summons: "as the man from Ha Tsautse, Maseru, Lesotho".[34] However, in *Ramalitse*, the issue of the Court's jurisdiction was not dealt with [sufficiently] despite the respondent's request.[35] The applicant's lawyer simply reasoned virtually in two lines that the "court has jurisdiction to determine this matter in as much as the civil marriage between the parties was solemnised within its jurisdiction".[36] In the absence of the Court's reasons to have decided to preside over this case, there seems to be an error of law on the part of the Court to arrive at this decision whatever the reasons may be. In fact, it even does not matter that the judge did not write a report on this case; the bottom line is that the law upon which the judge based her decision was incorrect, whatever that law is. The reason raised by counsel for the applicant that the Court has jurisdiction because the marriage was solemnised in its jurisdiction is incorrect under the Roman-Dutch Law. At common law, it is the courts where the husband is domiciled and not *lex domicilii celebrationis* that have jurisdiction to hear the divorce case. *Lex celebrationis* is only important to determine the validity of marriage. Therefore, if this were to be a reason on which the Court relied, it is an incorrect position of the law (*lex celebrationis*) to rule that the Lesotho Court has jurisdiction simply because the marriage was solemnised in the Court's area of jurisdiction – if it happens in other jurisdictions, clearly it is not the case with Roman-Dutch Law. Referring again to Zimbabwe, which is also a common law country (Roman-Dutch Law applies) as Lesotho, the Zimbabwe High Court focused on the domicile of the husband and not where the marriage was solemnised to determine whether the Zimbabwe High Court had jurisdiction or not.[37] In conclusion, the Judge in this case erred in founding jurisdiction on the basis of *lex celebrationis*. In fact, "it is generally agreed … that the place of marriage is too accidental to attribute to it any significance on the choice of law for divorce and legal separation."[38]

3.2 Custody and care of the minor child

Turning now to the custody and care order granted by the Lesotho High Court regarding the parties' minor child, the discussion seeks to determine whether the Lesotho High Court had jurisdiction to grant such orders. Both the Lesotho and South Africa's common law requires that only the courts where the child is domiciled will have jurisdiction to decide on issues of care and custody of the child involved.[39] The question is: Where is the minor child domiciled? Unless the child resides in a different place from that of the parents, the child's domicile is his/her parental home. In this case, the

34 *Ramalitse v Ramalitse*:1.
35 *Ramalitse v Ramalitse*:5.2.
36 *Ramalitse v Ramalitse*:3.
37 *Chikwenengere v Chikwenengere*.
38 Palsson 1978:130.
39 *Littauer v Littauer*:292.

child's domicile is Virginia, South Africa, which is the parental/matrimonial home,[40] and that is the place where the child is closely connected to.[41] The decision in *Zorbas* plays an important role in this regard.[42] This is a decision involving a husband and wife, both domiciled in South Africa but living in Athens, Greece, together with their minor child. The wife instituted divorce proceedings in South Africa and requested custody of their minor child. The court granted the divorce order, but declined jurisdiction regarding custody of the minor child. The reason for declining jurisdiction was that the Greek courts are best suited to decide on the issue of custody of the child present in the jurisdiction of Greece.[43] This means that, even if the Lesotho High Court had jurisdiction to have heard the divorce case between the parties, the Court ought to have declined jurisdiction with respect to guardianship and custody of the minor child. Only the court in an area where the child is domiciled can determine the best interests of the child, and that being a court in South Africa.

The above position is observed and upheld in many jurisdictions. To this end, in the case of *Chikwenengere* decided by the Zimbabwe High Court, the Judge also declined jurisdiction regarding guardianship of the children who were residing in the United Kingdom with their mother. The Judge in *Chikwenengere* reasoned that only the High Court in the United Kingdom can best determine custody, taking into account the best interests of those children. In addition, the Judge went on to say that the Court in the United Kingdom is best suited to "undertake an inquiry into the best interests of the child including an inquiry into their living conditions and domestic arrangements, issues that I am ill-equipped to deal with due to the absence of the children from the jurisdiction".[44] The exception to this rule is only where the child is in danger, but the permanent guardianship and custody will be left to the court with requisite jurisdiction.[45]

From the record, the Judge in the *Ramalitse* case did not even inquire into the child's domicile, and if she did, then she scrutinised an incorrect law, because Roman-Dutch Law is as it is stated above. Even the newly enacted Lesotho *Children's Protection and Welfare Act* 7 of 2011 does not alter this position, as it does not even deal with it despite its importance.

3.3 Declining jurisdiction

Even assuming that the jurisdictional requirements of the Lesotho High Court were met, the question remains as to whether Lesotho is the appropriate forum to give justice to the case – hearing and enforcement of judgement. To this effect, in *Schneider-Waterberg*, it was held that

40 *Ramalitse v Ramalitse*:5.6.
41 *Littauer v Littauer*:293.
42 *Zorbas v Zorbas* 1987 (3) SA (W):436.
43 *Zorbas v Zorbas*:439.
44 *Chikwenengere v Chikwenengere*:5.
45 *Littauer v Littauer*:294.

> [t]he court should not entertain the matter even if the jurisdictional requirements have been met inasmuch as a doctrine of effectiveness requires that, even if the court has the necessary power to hear the proceedings, it must be satisfied that it can give effect to its own judgment in due course.[46]

On this reasoning, the court in *Schneider-Waterberg* declined jurisdiction to hear a divorce case instituted by the South African citizen who took up Namibian citizenship and notably domicile. In particular, the court said: "[N]either the parties nor the affected minor child, nor any of the likely witnesses reside within the jurisdiction of this Court, this is a *forum non conveniens*, alternatively not the most appropriate forum to determine this dispute".[47] The principle of *forum non conveniens* will now be examined in order to determine whether the Lesotho High Court is a proper forum or not.

3.3.1 *Forum non conveniens*

This is a common law concept according to which a court which meets the jurisdictional requirements exercises its discretion to decline jurisdiction on the grounds that there is an alternative forum best appropriate to determine the dispute.[48] For a court to decline jurisdiction on the grounds of *forum non conveniens*, the following must be proved: there exists an alternative forum, and the alternative forum is the most convenient and appropriate in achieving the ends of justice.[49] In determining the latter requirement of *forum non conveniens*, the common law courts usually note the difficulty and expenses that each party will experience or incur if the case is heard before one or another forum. In addition, the courts consider the location of witnesses and documentary evidence as well as the means or possibility of compelling witnesses to avail themselves.[50] Residence and place of business of each of the parties is also taken into account in determining the appropriateness of a forum.[51]

When one applies the requirements of *forum non conveniens* to the *Ramalitse* case, there is no doubt that there is an alternative and available forum that has jurisdictions on the matter – South African courts. With regard to the second requirement, which is convenient and appropriate forum, both Mr and Mrs Ramalitse, the child concerned and possible witnesses are resident in South Africa, and clearly there are cost implications in travelling to Lesotho. This factor indicates that Lesotho High Court is a *forum non conveniens*. Furthermore, it will be nearly impossible for the Lesotho High Court to summon and compel witnesses to appear before the Lesotho Court, especially with regard to evidence needed for awarding

46 *Schneider-Waterberg v Schneider-Waterberg* 2009 JOL 24515 (WCC):6.
47 *Schneider-Waterberg v Schneider-Waterberg*:2-3.
48 Fawcett 1994:10.
49 Blom 1994:130.
50 Blom 1994:130-131.
51 Nygh 2002:323.

care of the minor child. In addition, the couple has the matrimonial property comprising three houses (immovable property) in South Africa,[52] and Mr Ramalitse is practising as a medical practitioner in South Africa. Clearly, the Lesotho High Court is a *forum non conveniens*. Further complications arise in relation to immovable property (three houses) that the couple owns. Clearly, Lesotho High Court is a *forum non conveniens*, and it should have declined jurisdiction in favour of the South African courts.

3.3.2 *Lis alibi pendens*

This is also another factor for the court to exercise its discretion to decline jurisdiction. *Lis alibi pendens* is invoked "where there are parallel or concurrent proceedings pending between the same parties concerning the same subject matter in different jurisdictions at the same time".[53] *Lis alibi pendens* is meant to avoid abuse of process and conflicting judgements. Notwithstanding the fact that abuse of court process and conflicting judgments can lead to miscarriage of justice, *lis alibi pendens* is less important to common law states.[54] The reason for this is that, at common law, *lis alibi pendens* is not a doctrine in itself that gives rise to "consequences on the exercise of either jurisdiction".[55] Unless given strength by a statute, *lis alibi pendens* is simply a situation that can cause the court to exercise its discretion to decline jurisdiction.[56] If this situation arises (parallel litigation), it must be proved that there is oppression and vexation in order to prevent administration of justice. In this way, the court can stay either the first or the second suit, and the first suit does not necessarily get preference. All that matters is that proceedings which are commenced at the appropriate forum will continue, while those started at the forum that is not appropriate will be stayed. It is for this reason that *lis alibi pendens* is treated as a facet of *forum non conveniens* under common law.[57]

However, applying the notion of *lis alibi pendens* to this case, the facts indicate that Mr Ramalitse lodged divorce proceedings with the High Court of Lesotho in 2008. The case was not heard until 24 May 2011. While nothing happened during this time in the Lesotho High Court, Mrs Ramalitse approached her lawyers in March 2011, and the process for different divorce proceedings was moved on the 11 May 2011 in the Free State High Court.[58] As a result, the two cases gave rise to *lis alibi pendens*. As indicated earlier, at common law, it does not matter who lodged the case first, South Africa's proceedings would not be stayed simply because they were the last to be lodged. Rather, the Court ought to have determined the

52 *Ramalitse v Ramalitse*:5.4.
53 Nygh 2002:304.
54 Graveson 1974:144-8.
55 Nygh 2002:310.
56 *McHenry v Lewis* (1882) 22 Ch D 397:408.
57 Fawcett 2002:29.
58 *Ramalitse v Ramalitse*:5.2.

appropriate forum for this case in order to decide whether to continue with the hearing or to leave the matter for the South African courts. At this point, it is important to note that the issue of *lis alibi pendens* was not raised by the applicant or the respondent's lawyers. The respondent's lawyers simply stated that other proceedings are pending in the Free State High Court,[59] and that this statement was never addressed by the applicant's lawyers and the presiding judge. Nonetheless, the earlier discussion under *forum non conveniens* indicated that Lesotho is a *forum non conveniens*. As a result, the Lesotho High Court could have stayed its proceedings in favour of South African courts.

On the basis of the conclusion made in the above paragraphs that the Lesotho High Court is not the appropriate forum, the following questions remain: What will the judge do, should Mr Ramalitse fail to pay maintenance ordered in respect of the minor child? Will the Judge order the South African police to arrest him? How will the Judge ensure that property is divided according to the orders (safe to say that the division of property was deferred to the later date)? It simply is not clear how the Lesotho High Court envisaged enforcing its orders.

However, one can argue that Justice Guni was hoping for reciprocal enforcement of judgements. This is a possibility, but there is a catch. For the foreign orders to be enforced in South Africa, the South African courts must recognise such orders. To this end, the South African law provides that foreign divorce orders can only be recognised in South Africa provided that on the date on which the order was granted, either party to the marriage was domiciled in the country or territory concerned, whether according to South African law or according to the law of that country or territory or was ordinarily resident in that country or territory or was a national of that country or territory.[60] As indicated earlier, neither the applicant nor the respondent is domiciled or resident in Lesotho. In addition, neither the applicant nor the respondent is a national of Lesotho, because Lesotho does not permit dual citizenship. This is especially the case where a person loses Lesotho's citizenship upon acquiring the citizenship of another country, except where such acquisition is by marriage.[61] It is important to note, however, that in *Lekhoaba v Director of Immigration*[62] the Court indicated that it is possible to have dual citizenship; however, such possibility is not relevant to this case, in particular, because it has not been argued that Mr Ramalitse holds dual citizenship. With regard to the respondent's citizenship, the author established, in a sworn interview, that the respondent no longer bears the Lesotho citizenship or nationality. Therefore, since both parties do not have Lesotho citizenship, it follows that the divorce order and custody order granted by the Lesotho High

59 *Ramalitse v Ramalitse*:5.2.
60 *Divorce Act* 70/1979:section 13.
61 The Constitution of Lesotho 1993:section 41(1) and (2).
62 *Lekhoaba v Director of Immigration & Another* Lesotho Constitutional Case No. 3 of 2007.

Court cannot be recognised by the courts in South Africa; therefore, they cannot be enforced in South Africa.

4. Conclusion

From this discussion of the case, it follows that the Lesotho High Court did not have jurisdiction to hear the divorce case and to grant an order regarding guardianship and custody/care of the child of the marriage. The Court erred fundamentally by basing itself on *lex celebrationis* instead of domicile of the applicant (husband). Consequently, the parties are divorced in Lesotho until another application challenging the decision of the Court is filed with the Court of Appeal of Lesotho. With regard to South Africa, the parties are still legally married and the proper divorce case (together with division of matrimonial property and maintenance for the respondent) as well as the issue of guardianship and care of the minor child has to be heard in the Free State High Court, Bloemfontein. The reason for referring to the Free State High Court is that it is the High Court in whose jurisdiction the parties are domiciled.

As indicated in the introduction, Lesotho is less protective of women's rights and this is evidenced in the manner in which this case has been handled whereby maintenance of the woman is treated as of less importance. For instance, in South Africa, Rule 43(1) of the Uniform Rules of the Court provides a relief while matrimonial action is still pending. The said interim relief includes the following: interim maintenance, contribution towards the costs of pending matrimonial action, interim care and contact with the child. As indicated from the record, the proceedings were instituted in 2008 and the case was heard in 2011. Consequently, while the matter was pending for so many years, the respondent could not get any relief from the applicant, because there is no such law in Lesotho. With regard to the final order, the South African *Divorce Act* makes pension interest part of patrimonial assets to be divided equally between the spouses if the parties are married in community of property.[63] Specifically, if a spouse is a member of the pension fund, the pension interest is the benefit to which that spouse would have been entitled to had s/he terminated his/her membership of the fund at the date of divorce by resigning from his/her employment.[64] In addition, where a spouse is a member of a retirement annuity fund, the pension interest (all contributions to the fund up to the date of divorce together with interest)[65] also becomes part of the community of property. One can presume that, in this day and age, a medical practitioner in the position of Mr Ramalitse has either a pension fund or a retirement annuity fund, which will definitely be excluded from the division of joint estate in Lesotho. As a result, the author is compelled to presume that this has been a calculated move on the part of the applicant to divorce the

63 *Divorce Act* 70/1979:section 7(7).
64 *Divorce Act* 70/1979:section 1.
65 *Divorce Act* 70/1979:section 1.

respondent in the jurisdiction where her matrimonial rights will potentially be ignored or be beyond the Court's material jurisdiction.

In *Erskine*, a commercial law case, the court considered that the appellant had left England to avoid his creditors, thus making him a fugitive from justice, and as such, the court ruled that "a fugitive from justice who has changed his domicile and residence with evasive intent cannot rely upon his absence".[66] Therefore, even if Mr Ramalitse were to allege that his domicile is in Lesotho, the Court ought to have foreseen that he might be a fugitive from justice, trying to evade litigation in South Africa. However, it does not seem to have occurred to the Judge why the South Africans residing in South Africa and having property in South Africa chose her court.

66 *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (W):821.

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