Opportunities for Development in South African Private International Law

The ongoing global pandemic is forcing the legal industry the world over to take stock. Infections in the Republic of South Africa ("RSA") have recently passed the half a million mark, while various legal institutions across the country have struggled to deal with the financial consequences of COVID-19. Amongst the gloom, however, there are reasons still to be optimistic: the country's judiciary has recently received a clear endorsement from Global Integrity, which has awarded it a score of 100 in its Africa Integrity Indicators, thereby affirming (once again) the judiciary's autonomy and independence.

Endorsements like these are very important, both in the short and long-term future. The pandemic has created conditions out of which legal disputes are almost certain to arise. Lawyers and courts will likely be required to grapple with these disputes for some time to come. Where these disputes have an international element to them, RSA, with its strongly independent judiciary and sophisticated legal system, ought to provide (at least continent-based) litigants with an attractive forum in which to resolve these disputes. Such resolution may require a South African court to try and determine the outcome of the dispute; it may, instead, require a South African court to afford

recognition and enforcement to a judgment emanating from a court in another (African or otherwise) jurisdiction.

Attractive forum though it is or ought to be, there are still certain points of private international law which require clarification. Their clarification will, it is submitted, make RSA an even more attractive forum for litigants in which to resolve disputes. The remainder of this article considers two specific issues in more detail.

Personal jurisdiction and the doctrine of *forum conveniens*

In order for a court to be able to determine a matter, it must have jurisdiction to do so. RSA's Roman-Dutch common law system traditionally required, when dealing with a *peregrinus* (that is, a foreign, non-South African) defendant, attachment of that defendant's property so as to found or to confirm the South-African court's (personal) jurisdiction over that defendant (Bid *Industrial v Strang* [2007] SCA 144 (RSA)).

In *Bid* itself, the Supreme Court of Appeal hinted at a relaxation of this requirement, with a view to modernising the law of (personal) jurisdiction. Howie P, giving the judgment of the Supreme Court, stated, in his view, that so long as the defendant was served with process in RSA and there was an "adequate connection [from the point of view of appropriateness and convenience] between the suit and the area of jurisdiction of the South African court concerned", the South African court would have jurisdiction (see [56]). This principle – that of *forum conveniens* – is, of course, familiar in English private international law and, at root, expresses the idea that task of the "court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice" (*Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804, at [88]).

Unfortunately, however, the

extent to which the principle of forum conveniens – and the subsequent relaxation of the traditional common law rules – has taken root in South African could be clearer. The cases decided after *Bid* have revealed a schism in judicial attitudes as to the role (if any) which ought to be carved out for this principle in RSA. Even so, and despite apparently contradictory statements at the highest level of the judiciary, the most recent pronouncements – although uttered against the backdrop of a specific statutory, rather than common law, context, viz the Competition Act 89 of 1998 – do suggest a wider role for the doctrine of forum conveniens in the future (see: *Competition Commission v Bank of America Merrill Lynch International Ltd & Others* [2020] (4) SA 105 (CAC)). Clarifying further the ambit of this principle and, consequently, loosening the traditionally restrictive requirements of the common law would, it is submitted, provide further opportunity for RSA to become a (regional) dispute resolution hub.

The enforcement of foreign judgments and the Hague Convention

The principles governing the recognition and enforcement of foreign judgments at common law in South Africa were set out by the Supreme Court in *Jones v Krok* (1995 (1) SA 677 (A)). The common law regime, within which these principles are contained, is far more important than the statutory regime, set out in the Enforcement of Foreign Judgments Act 32 of 1988. After all, the latter has only been extended to judgments emanating from the courts of Namibia.

That the common law principles have been labelled as "obsolete" (see S Khanderia, Journal of African Law, 2019, 63(3), 432) is obviously a point of concern. While not entirely agreeing with that assessment, it is submitted that some of those principles, particularly the ones which govern the circumstances in which the foreign court will be said to have had "international jurisdiction" (i.e. jurisdiction to determine the original dispute between the parties) are probably in need of reconsideration. As part of that reconsideration, lawyers, courts and legislators may have to ask whether to adopt a common law model from another Commonwealth court (like the "real and substantial connection test" posited by the Supreme Court of Canada: *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572) or, in due course and after its entry into force, to sign up to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "2019 Hague Convention").

The 2019 Hague Convention is, as stated, not yet in force and true assessments of its utility are hard to make until more data is available. On the other hand, the "real and substantial connection test" would certainly widen the potential scope of cases in which a foreign court would be deemed to have international jurisdiction and so would allow for the recognition and enforcement of more foreign judgments in RSA, thereby creating a more internationalist flavour to the existing private international law principles governing this area. Adopting it would, were such adoption to be accompanied by a wholesale welcome of *forum conveniens* principles in the law of personal jurisdiction, promote greater unity between the law of jurisdiction and the law governing the recognition and enforcement of foreign judgments. Even so, the Canadian model is not without its critics; English courts, for instance, have decisively rejected the Canadian approach (see: *Rubin v Eurofinance SA* [2013] 1 AC 236).

How easy it should be to recognise and enforce a foreign judgment in RSA is a difficult question to answer. The Constitutional Court has hinted that the development of the common law on such matters has been (and should be?) driven by "the need to ensure that lawful judgments are not to be evaded with impunity by any … person in the global village" (*Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC), at [54]). It remains to be seen whether this internationalist spirit prompts and influences further reconsideration of those common law rules in due course and, if it does, what that means for RSA as a dispute resolution forum in the future.

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