Conflicts of jurisdiction in Senegal: lesson from the Senegalese Supreme Court on Lis Pendens and the Exequatur of foreign judgments



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I. Introduction

The recognition and enforcement of foreign judgments in French-speaking sub-Saharan Africa has not been the subject of many studies. Although a few such studies do exist, this is in contrast to the field of conflict of laws and personal status law in particular. Consequently, the two rulings issued by the Supreme Court of Senegal on August 12, 2020, in connected disputes went practically unnoticed, even though they offer valuable insights into determining the

jurisdiction of Senegalese courts in international disputes and the enforcement of foreign judgments.

The purpose of this note is therefore to shed light on the law and practice of conflict jurisdictions in Senegal.

II. Facts and proceedings

The dispute involves a Senegalese couple, X (the husband) and Y (the wife), who married in Senegal in 1996. They lived there for some time before Y moved to Montreal, Canada, where she settled in 2015.

In 2017, X filed a petition for divorce in Senegal. Y challenged the jurisdiction of the Senegalese courts. The lower court rejected Y's objection and assumed jurisdiction over the dispute. Dissatisfied with the decision, Y appealed to the Supreme Court [Case 1].

Meanwhile, in 2019, Y successfully obtained an interim order from a court in Montreal, Quebec, in the divorce proceedings between the parties. The order, among other things, granted Y the exclusive right to occupy a residence located in Senegal, to the exclusion of X.

The lower court declared the Canadian judgment enforceable in Senegal. Dissatisfied with that decision, X appealed to the Supreme Court [Case 2].

III. Rulings

Case 1 (Ruling No 73 of 12 August 2020)

In the first case, the Supreme Court ruled that when disputes involve spouses of Senegalese nationality, the wife resides abroad, the rule governing the international jurisdiction of Senegalese courts set forth in Article 853 of the Family Code (CF) apply to the exclusion of domestic provisions contained in Article 167 of the same Code, which are confined to matters of territorial jurisdiction. Second, the Court held that, by virtue of the exclusive jurisdiction conferred upon it by Article 853, the Senegalese Court are not required, in the

event of international *lis pendens*, to decline jurisdiction in favor of a foreign court hearing the same dispute between the same parties. Consequently, the lower court dismissed the *lis pendens* noting that the – both Senegalese national married in Senegal – had lived there before Y moved to Canada in 2015, properly justified its decision.

Case 2 (Ruling No 74 of 12 August 2020)

In the second case, the supreme Court ruled as follows:

First, the Supreme Court recalled the applicable legal framework for granting exequatur, notably Articles 787-790 of the Code of Civil Procedure (CCP) dealing with the exequatur requirements, and Articles 853 [*op. cit.*] as well as 843 and 846 of the FC dealing with the law applicable to the extra-patrimonial effects of marriage and divorce or legal separation, as well as matrimonial property regimes. The Court then observed that the lower court had declared the Canadian judgment enforceable in Senegal on the ground that it satisfied the requirements for recognition and enforcement.

However, the Supreme Court disagreed and held that, by declaring the Canadian judgment enforceable, the lower court had misapplied the law. First, the Canadian court lacked jurisdiction to order provisional measures in divorce proceedings between Senegalese spouses, since some of those measures were to be enforced in Senegal and the Canadian court had failed to apply Senegalese law, which was designated as the applicable law under the Senegalese conflict-of-laws rules. Second, nothing in the order established that the judgment had been rendered in proceedings in which the parties had been duly served, properly represented, or declared in default.

IV. Comments

An analysis of the two rulings sheds light on how Senegalese Courts deal with parallel proceedings in international disputes (1) and the requirements of the recognition and enforcement of foreign judgments (2).

1. The treatment of parallel proceedings by Senegalese Court

The first ruling in case 1 by the Supreme Court of Senegal provides some useful insights. First according to the supreme court, where one of the defendants is resident abroad, rules on international jurisdiction should apply even when the dispute is between two Senegalese nationals. Second, rules on international jurisdiction do not recognize international *lis pendens*. This is because according to the Court, Article 853 of the FC confers exclusive jurisdiction to Senegalese court whenever either plaintiff or the defendant is Senegalese national.

Accordingly, while Article 853 of the FC does not explicitly refer to the exclusive nature of the ground of jurisdiction based on the Senegalese nationality, the Court interpreted the "privilege of jurisdiction" referred to in the provision as conferring Senegalese courts exclusive jurisdiction. This exclusive nature of the jurisdiction of Senegalese courts precludes the recognition of international *lis pendens*, unless the parties have waived the jurisdictional privilege conferred to them or the judgment resulting from proceedings initiated in Senegal is intended to be enforced abroad.

Consequently, a judgment rendered abroad in a dispute between Senegalese nationals or between a Senegalese national and a foreign national in violation of this exclusive jurisdiction may not be enforced in Senegal. Paragraph 2 of this article further provides that Senegalese courts also have jurisdiction over disputes between foreign nationals when the defendant is domiciled in Senegal or when one of the jurisdictional grounds referred to in article 34 through 36 o the CPC dealing with territorial jurisdiction is located in Senegal.

2. The recognition and enforcement of foreign judgment

a) Applicable legal framework

Under Article 787 of the CCP, in civil, commercial and administrative matters, contentious and non-contentious decisions rendered by foreign courts have de plano the force of res judicata in Senegal territory if they meet the following conditions:

a) The decision was rendered by a court having jurisdiction in accordance with the rules on conflicts of jurisdiction recognized in Senegal;

b) The decision applied the law governing the dispute in accordance with the conflict-of-laws rules recognized in Senegal

c) The decision is, under the law of the State in which it was made, final, binding and enforceable under the law of the rendering State;

d) The parties were duly summoned, represented or declared in default;

e) The judgment is not contrary to Senegalese public policy and does not conflict with a Senegalese court judgment having the force of res judicata.

The application of Article 787 must also be read in conjunction with Article 790 of the CCP, and Articles 843, 846 et 853 of the FC. Article 790 of the CCP determines the scope of the exequatur court's review by providing that, the President of the Regional Court of the place where enforcement is limited to verifying whether the decision for which a declaration of enforceability is sought meets the conditions laid down in Article 787.

Articles 843 and 846 of the FC lay down the rules on conflicts of law relating to personal status in Senegal, particularly in matters of marriage and divorce. These provisions are relevant for determining whether the foreign court had applied the law governing the dispute according to the Senegalese choice of law rules, as required by Article 787(b). Finally, as noted above, Article 853 establishes the rules governing international direct jurisdiction o the Senegalese courts and is relevant to determining whether the foreign court exercised jurisdiction in accordance with the jurisdictional rules recognized in Senegal, as required by Article 787(a).

b) The practice of recognition and enforcement of foreign judgements in Senegal

According to the Supreme Court the conditions laid down in Article 787 were not satisfied. First the Canadian court lacked jurisdiction to order provisional measures to be enforced in Senegal. Second, the Canadian court failed to apply Senegalese law, which was applicable in accordance with the conflict-of-laws

rules Articles 843 and 846 of the FC. Those provisions provide that the extra patrimonial effects of marriage as well as divorce and legal separation, are governed by the spouses' common national law where they share same nationality or where they are of different nationalities, by the law of the country where they have their common domicile at the time the proceedings are instituted. In the absence of proof of the existence of a common domicile the *lex fori* applies. Furthermore, the Court noted that nothing in the finding of the appealed order that the foreign judgment was rendered in proceedings which the parties had been duly summoned, represented or declared in default.