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24. MUSLIM LAW

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I. Introduction

24.1 It has been said that the "close relationship between the civil and Muslim law system requires a constant negotiation and renegotiation of both substantive and procedural laws governing both legal systems".[1] Four cases in 2020, one emanating from an appeal from a decision in the civil courts (the Family Justice Courts, to be precise) and three others arising in the Muslim law context, reflect the intricate workings of such a relationship and the close symbiotic relationship between the two regimes.

II. Stay of proceedings

24.2 Part of such negotiation between the two systems as alluded to in the preceding paragraph finds legislative expression in s 17A of the Supreme Court of Judicature Act[2] ("SCJA"), which sets out that, while the High Court possesses jurisdiction to deal with matters of custody and division of property matters, they should stay "the civil proceedings" when there are live concurrent proceedings in the Syariah Court on these matters unless the Syariah Court gave leave by way of the issuance of a continuation certificate to permit such proceedings in the civil courts to proceed.

24.3 The decision of the High Court in *VFU v VFV*[3] serves as a salutary reminder of the importance of being mindful of the need for such civil proceedings to be live in order for such a stay to be ordered. That case involved two parties who were married under Muslim law and who had three children. The wife had initially filed an Originating Summons ("OSG 9/2017") in the Family Court as a result of some marital difficulties. OSG 9/2017 would eventually culminate in a consent order

1 Ahmad Nizam Abbas *et al*, "Recent Developments in Muslim Law Practice in Singapore" *Singapore Law Gazette* (March 2019).
2 Cap 322, 2007 Rev Ed.
3 [2020] SGHCF 3.

("the OSG Order") which provided access to the children to the husband. Subsequently, the husband commenced divorce proceedings in the Syariah Court. Sometime thereafter, the husband commenced committal proceedings ("the committal proceedings") against the wife for having breached the OSG Order for a period of time in between the OSG Order and the date such proceedings were commenced. Shortly thereafter, the Syariah Court made certain interim orders on access to the children ("the Syariah Court interim orders").

24.4 The District Judge presiding over the committal proceedings declined to find that she had jurisdiction to hear the matter in the absence of a continuation certificate by virtue of s 17A(2) of the SCJA. The husband appealed this finding, urging the High Court to find that as the summons for the order of committal did not amount to proceedings on custody or division of property, leave of the Syariah Court (by way of the issuance of a continuation certificate) pursuant to s 17A was not required.

24.5 Debbie Ong J allowed the appeal. Noting that OSG 9/2017 had already concluded with the issuance of the OSG Order, Ong J opined that there was, in the circumstances, no civil proceedings to speak of that could be stayed.[4] Furthermore, Ong J observed that the OSG Order itself should not be stayed by virtue of s 17A of the SCJA, as the *raison d'être* for the stay of civil proceedings was to prevent a situation of two courts determining the same matter and reaching distinct outcomes. This concern possessed no scope for application in the present instance as there were no orders that regulated the parties until the Syariah Court interim orders were issued.[5] Consequently, Ong J found that the OSG Order would have subsisted and would have regulated the parties until it was superseded by the Syariah Court interim orders. It would, therefore, consequently follow that the committal proceedings were not "civil proceedings" that needed to be stayed under s 17A of the SCJA and there was no requirement for a continuation certification before the civil proceedings could proceed.[6]

24.6 *VFU v VFV* serves as a reminder of the need for the civil courts to be mindful to engage in a careful assessment in such cases of whether the proceedings before it are in fact the sort of proceedings that fall under the umbrella of proceedings that ought to be stayed under s 17A of the SCJA. Ong J's decision may potentially be rationalised through a slightly different, albeit related, lens: should the commencement of Syariah Court proceedings *ipso facto* result in the suspension of the operation of the

4 *VFU v VFV* [2020] SGHCF 3 at [10].
5 *VFU v VFV* [2020] SGHCF 3 at [11].
6 *VFU v VFV* [2020] SGHCF 3 at [12].

OSG Order, it would essentially allow for the emasculation of such an order by a dissatisfied party through the commencement of Syariah Court proceedings. This would be undesirable in so far as it would mean that any party aggrieved by such an order, and who does not wish to be bound at all by its strictures, could immediately commence Syariah Court proceedings to hollow the order of any effect. While the civil courts should certainly be mindful of the need to allow the Syariah Court to make the necessary orders and to regulate proceedings in relation to Muslim marriages, it would not be ideal for there to be a vacuum on the issue of custody and access in the time between when the Syariah Court proceedings commence and the time when interim orders on such matters can be made. The reasoning in *VFU v VFV* ensures that, in cases of this nature, the parties are continuously regulated on these matters.[7]

III. Applicability of structured approach for division of matrimonial assets to Muslim law cases

24.7 *Appeal Case 26/2018* provided the MUIS Appeal Board the occasion to consider the applicability of the three-step structured approach ("the structured approach") adopted by the Court of Appeal in *ANJ v ANK*[8] to cases adjudicated by the Syariah Court and the MUIS Appeal Board. It would be reminded that the structured approach involved a three-step process to assist with the process of division of matrimonial assets, broadly as follows:[9]

> (a) Under the first step, the court considers the parties' direct contributions as a ratio relative to each other.
>
> (b) Under the second step, the parties' indirect contributions (both financial and non-financial) are expressed as a ratio relative to each other.
>
> (c) The parties' overall contributions, relative to each other, are then derived by taking the average of these two ratios, though depending on the circumstances of the case, one of the ratios might be accorded more significance compared to the other.

24.8 The structured approach was a watershed development in family law at the time. It reflected a pronounced shift from the courts' use of the "uplift" approach in which the court uses the parties' direct financial contributions as a starting-point proxy for ascertaining the proportions of division before making necessary adjustments to take into account

7 *VFU v VFV* [2020] SGHCF 3 at [11].
8 [2015] 4 SLR 1043.
9 *Appeal Case 26/2018* at [21].

non-financial contributions by both parties to the marriage. This had the implicit effect of giving inordinate emphasis to financial contributions in a marriage and understating the value of non-financial contributions. As the Court of Appeal observed in *ANJ v ANK*:[10]

> As we see it, the 'uplift' methodology is not a good tool to assess and recognise the parties' indirect contributions to the marriage. The primary difficulty with this approach is the inherent risk of it undervaluing a spouse's non-financial contribution. Using direct financial contributions as the *prima facie* starting point would not achieve the objective of the [amendments to the Women's Charter] of equalising the non-financial contribution with financial contribution given the tendency for direct financial contributions to assume centre-stage, leaving inadequate room for indirect contributions to feature within the calculus.

24.9 Consequently, the structured approach, it was posited, enabled the court to "better strike a proper balance between the search for a principled test and the need to remain sensitive to the factual nuances of each case".[11] More recent decisions from the Supreme Court have, however, clarified that the structured approach ought not to be slavishly applied without first a clear appreciation of its applicability to the dispute before the court. As an example, in *TNL v TNK*,[12] the Court of Appeal cautioned that the structured approach may not be of much assistance in determining the division of matrimonial assets in single-income marriages where one spouse was the sole income earner and the other played the role of homemaker, as it had the effect of disadvantaging a non-working spouse.[13]

24.10 The facts of *Appeal Case 26/2018* can be very briefly stated. The appellant (wife) and the respondent (husband) married in 1997. Unfortunately, the marriage broke down and was eventually dissolved in 2018.[14] While the appellant was gainfully employed for most of that time and served as the primary breadwinner, the respondent was not in any permanent or meaningful employment for much of the duration of the marriage.[15] At the same time, the respondent could not be said to be a homemaker as he was absent from the household for substantial periods of time, primarily to pursue further studies overseas.[16] In this connection, the Appeal Board opined that even when he was residing in Singapore, there was no cogent evidence that he took on the burden of a homemaker

10 *ANJ v ANK* [2015] 4 SLR 1043 at [19].
11 *ANJ v ANK* [2015] 4 SLR 1043 at [30].
12 [2017] 1 SLR 609.
13 *TNL v TNK* [2017] 1 SLR 609 at [44] and [46].
14 *Appeal Case 26/2018* at [2]–[4].
15 *Appeal Case 26/2018* at [31].
16 *Appeal Case 26/2018* at [31].

or that he was engaged in any meaningful employment.[17] The appellant was also largely taking care of the two children in the marriage. In gist, the Appeal Board observed that "the totality of the evidence points to the fact that the appellant has primarily shouldered both the burdens of breadwinning and homemaking for the family."[18]

24.11 One of the questions that the court therefore had to grapple with was the applicability of the structured approach to cases of this nature. In this regard, the Appeal Board noted that as the structured approach had much to commend it and served to "provide a more principled methodology for a just and fair division of matrimonial property, and enables greater understanding of and certainty about how the court arrives at its decision,"[19] there was no reason why the structured approach could not be applied in the Muslim law context to cases before the Syariah Court. Nonetheless, the Appeal Board cautioned that even in doing so, it was important to appreciate that there were inherent limitations and nuances in the structured approach, and this must be recognised – in particular, the Appeal Board observed, as noted in *TNL v TNK*, the structured approach may not be suitable for cases involving exceptional circumstances or where it involved long "single-income" marriages.[20]

24.12 On the facts of the case before it, applying a qualitative assessment of the roles played by each of the spouse *vis-à-vis* the other in this case, the Appeal Board observed that the marriage fell into the definition of a long "single-income" marriage for the reasons expressed above.[21] Consequently, the Appeal Board opined that the structured approach would not be applicable and the "uplift" approach ought to be employed to facilitate the process of division of matrimonial assets.

24.13 *Appeal Case 26/2018* represents a useful jurisprudential development on at least two distinct, if inter-related, fronts. First, it provides useful clarity on the *general* applicability of the structured approach in cases involving dual-income households, and further reinforces the continued application of common law jurisprudential approaches in the Muslim law context in Singapore. Second, and relatedly, the decision of the Appeal Board also echoes jurisprudential developments in the civil law realm which speaks to the inherent limitations of the structured approach test to assist with the division of matrimonial assets for certain categories of cases. As noted by the High Court, the structured approach

17 *Appeal Case 26/2018* at [34].
18 *Appeal Case 26/2018* at [31].
19 *Appeal Case 26/2018* at [29].
20 *Appeal Case 26/2018* at [23] and [24].
21 See para 24.10 above.

is not always going to apply, and is probably "best applied where it can be seen that the non-financial or indirect contribution of one spouse, even in equal proportion, enabled the other to pay for the purchase of the matrimonial assets" and should not be applied in "unusual cases".[22]

IV. Whether third party interveners have right to seek custody order in their favour under Administration of Muslim Law Act

24.14 *Appeal Case 11/2019* raises the interesting issue of whether non-parties to a marriage are empowered under the Administration of Muslim Law Act[23] ("AMLA") to obtain custody or care and control orders pursuant to divorce proceedings. In *Appeal Case 11/2019*, pursuant to divorce proceedings, both husband and wife, by consent, agreed to joint custody of the two children ("the custody order"). After the wife passed away, her parents ("the Interveners") applied to vary the custody order and sought custody of the two children. At first instance, the Syariah Court granted the husband sole custody but ordered for reasonable access to be granted to the Interveners. The Interveners appeared against the order, seeking custody of the two children.

24.15 On appeal, the Appeal Board opined that there was no jurisdiction for the Syariah Court (and by extension the Appeal Board) to grant custody or care and control orders to the Interveners. Specifically, the Appeal Board observed that the Syariah Court is a creature of statute and it did not possess any freestanding power under s 35(2) of the AMLA to grant custody or care or control orders.[24] Instead, its power to grant such orders is specifically within the context of matrimonial proceedings under s 53(2) of the AMLA, which did not permit a third party to apply to obtain custody or care and control of the children.[25] The Appeal Board, in coming to this conclusion, applied by analogy the position adopted by similar jurisprudence in the civil realm[26] which similarly took the position that while an intervener had the right to be heard, there was no substantive jurisdiction and power for the court to make an order for or against any such intervener[27] (as its powers were limited to being applied between the spouses). In this connection, the Appeal Board observed that while s 52(6) of the AMLA allows for interested parties to apply for

22 *UQP v UQQ* [2019] 4 SLR 1415 at [11].
23 Cap 3, 2009 Rev Ed.
24 *Appeal Case 11/2019* at [8].
25 *Appeal Case 11/2019* at [9] and [10].
26 *UDA v UDB* [2018] 3 SLR 1433, affirmed by the Court of Appeal in *UDA v UDB* [2018] 1 SLR 1015.
27 *Appeal Case 11/2019* at [14].

a variation order, this did not extend to giving such interested parties the right to obtain such orders in their favour, as this must be subject to the primary powers accorded under s 52(3), which envisioned such an order only being made in favour of the parties to the marriage (that is, in this case, only the husband and wife).[28] In the circumstances, the Appeal Board was constrained to overturn the decision made by the Syariah Court to allow the Interveners to be granted reasonable access to the two children.[29] The Appeal Board concluded by highlighting that, while this was the necessary outcome mandated by law, the husband should nonetheless come to an amicable arrangement with the Interveners to ensure that the latter are granted reasonable access to the two children, as this would be in their best interest.[30]

V. Power of variation and right of third parties to seek substantive order for proceeds of matrimonial assets under Administration of Muslim Law Act

24.16 *UDA v UDB*[31] was similarly found to be persuasive in the Appeal Board's reasoning in *Appeal Case 32/2019*, which similarly also engaged questions of the proper construction to be had to s 52 of the AMLA. In *Appeal Case 32/2019*, pursuant to divorce proceedings, the Syariah Court had ordered for the matrimonial assets between the first appellant (the husband) and respondent (the wife) to be sold in the open market and for the nett proceeds to be awarded in full to the respondent. Notwithstanding the fact that he was in time to appeal against such an order, the husband elected to file a variation order, and the second appellant, who was the first appellant's present wife, was added as an intervener. In gist, the first and second appellants contended that as the second appellant had provided a sum of slightly over $200,000 to the respondent to allow for the first appellant to take over the matrimonial assets (such sum being disputed, but the dispute of which is irrelevant for the present discussion), and that such sums should accordingly be returned to the second appellant from the nett sale proceeds from the matrimonial assets. Furthermore, the first appellant contended that he should be entitled to 15% of the nett proceeds thereafter. At first instance, the Syariah Court varied the order to make an order for the payment of the monies from the sale proceeds of the matrimonial assets to the second appellant.

24.17 On appeal, the Appeal Board observed that there were two primary issues that it had to deal with. The first was whether the first

28 *Appeal Case 11/2019* at [15] and [16].
29 *Appeal Case 11/2019* at [21].
30 *Appeal Case 11/2019* at [23].
31 [2018] 1 SLR 1015.

appellant was entitled to apply for a variation order under s 52(6) of the AMLA in the present circumstances, having elected to do so instead of appealing the decision. The Appeal Board observed that the categories for variation under s 52(6) of the AMLA were circumscribed to various factors, including, *inter alia*, a material change in the circumstances or other good cause. In this connection, the Appeal Board, placing reliance on the Court of Appeal's decision in *AYM v AYL*,[32] observed that in view of the need for finality in court orders for division of matrimonial assets, for a variation order to succeed on grounds of there being a "material change in circumstances", there is a need for the initial order given to be "unworkable" as any lower standard would incentivise dissatisfied parties to continually seek to revisit the orders at every opportunity where even minor changes in circumstances arise.[33] On the matter of there being "other good cause", the Appeal Board observed that there was no such cause in this case – the first appellant had elected to apply to vary the order rather than to appeal the order, thereby effectively affirming the very order he sought to impugn.[34] The Appeal Board observed that what should have been done was for the first appellant to have filed an appeal, which would have allowed a consideration of whether there had been an error in any findings of fact or application of the law by the Syariah Court.[35]

24.18 In relation to the rights of the second appellant, placing reliance once more on the reasoning employed in *UDA v UDB*, the Appeal Board noted that s 52(6) of the AMLA does not confer jurisdiction upon the Syariah Court to determine substantive claims for or against an intervener as it is nothing more than a matrimonial jurisdiction that can only be exercised *vis-à-vis* the spouses.[36] The Appeal Board observed in this regard that the Syariah Court was therefore not empowered as a matter of law to make orders for or against an intervener as there is no jurisdiction to do so. Instead, where there were third party interests engaged that may be relevant to the determination of the rights between the parties to the proceedings (though it noted this should be rare), the Syariah Court may stay the proceedings pending the determination of such rights in the appropriate forum.[37] As the question of whether the inclusion of contributions of a third party (that is the second appellant) should have been designated as matrimonial assets is an argument that should be properly considered in an appeal and not in a variation application, it would not be appropriate for the Appeal Board to deal with

32 [2013] 1 SLR 924.
33 *Appeal Case 32/2019* at [51], [53] and [56].
34 *Appeal Case 32/2019* at [62].
35 *Appeal Case 32/2019* at [61].
36 *Appeal Case 32/2019* at [73].
37 *Appeal Case 32/2019* at [74].

the issue.[38] For completeness, the Appeal Board observed that this did not mean that the second appellant would be precluded from claiming recovery of her money, but only that this should be the subject of a civil action and not as part of the matrimonial proceedings.[39] Consequently, the Appeal Board reversed the Syariah Court's variation order for the payment of the moneys from the sale proceeds of the matrimonial assets to the second appellant, as it concluded that there was no jurisdiction or power on the part of the Syariah Court to make such an order.[40]

38 *Appeal Case 32/2019* at [78].
39 *Appeal Case 32/2019* at [79].
40 *Appeal Case 32/2019* at [81].