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The South African High Court Erring in the Application of Law: Does a Foreign Arbitral Award 'Cease to Exist' When Made a Court Order?

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In this post we consider the soundness of the legal conclusion of the Johannesburg High Court in the recent matter of ***Government of the United Republic of Tanzania v Hermanus Philippus Steyn*** (28994/2019) [2019] ZAGPJHC 312 (4 September 2019); 2019 JDR 1690 (GJ) ("**Reconsideration Judgment**") to confirm jurisdiction over foreigners in South Africa in order to institute future proceedings for the enforcement of a foreign arbitral award under the South African International Arbitration Act 2017.

It is a well-established principle under South African law that for a South African court to exercise effective jurisdiction over a foreigner in South Africa such jurisdiction must be confirmed or founded by means of attachment of property owned by such foreigner in South Africa. Thus, any legal proceedings for the recognition and enforcement of a foreign arbitral award under the South African International Arbitration Act will not be competent without an order to confirm or found jurisdiction over a foreigner in South Africa. The relevant background facts are:

- In July and September 2010, Hermanus Philippus Steyn ("**Steyn**") obtained an arbitration award against the United Republic of Tanzania ("**Tanzania**") in the sum of US$36,375,672.81 for land compensation claim that dates back to the 1980s ("**Steyn Award**"). The arbitration award was made an order of court of the High Court of Tanzania, Commercial Division on 3 May 2011.
- On 17 July 2012, the parties thereafter concluded a settlement agreement with the Republic of Tanzania agreeing to pay Steyn the amount of US$30,000,000.
- During 2018, Tanzania then unsuccessfully attempted to set aside the arbitration award made an order of court on 3 May 2011 on the basis that it was fraught with errors which needed to be reconsidered. This application was dismissed by the High Court of Tanzania on 4 December 2018 on the basis that the arbitration award was non-existent in Tanzania by virtue of it being made an order of court.
- In June 2019, Tanzania launched its maiden flight to Johannesburg.
- On 21 August 2019, Steyn obtained an *ex parte* order from the Johannesburg High Court by Judge Wepener J, who ordered the attachment of the aircraft owned by Tanzania in order to confirm, alternatively to found jurisdiction, to enable Steyn to seek the recognition and enforcement of an arbitration award.

The Reconsideration Judgment related to a reconsideration application brought by the Government of Tanzania before Judge Twala to reconsider the *ex parte* order of Judge Wepener J rendered on

21 August 2019 resulting in the attachment of the aircraft owned by the Government of Tanzania. The attachment order established the jurisdiction of the Johannesburg High Court "*in proceeding to be instituted*" by Steyn for the enforcement of a foreign arbitral award under the South African International Arbitration Act 2017.

In Judge Twala's Reconsideration Judgement, he granted an order in favour of Tanzania setting aside the attachment order of the aircraft to confirm jurisdiction of the Johannesburg High Court on the following grounds:

> "*[16] I am of the considered view that the arbitration award ceased to exist on 3 May 2011 when it was made an order of Court. ….*
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> […]
>
> *[18] … The ineluctable conclusion is that the first respondent does not have an arbitration award which requires recognition and enforceability as envisaged by section 3 of the IA Act but is armed with a Court Order.*"

Even though the Reconsideration Judgment was in relation to an application to confirm or found jurisdiction over foreigners in South Africa, the reasoning which underpins this decision was pronounced on fundamental legal principles of the enforcement of foreign arbitral awards in South Africa. As the reasoning for Reconsideration Judgement by Judge Twala is essentially pegged to the date the arbitral award was made an order of court in Tanzania (3 May 2011), this post will not address the developments that took place during the period between 3 May 2011 and 4 December 2018, i.e. with the compromise reached between the parties and the recent unsuccessful setting aside proceedings in Tanzania.

The relevant facts for purpose of considering whether the Johannesburg High Court was dealing with a "foreign award" (also called "non-domestic award"), as contemplated by the South African International Arbitration Act, under Article I of the New York Convention were:

- Steyn (a Namibian national) and the Government of Tanzania were parties to an arbitration relating to a land compensation claim in respect of land owned by Steyn in Tanzania;
- The arbitral tribunal seated in Tanzania rendered an arbitration award in September 2010 in favour of Steyn; and
- The arbitral award rendered in September 2010 was made an order of court of the High Court of Tanzania on 3 May 2011 for purpose of enforcement of such award in Tanzania.

Section 14(d) of the South African International Arbitration Act defines a foreign arbitral award as "an arbitral award made in the territory of a state other than the Republic". Once a court is satisfied that it is dealing with a "foreign award", it must give effect to Article I and III of the New York Convention to such award during proceedings for the recognition and enforcement of the award. Article I and III of the New York Convention obliges contracting states to recognise foreign arbitral awards as binding and to enforce such award in accordance with the rules of procedure applicable in such contracting state. The Steyn arbitral award appears to qualify as a foreign arbitral award, as the arbitral award was a) rendered in Tanzania and b) the parties involved are Namibian and Tanzanian.

On a *prima facie* basis, the attachment order to confirm the jurisdiction of the Johannesburg High Court should have been confirmed by Judge Twala in order for Steyn to proceed with the enforcement proceedings. However, instituting enforcement proceedings would not imply that enforcement of the Steyn Award would necessarily have been granted by the court dealing with such proceedings against the Government of Tanzania. The Government of Tanzania would have been entitled during such enforcement proceedings to raise specific grounds for the refusal of recognition and enforcement of the Steyn Award as contemplated by the section 18 of the South African International Arbitration Act (which is a *verbatim* adoption of Article V of the New York Convention). This could, amongst others, have been on the grounds that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made, including public policy considerations in South Africa. In addition, the Government of Tanzania would have been entitled to raise defences based on the procedural rules of South Africa, including defence of potential prescription of the award and state immunity.

The fact that the Steyn award was made an order of court on 3 May 2011 in Tanzania, for enforcement purposes in Tanzania, had no legal effect on its separate existence as a foreign arbitral award rendered in favour of Steyn, as contemplated by the New York Convention. Any legal conclusion that the Steyn Award ceased to exist on 3 May 2011 violates the entire foundation on which international arbitration and the recognition and enforcement of foreign arbitral awards are based, i.e. that a contracting state shall recognize foreign arbitral awards as binding and enforce such award, unless a party is able to convince a court that recognition and enforcement be refused on the grounds listed in Article V of the New York Convention. The Steyn Award was never set aside or annulled by the court at the seat (Tanzania).

Only once a foreign arbitral award has been set aside or annulled in the seat of arbitration in accordance with article V(1)(a) of the New York Convention and section 18(1)(b)(vi) of the South African International Arbitration Act it is considered to cease to have legal existence and has become null. However, courts in France, Switzerland and other jurisdictions have held that even foreign awards that have been set aside or annulled in the seat of arbitration (i.e. awards set aside) remain binding and are enforceable in other jurisdictions.[1)] In other words, they do not "cease to exist". Thus, even if the Steyn Award was set aside in the seat of arbitration, i.e. Tanzania, it could possibly still be recognized and enforced in any other New York Convention jurisdiction. The approach adopted by Judge Twala in the Reconsideration Judgment to consider the Steyn Award as having ceased to exist for recognition and enforcement purposes in South Africa, therefore, does not accord with what is contemplated by the New York Convention and the South African International Arbitration Act.

Judge Twala's task in the reconsideration application was merely to ascertain whether *prima facie* a foreign arbitral award existed for the purposes of the attachment order in order to confirm South Africa's jurisdiction over the foreigners. Thereafter, Steyn would need to submit an application for the recognition and enforcement proceedings before another court, which would then deal with any grounds for the refusal of the recognition and enforcement of the foreign arbitral award. The conclusion by Judge Twala that "*the arbitration award ceased to exist on 3 May 2011 when it was made an order of Court*" resulting in the setting aside of the *ex parte* attachment order was based on an error in law, i.e. applying a legal principle applicable to domestic arbitral awards, as opposed to the legal principles applicable to a foreign arbitral award. In addition, the reasoning of Judge Twala is inconsistent with the fundamental international principles discussed above, that underpin

the recognition and enforcement of foreign awards as contemplated by the South African International Arbitration Act and the New York Convention.

Fortunately, the Reconsideration Judgement has no precedent setting effect and will most probably be corrected in future recognition and enforcement applications in the Johannesburg High Court or other high courts in South Africa. However, these types of pronouncements have the effect to undermine Johannesburg as a seat for international arbitration. If one has regard to the arguments made by counsel during the reconsideration application and the reasoning of Judge Twala, it does highlight the need for South African professionals and the judiciary to ensure we invest in education and training on various aspects of international arbitration. If not, South Africa's development as "Go-To" seat for international arbitration in Africa could be undermined.

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References

?1 Judgement of 10 June 1997, Omnium de Traitement et de Valorisation v Hilmarton, XXII Y.B Comm. Arb 696(1997); G. Born, International Arbitration: Law and Practice at page 338 – 341 (2012); posts about this discussion are available also at the Kluwer Arbitration Blog **here**.

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