School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Josias Van Zyl and others v Kingdom of Lesotho [2017] SGHC 104 – Judgement 24 April 2017

Case Report by: Lucia Raimanová **, Editor Diego Luis Alonso Massa***

Summary: The central question considered in this appeal against an order of Assistant Registrar was whether a leave order to enforce an arbitral award against a sovereign State must be served through diplomatic channels in accordance with s 14 of the State Immunity Act (Cap 313, 214 Rev Ed). Having prevailed in an Investor-State arbitration commenced under Annex 1 to the Protocol on Finance and Investment of the South African Development Community, the appellants obtained a leave order to enforce the award on costs on the Kingdom of Lesotho and attempted service on the Kingdom's solicitors in prior proceedings and the Attorney General. After the attempted service failed, the appellants sought leave from the Assistant Registrar to serve the order by substituted means. The Assistant Registrar refused the application and the appellants appealed. The High Court dismissed the appeal and upheld the Assistant Registrar's decision that service of the leave order on the Kingdom of Lesotho had to be effected through diplomatic channels as required by s 14 of the State Immunity Act. The issue took the appellants and the court into unchartered waters as far as Singapore jurisprudence is concerned. The High Court held that the leave order was a "writ or other document required to be served for instituting proceedings against a State" within the meaning of s 14(1) of the State Immunity Act. In particular, the High Court held that the relevant distinction that s 14(1) of the State Immunity Act seeks to draw is not between originating and non-originating processes as argued by the appellants, but between the "institution" of new proceedings (of which the State is unaware) and the continuation of on-going proceedings (of which the State already has notice). A leave order fell into the former category and s 14 of the State Immunity Act therefore applied.

Main Issues: Enforcement - Singapore award - Enforcement against a State - State Immunity Act (Singapore) - Procedure for service on foreign State - Section 12 of the State Immunity Act 1978 (UK)

High Court Judge: Kannah Ramesh J, Originating Summons No 95 of 2017 (Registrar's Appeal No 91 of 2017)

Plaintiff's Counsel: Alvin Yeo SC, Mak Shin Yi, Oh Sheng Loong and Tara Radakrishnan (WongPartnership LLP)

Defendant's Counsel: Paul Tan Beng Hwee and Alessa Pang Yi Ching (Rajah & Tann Singapore LLP)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Lucia Raimanová is a solicitor-advocate of England & Wales and a Counsel in Allen & Overy's International Arbitration Group. Lucia was assisted by Lucia Dulovičová in the preparation of this case report.

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at: alonso.arbitrage@icloud.com or https://ar.linkedin.com/in/diegoluisalonsomassa

Digest:

1. Relevant Facts and Procedural History

The appellants Josias Van Zyl, the trustees of the Josias Van Zyl Family Trust and the Burmilla Trust invested in certain mines in the Kingdom of Lesotho ("the Kingdom") – the defendant in the proceedings. The proceedings arose out of an Investor-State arbitration commenced pursuant to Annex 1 to the Protocol on Finance and Investment of the South African Development Community ("SADC") concerning the Kingdom's alleged breaches of obligations under the Treaty of the SADC and related protocols. The arbitration was seated in Singapore and administered by the Permanent Court of Arbitration. Two awards were rendered in the arbitration: (i) a partial final award on jurisdiction and merits dated 18 April 2016; and (ii) a final award on costs dated 20 October 2016. The appeal related to the latter award (paras 1 and 3).

After the awards were rendered, several proceedings were brought in Singapore. The Kingdom applied to set aside the partial final award on jurisdiction and merits on the basis, *inter alia*, that the tribunal did not have jurisdiction over the claims in the arbitration (para 4). Shortly thereafter, the appellants filed an *ex parte* application to enforce the final award on costs and obtained a leave order to enforce the award on 26 January 2017 ("the Order") pursuant to O 69A r 6 of the Rules of Court (para 5).

The appellants' solicitors then attempted to serve the Order on the Kingdom, as required by O 69A r 6(2). The attempts to serve on the Kingdom's separate sets of solicitors in the set aside proceedings and the arbitration and on the Attorney-General of Lesotho failed as they refused to accept service on the grounds of lack of authority and non-compliance with the procedure for effecting service on a sovereign State (paras 6-8).

On 1 March 2017, the appellants eventually filed an *ex parte* application for a permission to serve the Order through substituted means on the solicitors who represented the Kingdom in the set aside proceedings. On 14 March 2017, the Assistant Registrar rejected the request on the basis that service of the Order had to comply with s 14 of the State Immunity Act (Cap 313, 214 Rev Ed) ("the Act") and be effected through the Ministry of Foreign Affairs. The appellants appealed against the decision of the Assistant Registrar (paras 1 and 9). Meanwhile, the Kingdom applied for a declaration that, *inter alia*, the appellants' purported service of the Order was invalid and ineffective (para 10).

2. Analysis of Legal Issues

The central question in the appeal of the Assistant Registrar's decision was whether an order granting leave to enforce an arbitral award (a "leave order") must be served in accordance with s14 of the Act.

S 14(1) of the Act provides:

> "Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the ministry of foreign affairs of that State, and service shall be deemed to have been effected when the writ or document is received at that ministry" (emphasis added).

Ramesh J considered that the appeal turned on whether a leave order is a "*writ or other document required to be served for instituting proceedings against a State*" within the meaning of s 14(1) of the Act, which was a question of construction of the statutory provision (para 13). To that end, the High Court found it instructive to consider s 12 of the UK State Immunity Act 1978 ("the UK Act") on which s 14 of the Act was modelled (para 14). However, it also noted that it seemed instinctively incorrect that service of a leave order on a sovereign State could be effected in some other manner than that provided in s 14(1) of the Act.

In his analysis, Ramesh J considered (1) the position in the UK, (2) the differences in the procedural rules concerning enforcement of arbitral awards in the UK and Singapore, (3) the relevance of State's immunity for the subject matter of the proceedings, and (4) a reference "*entering appearance*" in s 14(2) of the Act. Each of these points of analysis are summarised in turn below.

2.1 S 12 of the UK Act

Citing *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2002] EWHC 2120 (Comm) *and PCL and others v Y Regional Government of X* [2015] EWHC 68 (Comm), Ramesh J noted that the position in the UK is that an order granting permission to enforce an arbitral award ("*a permission order*") must comply with the procedure in s 12 of the UK Act. In particular, Ramesh J observed that s 12(2) of the UK Act applied also to enforcement proceedings and that while s 12(1) of the UK Act would not apply to "*interlocutory applications in existing court proceedings*", an application for enforcement involved the "*initiation*" of "*separate proceedings*" of which a State would have to be made aware of for the first time and, as such, would have to comply with the requirements of s 12(1) of the UK Act (para 22).

2.2 Differences in UK and Singapore procedural rules

Having established the position in the UK, Ramesh J considered whether there were differences in the procedural rules concerning enforcement of arbitral awards that would justify a different outcome from that in the UK, as submitted by the appellants.

To this effect, the appellants focused on the differences in wording in CPR 62.18(8) of the UK Civil Procedure Rules ("CPR") as compared to O 69A r 6(3) of the Singaporean Rules of

Court. In particular, the appellants emphasised that while CPR 62.18(8) stipulates that service of a leave order out of jurisdiction must comply with CPR 6.44 (Service of claim form or other document on a State), O 69A r 6(3) does not contain a reference to an equivalent provision in the Singaporean Rules of Court, namely O 11 r 7 (Service of process on foreign State). They argued that the omission of this reference meant that a leave order does not have to comply with the service of process on foreign State stipulated in O 11 r 7. They also argued that the procedure in O 11 r 7 only applied to originating processes such as writs and originating summonses rather than a leave order, to which O 69A r 6(2) applied, allowing, *inter alia*, for service "*in such other manner as the Court may direct*" (paras 32 and 50).

Ramesh J rejected the appellants' arguments. He held that s 14 of the Act, being primary legislation, must be construed on its own terms and in accordance with Parliament's intention rather than by reference to the Rules of Court. Taking into account the Preamble of the Act and Parliamentary debates, Ramesh J held that the Act and its s 14 in particular encompass the 'entirety of the jurisdiction of the court,' without distinguishing between adjudication and enforcement proceedings (paras 34-40).

Ramesh J then went on to consider whether a leave order constitutes a "*document required to be served for instituting*" enforcement proceedings. He held that the relevant distinction that s 14 of the Act seeks to draw is not between originating processes and non-originating processes as a matter of form, but between the "*institution*" of new proceedings (of which the State is unaware) and the continuation of on-going proceedings (of which the State already has notice) (para 44). It is therefore only after a State already has notice of the proceedings when the procedure for service need not strictly comply with s 14 of the Act. Ramesh J held that this was not the case with respect to a leave order, as it is the leave order that makes the defendant aware of the claim (para 44). He also emphasised that this was a procedural safeguard to which a State is entitled under s 14 of the Act, and it is therefore irrelevant whether the Kingdom was aware of the appellants' intention to enforce the award (para 47).

Having concluded that s 14 of the Act applies to a leave order, Ramesh J considered it irrelevant that O 69A r 6(3) of the Rules of Court did not contain a reference to O 11 r 7 (Service of process on foreign State) (para 49). Ramesh J observed *obiter* that the omission was accidental as O 11 r 7 did not exist at the time the predecessor provision to O 69A r 6(3) was enacted and when O 11 r 7 was enacted, the provision at issue was not updated (para 64).

Even if s14 of the Act did not apply to a leave order, Ramesh J observed *obiter* that the third of the three options for service provided in O 69A r 6(2), which permits service of the leave order "*in such other manner as the Court may direct*", and was relied on by the appellants was not applicable to service of leave orders on States. This was because: (i) the judicial discretion in O 69A r 6(2) appeared to be a residual power to customise service on lay defendants within jurisdiction where the first two methods of service proved ineffective and not to extend to service on a sovereign State (paras 51 and 55); (ii) it was highly unlikely that Parliament would have left the procedure for service of leave orders on foreign States to the discretion of judges and the efforts of individual parties (paras 54); (iii) the approach would be impractical as it would require the courts to give directions as to how the leave order should be served on a State each time such an order was made (para 56); and (iv) it would be inconsistent with how service of all other documents out of Singapore is effected (para 57).

2.3 The relevance of immunity

Throughout the proceedings, the appellants also contented that s 14 of the Act only applied to proceedings from which a State is immune and since the Kingdom had waived its immunity, s 14 of the Act was not attracted (para 66). Ramesh J rejected this argument, holding that s 14 of the Act applies to the service of process on States in general, notwithstanding any arguments of immunity that may be made in the substantive application (para 66). He considered that the purpose of s 14 of the Act was to ensure that a foreign State has adequate time and opportunity to respond to the conduct of proceedings, including by asserting State immunity (para 67).

2.4 Whether "entry of appearance" corresponds with an application to set aside an order granting leave to enforce

Finally, Ramesh J also agreed with the Assistant Registrar's conclusion that an "*entry of appearance*" referred to in s 14(2) and (3) of the Act does not require that s 14 of the Act apply only to documents in response to which an appearance must be entered (para 71).

3. Decision

Ramesh J held that the Assistant Registrar was correct in concluding that a leave to enforce an arbitral award against the Kingdom must be served through diplomatic channels in accordance with s14 of the Act and dismissed the *ex parte* appeal.