



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Josias Van Zyl and others v Kingdom of Lesotho - Judgment of the High Court of Singapore concerning the Originating Summons No 924 of 2017 in the matter of Josias Van Zyl and others v Kingdom of Lesotho - 14 March 2017

Case Report by: Diana Moise**, Editor Ignacio Torterola ***

Summary:

The Singapore High Court rejected Plaintiffs' application to serve an Enforcement Order on Lesotho by posting it at the address of Lesotho's solicitors in Singapore. Under the State Immunity Act s 14(1), any document required to be served for instituting proceedings needs to be served at the Ministry of Foreign Affairs. The Court decided that an Enforcement Order qualifies as such a document.

Main issues: Civil procedure, Service, Procedure for service on Foreign State, Arbitration, Enforcement, Singapore award

Decided by: Shaun Pereira (Assistant Registrar)

Plaintiffs' Counsel: Mak Shin Ti (WongPartnership LLP)

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Digest:

1. Relevant Facts and Procedural Dates

In an arbitration relating to Lesotho's violations of the Treaty of the Southern African Development Community, the Plaintiffs obtained an order allowing them to enforce the final arbitration award on costs as a judgment of the Singapore High Court. The Permanent Court of Arbitration tribunal, seated in Singapore, rendered a final partial

award on jurisdiction and merits on 19 April 2016, and a final award on costs on 20 October 2016.

Lesotho applied to set aside the partial award, on the grounds that the tribunal lacked jurisdiction, in Originating Summons No 492 of 2016. Immediately after the hearing, where judgment was reserved, the plaintiffs separately applied for enforcement. After obtaining the Enforcement Order, the Plaintiffs unsuccessfully attempted to serve it on Lesotho at several of its solicitors' offices and at the Attorney-General of Lesotho. Thus, the Plaintiffs applied for permission to serve the order on Lesotho's solicitors in the proceedings relating to Summons No 492.

2. The Court's Analysis

The Court proceeded to analyse whether an Enforcement Order falls under s 14(1) of the State Immunity Act, which requires service through diplomatic channels, through the Ministry of Foreign Affairs in Singapore.

The Court looked at four aspects. First, the drafting of s 14(1) is wide, encompassing any writ or document. Second, the service has the effect of instituting proceedings for the enforcement of the award, which is covered by s 14(1). The Court considered *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2009] Bus LR 558, where Gross J rejected a distinction between adjudicative and enforcement jurisdiction.

Third, s 14(2) and 14(3), which address appearance in proceedings, include any reference to any corresponding procedures, as per s 2(2)(a) of the same Act.

Fourth, the Court looked at the purpose of the requirement in s 14, which aims to ensure that the foreign State has the time and opportunity to respond to the proceedings.

The Plaintiffs argued that the Court should apply the Rules of Court, which under Order 69A r6(3) allow service out of the jurisdiction without leave. Furthermore, the purpose of s 14 has been overtaken by Lesotho's refusal to accept service. Lesotho is clearly aware of the Enforcement Order against it as it instructed counsel in Summons No 492.

The Court dismissed the first argument considering that the Rules of Court are silent regarding service on a foreign State. Also, the Rules of Court cannot override the requirements of the State Immunity Act. Further, the Court noted that the plaintiffs do not argue that the proceedings following Summons No 492 amount to an appearance under s 14(3). In any event, such argument would not have been successful.

Although the Court accepted that by commencing Summons No 492, Lesotho has fulfilled the purpose of s 14 to give notice and time to respond, those proceedings are procedurally distinct from the ones relating to the Enforcement Order. Thus, the Summons No 492 proceedings cannot be considered an appearance in the enforcement proceedings, which were commenced at a later date. Moreover, the two proceedings have a different character. Summons No 492 challenges the arbitration process by denying jurisdiction, whereas the enforcement proceedings seek the use of the coercive force of the State. This is also reinforced by the fact that Summons No 492 was brought by Lesotho in an attempt to repudiate the basis of the Enforcement Order.

3. The Court's Decision

Finally, the Court dismissed the Plaintiffs' application for substitute service of the Enforcement Order, by serving it on Lesotho's solicitors in the Summons No 492 proceedings.