REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

In the following matters between:

Case No: 28994/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED:

12/9/19 .....

DATE SIGNATURE

THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA — **APPLICANT**

AND

HERMANUS PHILIPPUS STEYN — **FIRST RESPONDENT**

THE AIRPORTS COMPANY OF SOUTH AFRICA LIMITED — **SECOND RESPONDENT**

DIRECTOR OF THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY	**THIRD RESPONDENT**
AIR TANZANIA COMPANY LIMITED	**FOURTH RESPONDENT**
AIR TRAFFIC NAVIGATION SERVICES SOC LIMITED	**FIFTH RESPONDENT**
MR SIBUSISO NKABINDE	**SIXTH RESPONDENT**
MR KGOMOTSO MOLEFI	**SEVENTH RESPONDENT**
MR PATRICK SITHOLE	**EIGHTH RESPONDENT**

SUMMARY

Arbitration - Recognition of foreign court arbitral award - ex parte order attaching property to found and or confirm jurisdiction to enforce the arbitration award – interpretation of compromise concluded after the arbitration award was obtained – arbitration award is no longer extant - lack of jurisdiction to found and confirm jurisdiction – court set aside judgment attaching property.

The first respondent, as an applicant obtained an ex parte order in chambers attaching the property of the applicant in order to confirm, alternatively found jurisdiction to enable it to see the recognition and enforcement of an arbitration award that was granted in its favour in terms the International Arbitration Act, 15 of 2017 ("the IA Act"). As a result, the aircraft of the applicant was attached. The applicant appears before this Court on urgency seeking reconsideration and setting aside of the ex parte order.

Initially, on 9 July 2010 the first respondent obtained an arbitration award against the applicant, which was made an order of Court and enforceable by the High Court of

Tanzania on 14 September 2010. Further, the parties concluded a settlement agreement (a compromise) on 17 July 2012 which provided that the applicant would pay to the first respondent USD 30 000 000 instead of the USD 36 375 672.81 as awarded by the arbitrator. This settlement agreement was accordingly made an order of court by the Commercial Division of the High Court of Tanzania on 18 July 2012.

The IA Act provided under section 16 (Recognition and enforcement of arbitration agreements and foreign arbitral awards) that a foreign arbitral award must be recognised and enforced in the Republic as required by the Convention. Further, it must, on application, be made an order of court and may be enforced in the same manner as any judgment or order of court. Clause 6 of the compromise provided that any delay in any payment of any yearly tranches for more than six months shall constitute default and the decree holder shall be entitled to immediately enforce the Consent Order from the Deed of Settlement minus any amounts already paid.

The applicant raised three principle issues against the granting of the ex parte order. Firstly, there was no arbitration award that can be recognised by the IA Act. Secondly, to the extent that an arbitration award is extant, the applicant enjoys immunity in terms of the Foreign States Immunities Act, 87 of 1981. Thirdly, on the common law principles of jurisdiction, two foreign peregrines cannot seek to have their dispute resolved by a South African Court on the basis of attachment to found jurisdiction only.

The first respondent's counsel submitted that the first respondent approached this Court on the basis of the arbitration award being awarded in its favour in Tanzania. The ex parte order to attach the property of the applicant to found jurisdiction was to enable it to institute the proceedings to recognise and enforce the arbitration award against the applicant. Further, the judgment of the High Court of Tanzania is not binding because the Judge did not consider the matter of breach in terms of the deed of settlement as they were not triable issues before her. Clause 6 of the settlement agreement, as per the legal opinion of a lawyer practicing in Tanzania submitted by the first respondent, is a clawback provision which resurrects the arbitration award. Therefore, the first respondent has established a *prima facie* case which can only be tested at the trial of the matter.

The applicant's counsel submitted that when the arbitration award was made an order of court, it ceased to exist. Thereafter the parties concluded a compromise which was also made an order of Court. Counsel submitted that the said clause 6 must be given a literal interpretation and the literal interpretation of a compromise does not amount to a clawback provision to the arbitration award. A judgment of the Court stands until it is set aside. Anything that existed between the parties before the compromise was concluded was abandoned as found by the Court on 4 December 2018.

The Court did not agree that the arbitration award is extant because clause 6 is a compromise. The literal interpretation is that once there is a breach of the terms thereof, the Decree Holder (Judgment Creditor), the first respondent in this case, is entitled to immediately enforce the Consent Order, and not the deed of settlement or arbitration award. The Court held that there was no ambiguity in the words used in Clause 6 of the compromise that was made an order of Court.

The Court held that the arbitration award ceased to exist on 3 May 2011 when it was made an order of the Court. The Court agreed with Phillip J that once a deed of settlement is filed in Court for compromise of a claim or any award, it means that the claim, award or decree that existed before the deed is entered into is abandoned. The legal opinion provided by the first respondent cannot trump a judgment of the Court which remains binding and enforceable until it is set aside.

The Court held that this Court does not have jurisdiction to attach the property to confirm or found jurisdiction based on a court order of a foreign court. Therefore, the ex parte order of the 21st August 2019 is set aside. The first respondent is liable to pay the costs of the application including the costs occasion by the employment of 2 counsel.