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Josias Van Zyl and others
v
Kingdom of Lesotho

[2017] SGHCR 02

High Court—Originating Summons No 95 of 2017 (Summons No 924 of 2017)
Shaun Pereira AR
1 March; 8 March 2017

Civil procedure — Service — Procedure for service on foreign State

Arbitration — Enforcement — Singapore award

14 March 2017 Judgment reserved.

Shaun Pereira AR:

1 The plaintiffs obtained *ex parte* an order giving them permission to enforce a final arbitration award on costs in the same manner as a judgment of the Singapore High Court. I shall refer to this as "the Enforcement Order".

2 In the application before me, the plaintiffs seek permission to serve the Enforcement Order on the defendant, the Kingdom of Lesotho, through substituted means. The plaintiffs ask for liberty to serve the Enforcement Order either by posting it at the local address of Lesotho's Singapore solicitors, by emailing a copy of the Enforcement Order to Lesotho's Singapore solicitors, or both.

3 Lesotho is a State to which the State Immunity Act (Cap 313, 2014 Rev Ed) applies. The question is whether the Enforcement Order is a "writ or other document required to be served for instituting proceedings against a State" within the terms of s 14(1) of the State Immunity Act. If so, then s 14(1), which sets out the procedure for service of such documents, requires service to be made through diplomatic channels; substituted service on Lesotho's Singapore solicitors will not be permissible.

4 I find that the Enforcement Order falls within the terms of s 14(1) of the State Immunity Act and therefore dismiss the application for substituted service.

The facts

The arbitration

5 In the arbitration from which these proceedings follow, the plaintiffs were amongst the claimants and Lesotho was the respondent. The arbitration concerned compensation for Lesotho's alleged breaches of obligations under the Treaty of the Southern African Development Community and related protocol. The arbitration was administered by the Permanent Court of Arbitration. The arbitration was determined by the tribunal presiding over it to be seated in Singapore. The tribunal rendered two awards: a partial final award on jurisdiction and merits on 18 April 2016; and a final award on costs on 20 October 2016.

The proceedings in Singapore

6 The partial final award on jurisdiction and merits is the subject of proceedings in Originating Summons No 492 of 2016. Lesotho, which is represented by Rajah & Tann Singapore LLP in those proceedings, has applied to set aside the partial final award on the grounds that the tribunal did not have

jurisdiction over the claims in the arbitration. The plaintiffs in the present proceedings are amongst the respondents in Originating Summons No 492 of 2016.

7 Shortly after oral arguments had been heard and judgment reserved in Originating Summons No 492 of 2016, the plaintiffs initiated the present proceedings in Originating Summons No 95 of 2017 to enforce the final award on costs. The plaintiffs applied for and obtained the Enforcement Order pursuant to O 69A r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The plaintiffs' solicitors then attempted to serve the Enforcement Order on Lesotho, as is required by O 69A r 6(2).

The attempts at service

8 The plaintiffs' solicitors first wrote to Rajah & Tann enclosing the Enforcement Order. Rajah & Tann intimated that it had no instructions from Lesotho to accept service of the order.

9 The plaintiffs' solicitors then attempted service of the Enforcement Order on Webber Newdigate by email, fax and post. Webber Newdigate was the firm which acted for Lesotho in the arbitration and which was authorised to act for Lesotho in Originating Summons No 492 of 2016. Webber Newdigate rejected the plaintiffs' attempted service. Webber Newdigate said that it had no instructions to accept service of the order and that such service, in any event, did not comply with the procedure for effecting service on a sovereign State.

10 The plaintiffs' solicitors then attempted to serve the Enforcement Order on the Attorney-General of Lesotho by email and by courier to the Attorney-General's Chambers in Lesotho. The plaintiffs' solicitors received a letter in response from Webber Newdigate shortly thereafter, purporting to be written

on the Attorney-General of Lesotho's instructions. The letter stated that service of the Enforcement Order on the Attorney-General was invalid for non-compliance with s 14(1) of the State Immunity Act.

11 The plaintiffs say that Lesotho must be aware of the Enforcement Order and yet Lesotho is refusing to accept service of it and so Lesotho must be evading service. The plaintiffs therefore seek permission to serve the order through substituted means on Rajah & Tann in Singapore.

Analysis

12 The question before me is a narrow one: whether s 14(1) of the State Immunity Act applies to service of an order giving permission to enforce an award. I set out for convenience the relevant subsections of s 14:

> **Service of process and judgments in default of appearance**
>
> **14.**—(1) 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.
>
> (2) Any time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received.
>
> (3) A State which appears in proceedings cannot thereafter object that subsection (1) has not been complied with in the case of those proceedings.
>
> …
>
> [emphasis added]

13 My view is that an order giving permission to enforce an award falls within the terms of s 14(1) and must be served through diplomatic channels, for the reasons that follow.

14 First, the phrase "writ or other document" is capacious and capable of including documents other than originating processes.

15 Second, an order giving permission to enforce an award is required to be served under O 69A r 6(2), and that service has the effect of instituting proceedings in relation to the enforcement of the award against the party served.

16 In *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2009] Bus LR 558, the claimant obtained *ex parte* an order giving permission to enforce an award in the UK. The order provided that the respondents had 21 days from service of the order to apply to set it aside. The claimant served the order on the State of Ukraine. Gross J eventually set aside the order as against Ukraine because Ukraine was not a party to the arbitration and thus not a proper party to the order giving permission to enforce the award. But Gross J also considered whether Ukraine could, on the assumption that it was properly a party to the order, avail itself of the two-month period in s 12(2) of the UK State Immunity Act 1978 (c 33) (UK) beyond the 21-day period stipulated in the order to apply to set it aside. (Section 12(2) of the UK State Immunity Act is identical to s 14(2) of our State Immunity Act (see [12] above) in all material respects.)

17 Counsel for the claimant in *Norsk Hydro* argued that s 12(2) of the UK State Immunity Act did not apply to the order, since the order did not invoke the court's adjudicative jurisdiction, but only its enforcement jurisdiction. Gross J rejected the argument and held that there was nothing in the terms of s 12(2) which qualified the scope of the provision: *Norsk Hydro* at para 25(2). Gross J concluded that the procedure set out in s 12 of the UK State Immunity Act (again, identical to s 14 of our State Immunity Act in all material respects) applied equally to an application to enforce an award: *Norsk Hydro* at para 25(4). Ukraine would therefore have been able to avail itself of the two-

month stipulation as to time in s 12(2) of the UK State Immunity Act. *Norsk Hydro* was cited with approval by Hamblen J in *L and others v Y Regional Government of X* [2015] 1 WLR 3948 at [37]–[38].

18 Third, the reference to entry of an "appearance" in ss 14(2) and 14(3) of the State Immunity Act does not require that s 14 apply only to documents in response to which an appearance must be entered. Section 2(2)(*a*) of the State Immunity Act states that "references to entry of appearance … include references to any corresponding procedures". An application to set aside an order giving permission to enforce an award is not strictly an appearance but can be accommodated within s 2(2)(*a*). This may be at odds with Stanley Burnton J's conclusion in *AIC Limited v The Federal Government of Nigeria* [2003] EWHC 1357 (QB) at [23], but that decision cuts against the grain of the cases cited above and was rejected expressly by Teare J in *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] 1 WLR 2829 at [64].

19 Fourth, as a matter of principle there can be no reason for excluding proceedings to enforce an award against a State from the procedural requirements on service in s 14 of the State Immunity Act. The provision exists "clearly to ensure that the foreign state has adequate time and opportunity to respond to the conduct of proceedings in the [forum] court of whatever nature which affects its interests": Hazel Fox QC & Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd Ed, 2013) at p 231. States require time to respond to proceedings brought against them, and enforcement proceedings are no exception. Proceedings to enforce an award may be brought in any jurisdiction in which the respondent State has assets, independent from that jurisdiction's connection to the underlying arbitration or the merits of the substantive dispute. The need for time and opportunity to respond applies with equal force.

20 Ms Mak Shin Yi, who appeared for the plaintiffs, argued that I should lay aside the English authorities and focus instead on the Rules of Court. Order 69A r 6, which sets out the procedure for obtaining permission to enforce an award, also sets out the manner of service for such orders. Order 69A r 6(3) states that "[s]ervice of the order out of the jurisdiction is permissible without leave, and *Order 11, Rules 3, 4 and 6 shall apply in relation to such an order*" [emphasis added]. Ms Mak argued that O 11 r 7 of the Rules of Court, which supplies the procedure for "service of process on a foreign State", had been omitted from O 69A r 6(3). Therefore, the Rules of Court are silent on the mode of effecting service on a foreign State of orders made under O 69A r 6.

21 Ms Mak also argued that the purpose of s 14 was to give a foreign State notice of the proceedings against it and time to respond to the proceedings. That purpose had been overtaken entirely by the manner in which the proceedings in Singapore had developed. Lesotho first commenced proceedings in Singapore in Originating Summons No 492 of 2016 to set aside the partial final award on jurisdiction and merits. Lesotho instructed Singapore solicitors to act for it in those proceedings. Lesotho is clearly aware that Originating Summons No 95 of 2017 for enforcement of the final award on costs has been commenced against it. Despite all of this, it still insists on not accepting service. The court should therefore make an order for substituted service notwithstanding s 14 of the State Immunity Act. Ms Mak relied on *Petroval SA v Stainby Overseas Ltd and others* [2008] 3 SLR(R) 856 and argued that this was an appropriate case to permit substituted service on Rajah & Tann.

22 With respect, if the State Immunity Act requires service in accordance with a specified procedure, then it is nothing to the point that the Rules of Court do or do not provide for service in that manner. The omission of O 11 r 7 from O 69A r 6(3) appears an aberration; one that could well have arisen because

investor-state arbitration was not in contemplation when the Order was drafted. But that omission cannot obviate the mandatory stipulations in s 14 of the Sovereign Immunity Act which in my view are applicable.

23 Nor does it matter that Lesotho first commenced action in Originating Summons No 492 of 2016. No argument was made that this amounted to an appearance within s 14(3) of the State Immunity Act that disentitles Lesotho from requiring compliance with s 14(1) in respect of Originating Summons No 95 of 2017. Even if the argument were made, I am doubtful it would have succeeded.

24 I accept Ms Mak's suggestion that the need for notice and time to respond had been substantially eclipsed by Lesotho first commencing Originating Summons No 492 of 2016. The basis upon which Lesotho applied to set aside the partial final award in those proceedings will presumably be the same basis upon which it resists enforcement of the final award on costs in the present proceedings. But even if both sets of proceedings will engage similar issues, they are procedurally distinct. I struggle to see how it is semantically possible for the prior initiation of separate proceedings to amount to an appearance in proceedings later commenced.

25 Further, both sets of proceedings are in my view of a fundamentally different character to each other. In the setting aside proceedings, Lesotho invokes the Singapore court's curial jurisdiction, which exists to support and scrutinise the arbitration process and the resultant award. In the enforcement proceedings, by contrast, the plaintiffs seek to set in motion a process which—if they are successful in bringing to pass—will permit the use of the coercive force of the State to levy execution for satisfaction of an owing money debt. Lesotho's initiation of the setting aside proceedings cannot therefore be

meaningfully construed as a waiver of the procedural privileges it is entitled to in respect of the proceedings commenced by the plaintiffs to enforce the final award on costs by virtue of ss 14(1) and 14(2) of the State Immunity Act. Especially so because Lesotho's position in the earlier proceedings—that the award should be set aside for the tribunal's lack of jurisdiction—is a complete repudiation of the basis upon which the latter is brought.

Conclusion

26 Because the Enforcement Order must be served in accordance with the requirements in s 14(1) of the State Immunity Act, I dismiss the plaintiffs' application for substituted service.

Shaun Pereira
Assistant Registrar

Mak Shin Yi (WongPartnership LLP) for the plaintiffs.