REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28994/2019

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

04/09/19 ML Twala

Date **ML TWALA**

In the reconsideration application between:

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 AURHORITY	**THIRD RESPONDENT**

CIVIL AVIATION AURHORITY	**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**

JUDGMENT

TWALA J

[1] On the 21st of August 2019, the first respondent as an applicant a quo, obtained an ex parte order in chambers attaching the property of the applicant in order to confirm, alternatively to found jurisdiction to enable it to seek the recognition and enforcement of an arbitration award that was granted in its favour in terms of the International Arbitration Act, 15 of 2017 (*"The IA Act"*). The order attached the aircraft of the applicant with registration number 5H-TCH. The applicant came before this Court on urgency seeking a reconsideration and setting aside of the said ex parte order.

[2] For the sake of convenience in this judgment, I will refer only to the applicant and the first respondent since the other respondents did not file any opposing papers.

[3] The genesis of this application is that on the 9th of July 2010 the first respondent obtained an arbitration award against the applicant which award was on the 3rd of May 2011, together with the Ruling of the Arbitrator dated the 14th of September 2010, declared by the High Court of Tanzania, Commercial Division, to be a decree of the Court and to be enforceable as such. It is further common cause that on the 17th of July 2012 the parties concluded a deed of settlement wherein it was agreed that the applicant, as the Judgment Debtor, shall pay the first respondent a sum of US$30 000 000 instead of the sum of US$36 375 672.81 as awarded by the arbitrator. This compromise was made an order of Court by the Commercial Division of the High Court of Tanzania on the 18th of July 2012.

[4] It is further not in dispute that during 2018 the applicant approached the High Court of Tanzania seeking a review of the decision of the High Court which was delivered on the 3rd of May 2011 declaring the arbitration award a decree of the Court sighting the deed of settlement as fraught with errors which need to be reconsidered. In a nutshell the application was struck of on the basis that the arbitration ruling was non-existent as it was overtaken by the events.

[5] There are three principle issues being raised by the applicant against the granting of the ex parte order in that, firstly there was no arbitration award that can be recognised and enforced in terms of the IA Act; second that to the extent that an arbitration award is extant, the applicant nevertheless enjoys immunity in terms of the Foreign States Immunities Act, 87 of 1981 and finally, that 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.

[6] Advocate Fitzgerald SC submitted for the first respondent that it approached this Court based on the arbitration award that was granted in its favour in Tanzania. The first respondent obtained the ex parte order to attach the property of the applicant to found jurisdiction to enable it to institute the proceedings to recognise and enforce the arbitration award against the applicant. It was submitted further that clause 6 of the compromise that was made an order of Court entitles the first respondent to enforce the arbitration award in case there was a breach of the terms thereof.

[7] It was contended further that, the judgment of the High Court of Tanzania of the 4th of December 2018 is not binding because, as the argument goes, the Judge did not consider the matter of breach of the terms of the deed of settlement as they were not triable issues before her. Based on the opinion Dr Kibuta Ongwamuhana, a lawyer in Tanzania, it is submitted by counsel for the first respondent that clause 6 of the compromise is a clawback provision which resurrects the arbitration award – hence the first respondent has established a prima facie case which can only be tested at the trial of the matter.

[8] Advocate Ngcukaitobi SC for the applicant submitted that immediately the arbitration award was made an order or a decree of the Court, it ceased to exist. The arbitration award was made an order of Court, thereafter the parties concluded a compromise which was also made an order of Court. It was contended further that clause 6 of the compromise concluded by the parties should be given its literal interpretation and meaning. The literal interpretation of clause 6 of the compromise does not amount to a clawback provision to the arbitration award. An opinion of a lawyer, so it was argued, cannot overturn

or take precedent over a judgment of the Court. A judgment of the Court stands until it is set aside. Anything that existed between the parties before the compromise was concluded, so it was contended, was abandoned as found by the Court in its judgment of the 4th of December 2018.

[9] It has long been established that once an agreement between the parties has been made an order of Court, its status changes to that of an order of Court. It is further trite that a judgment and order of Court remains binding and enforceable until it is set aside.

[10] It is now opportune to mention the provisions of the International Arbitration Act which are relevant for the purposes of this judgment including clause 6 of the compromise agreement concluded between the parties and consented to be made an order of the Court.

[11] The International Arbitration Act, 15 of 2017 provides as follows:

"3. Objects of Act. – The objects of the Act are to –

a) .....

b) .....

c) Facilitate the recognition and enforcement of certain arbitration agreement and arbitral awards; and

d) .....,.

16. Recognition and enforcement of arbitration agreements and foreign arbitral awards. –

1) *Subject to section 18 an arbitration agreement and a foreign arbitral award must be recognised and enforced in the Republic as required by the Convention, subject to this Chapter.*
2) ……
3) *A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court, subject to the provisions of this section and sections 17 and 18.*

[12] Clause 6 of the compromise that was made an order of Court reads as follows:

"Any delay in payment of any yearly tranches for more than six months shall constitute default and the Decree Holder shall be entitled to immediate enforcement of the Consent Order resulting from the Deed of Settlement less any amount already paid."

[13] I am unable to agree with counsel for the first respondent that the arbitration award is extant because of clause 6 of the compromise. The literal, simple and plain interpretation of clause 6 of the compromise order is that once there is a breach of the terms thereof, the Decree Holder or Judgment Creditor, the first respondent in this case, shall be entitled to immediately enforce the *'Consent Order'* and not the deed of settlement or arbitration award. The status of the deed of settlement changed on making it an order of Court – hence clause 6 provides for a '*consent order resulting from the deed of*

settlement'. It is my respectful view that there is no ambiguity in the words used in clause 6 of the compromise that was made an order of Court.

[14] In *Novartis v Maphil [2015] ZASCA 111*, the Supreme Court of Appeal per Lewis JA alluded to the following:

"*[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.*

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach

in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs

in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[15] In the *Eight Edition of Amler's Precedents of Pleadings by LTC Harms at* page 89, the author states as following:

"Breach of Compromise:

In the absence of a reservation of the right to proceed on the original cause of action, the compromise agreement bars any proceedings based on the original cause. In addition, the defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.

A term providing that when one of the parties does not comply with the terms of the compromise the other may rely on the original cause of action may be express or tacitly implied and may be in the form of either a resolutive or a suspensive condition."

[16] I am of the considered view that the arbitration award ceased to exist on the 3rd of May 2011 when it was made an order of the Court. I hold the view that when the parties concluded the deed of settlement, the compromise, it was in relation to, or a compromise of the order of Court of the 3rd of May 2011 and not the arbitration award which was no longer in extant at the time. Further, the compromise was by consent between the parties made an order of Court.

The provisions of the compromise which was made an order of Court only entitles the holder of the decree to enforce that consent order in case of any breach of that order. There is no express or tacitly implied term in the compromise that was made an order of Court that when the breach occurs, the other party would be entitled to rely on the initial arbitration award.

[17] I find myself in agreement with the judgment of Phillip J that, once a deed of settlement is filed in Court for compromise of a claim or any award or decree it means that the claim, award or decree that existed before the deed of settlement is entered into is abandoned, it becomes not binding to the parties and is overtaken by events. I disagree with counsel for the first respondent that I should accept the opinion of a lawyer who practices in Tanzania that Phillip J did not consider the provisions of clause 6 in her judgment since it was not a triable issue before her. It is my respectful view that, even if clause 6 was not a triable issue before Phillip J, her finding that once the parties enter into a compromise, it means that the claim or award that existed before such compromise is entered into is abandoned and becomes not binding to the parties confirms that the arbitration award, if it was extant at the time, ceased to exist as it was abandoned or overtaken by the events.

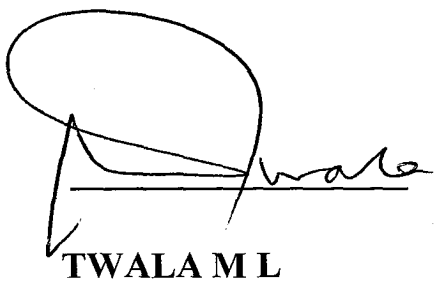
[18] I am in agreement with counsel for the applicant that an opinion of a lawyer cannot trump a judgment of the Court which remains binding and enforceable until it is set aside. The ineluctable conclusion is that the first respondent does not have an arbitration award which requires recognition and enforceability as envisaged by section 3 of the IA Act but is armed with a Court Order. I am therefore satisfied that this Court does not have jurisdiction to attach the property of the applicant to confirm or found jurisdiction based on a court

order of a foreign court. I therefore find that the ex parte order of the 21st August 2019 was erroneously granted and should be set aside.

[19] It is my considered view that there is no reason for me to determine the remaining issues raised by counsel in this case since the conclusion that the arbitration award ceased to exist on the 3rd of May 2011 is dispositive of the whole case.

[20] In the circumstances, I make the following order:

1. The order of the Court dated the 21st August 2019 under case number 28994/2019 is hereby set aside.
2. The first respondent is liable to pay the costs of the application including the costs occasion by the employment of 2 counsel.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **30th August 2019**

Date of Judgment: **04th September 2019**

For the Applicant:	**Adv. T Ngcukaithobi SC** **Adv. T Ramogale**
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For the Respondents:	**Adv. M Fitzgerald SC**
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