LEGAL UPDATE

FB ATTORNEYS

4 September 2019

SA Court releases Government aircraft

- **States that it has no jurisdiction to attach Government property**
- **Court states that the initial ex parte order was erroneously granted and releases aircraft**

Judge Twala, J of the South African High Court (Gauteng Local Division), Johannesburg today ruled in favour of the Government of Tanzania (Government), and vacated its seizure order of 21 August 2019 whereby a brand new Air Tanzania Airbus A 220-300 was attached in Johannesburg. The ruling paves way for the aircraft to fly back to Dar es Salaam immediately.

Background

On 21 August 2019, one Hermanus Steyn (Steyn) applied for and obtained an ex parte order from the High Court in Johannesburg against the Government to seek the recognition of an arbitration award that was granted in Steyn's favour. The ex parte order was granted that led to the attachment of the Government's aircraft that is currently being operated by Air Tanzania.

The arbitration award was obtained by Steyn on 9 July 2010, and which became a decree of the Court as issued by the High Court of Tanzania (Commercial Division) on 3 May 2011. On 17 July 2012, Steyn and the Government concluded a settlement deed in which it was agreed that Steyn would settle for a sum of USD 30M instead of the arbitral award of about USD 36.38M. On 18 July 2012, this compromise was made an order of the Court.

In 2018, the Government approached the High Court (Commercial Division) seeking a review of its decision of 3 May 2011 declaring the arbitration award a decree of the Court, stating that the deed of settlement having errors which needed to be reconsidered. This application by the Government was unsuccessful, the High Court (Phillip, J) holding that the arbitration ruling was nonexistent as it was overtaken by events.

Application by the Government

After having its aircraft attached, the Government moved the South African High Court under a certificate of urgency to vacate its ex parte attachment order on the grounds that:

a. There was no arbitration award that can be recognized and enforced in terms of the International Arbitration Act 15 of 2017
b. The Government enjoys immunity in terms of the Foreign States Immunities Act, 87 of 1981
c. On common law principles of jurisdiction, two foreign peregrines cannot seek to have their dispute resolved by a South African Court

Decision of the South African High Court

In a decision welcomed by the Government, Twala J held the following:

(i) That the arbitration award ceased to exist on 3 May 2011 when it was made an order of the Court

For further information on legal updates please contact:

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About FB Attorneys
FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 1 by Chambers and Partners General Business Law.

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(ii) That the compromise entered into on 17 July 2012 (which became an order of the Court on 18 July 2012) was in relation to the order of the Court of 3 May 2011 and not the arbitration award which was not in existence any more

(iii) That the compromise was by consent of the parties and became an order of the Court, there being no express or implied term in the compromise that when a breach occurs the other party would be entitled to rely on the initial arbitration award

(iv) That once a deed of settlement is filed in Court for a compromise, it means that the claim, award or decree that existed before is abandoned, and is not binding on parties, and is overtaken by events

(v) That because of the above, the ineluctable conclusion is that Steyn does not have an arbitration award which requires recognition and enforceability as envisaged by section 3 of the International Arbitration Act but is armed with a Court order

(vi) Therefore, since Steyn does not have an award but a Court order from a foreign country, the South African Court does not have jurisdiction to attach the property of the Government of Tanzania

In summary, the South African High Court declined to assume jurisdiction, and ordered the release of the aircraft and awarded costs to the Government of Tanzania.

To read a copy of the ruling, click here.

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