REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17/18638

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

29/06/2017
DATE

SIGNATURE

In the *ex parte* application of:

BALKAN ENERGY LIMITED — First Applicant

BALKAN ENERGY (GHANA) LIMITED — Second Applicant

In the matter between:

BALKAN ENERGY LIMITED — First Applicant

BALKAN ENERGY (GHANA) LIMITED — Second Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF GHANA — Respondent

JUDGMENT

S. KUNY AJ:

1 The first applicant, a company whose registered office is situated in the United Kingdom, and the second applicant, a company registered and incorporated in Ghana, seek to make a foreign arbitral award an order of this court in accordance with the provisions of section 2 of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 ("the Recognition and Enforcement Act"). The respondent is the Government of Ghana, referred to in the agreement which gives rise to the dispute and arbitration between the parties, as "GoG".

2 This matter came before court on 27 June 2018 as an *ex parte* application to attach 6 373 650 ordinary shares purportedly held by the respondent in Anglo Gold Ashanti Limited *ad confirmandam jurisdictionem* alternatively, *ad fundandam jurisdictionem*. The applicant also sought leave to institute proceedings against the respondent by way of edictal citation in terms of Rule 5 of the Uniform Rules of Court. Anglo Gold Ashanti Limited is registered and incorporated in the Republic of South Africa and its registered office is within the jurisdiction of this court. This court is empowered in terms of section 21(2) of the Superior Court Act, No 10 of 2013 to issue an order for the attachment of property to confirm jurisdiction.

3 The dispute has its origins in an agreement called "the Power Purchase Agreement" ("the PPA") entered into on 27 July 2007. In terms of this agreement the respondent leased and contracted the second applicant in

Ghana to operate a dual fired diesel and gas power barge on its behalf for the purposes of the generating and supplying electricity. Clause 22.2 of the PPA provides:

> *21.1 If any dispute arises out of or in relation to this Agreement and if such matter cannot be settled through direct discussions of the Parties, the matter shall be referred to binding arbitration at the Permanent Court of Arbitration, Peace Palace, Carnegieplein 2, 2517 KJ in The Hague, The Netherlands. Unless the Parties to this Agreement agree otherwise, the arbitrator shall not have the power to award nor shall he/she award any punitive or consequential damages (however denominated). Each side shall pay its own attorney's fees and costs no matter which side prevails and each party shall share equally in the cost of any mediation or arbitration. Application may be made to such court for judicial recognition of the award and/or an order of enforcement as the case may be. Arbitration shall be governed by and conducted in accordance with UNCITRAL rules.*

4 Clause 24 of the PPA provides:

> *24. Jurisdiction*
>
> *To the extent that GoG may in any jurisdiction claim for itself or its assets or revenues immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to GoG or its assets or revenues such immunity (whether or not claimed) GoG agrees not to claim and irrevocably waives immunity to the full extent permitted by the laws of such jurisdiction.*

5 The dispute that arose between the parties gave rise to an arbitration held in London during 2013. On 1 April 2014 an arbitral award was made in favour of the second applicant against the respondent *inter alia* for payment of three amounts, USD 12 million, USD 300 000 and USD 50 000, as well for interest on the first two amounts ("the arbitral award"). In 2016 the second applicant

ceded and assigned its right, title and benefit relating to the arbitral award to the first applicant in consideration for it having funded the costs and expenses incurred in connection with the arbitration proceedings. As a result it is alleged that the first applicant became the title holder of the award and is entitled to claim the proceeds.

6 In contending that this court has jurisdiction to recognise, give effect to and enforce the arbitral award the applicants rely on section 2(1) of the Recognition and Enforcement Act that provides as follows:

> *2 Foreign arbitral award may be made order of court and enforced as such*
>
> *(1) Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.*
>
> *(2) Where any amount payable in terms of such award is expressed in a currency other than the currency of the Republic, the award shall be made an order of court as if it were an award for such amount in the currency of the Republic as, on the basis of the rate of exchange prevailing at the date of the award, is equivalent to the amount so payable.*
>
> *(3) Any such award which has under subsection (1) been made an order of court, may be enforced in the same manner as any judgment or order to the same effect.*

7 In terms of section 3 of the Recognition and Enforcement Act an application for an order of court mentioned in section 2 (1) may be made to any court and shall:

> *(a) be accompanied by -*

(i) *the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or*

(ii) *a certified copy of that award and of that agreement;*

8 In compliance with these provisions, the applicants have attached to their application an authenticated copy of the original foreign arbitral award. A certified copy of the PPA was handed into court at the hearing of the application. Full written and oral argument was addressed to me, to the effect that the applicants had met all the requirements for the relief sought and were entitled to the orders prayed for.

9 The litigants cited in these proceedings are all *peregrini*. The only connection to the forum of the court in South Africa is the fact that the respondent purportedly owns shares in a company whose registered office is situated within the jurisdiction of the court.

10 Adv CM Eloff SC who appeared for the applicants referred me to *Siemens Ltd v Offshore Marine Engineering Ltd 1993 (3) SA 913 (A)*. The case concerned a plaintiff, incorporated in South Africa, with its head office and principal place of business in Johannesburg. The plaintiff sought *ex parte* to attach goods situated within the jurisdiction of the Eastern Cape Division in order to found jurisdiction against a defendant company, incorporated and operating in England. The plaintiff, whose cause of action was for goods sold and

delivered, applied at the same time for leave to sue the defendant by edictal citation. In an appeal against the refusal to grant the application, based on a lack of jurisdiction, the Appellate Division (per Hoexter JA), after an exhaustive consideration of the case law and authorities on the matter, held that:

> *... where the plaintiff and the defendant are both foreign peregrini (extranei, uitlanders) both a recognised ratio jurisdictionis as well as arrest of the defendant or attachment of his property are essential to found jurisdiction.*

11 Adv Eloff SC sought to distinguish the *Siemens* case from the facts in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1984 (3) SA 233 (D)*. In the latter case a *perigrinus* applicant applied for an order (also apparently initially on an *ex parte* basis) granting it leave to sue a *perigrinus* respondent by way of edictal citation and a rule *nisi* calling upon the respondent to show cause why an arbitrator's award should not be made an order of court in terms of the provisions of the Recognition and Enforcement Act. An interdict was also sought preventing the respondent from removing or disposing of the bunker on board a vessel anchored in Durban harbour from the court's area of jurisdiction pending the determination of the applicant's right to enforce an arbitration award. After an order was granted in the applicant's favour the respondent counter-applied to set aside the attachment on the basis that:

> *Neither the agreement of charter, nor any aspect of the arbitration award which is referred to in the order and which forms the subject-matter of the applicant's application, were concluded, or arose, or related to the Republic of South Africa.*

12 The court in *Laconian Maritime Enterprises Ltd* recognised that an attachment to found jurisdiction at common law cannot be made at the instance of a *peregrinus* plaintiff against a *peregrinus* defendant where the cause of action did not arise within such area of jurisdiction. However, the court held that section 2 of the Recognition and Enforcement Act was intended by the legislature to invest any Provincial or Local Division of the Supreme Court of South Africa with jurisdiction to recognise any foreign arbitral award, even one between *peregrini*. This was subject only to there being that degree of effectiveness provided by an attachment of property or person.[1] In its conclusion the court found that the provisions of the Recognition and Enforcement Act had to be interpreted within the framework of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("the New York Convention") and specifically the aims and objectives that the New York Convention set out to achieve.

13 The New York Convention provides a common legislative standard for the recognition of arbitration agreements, and court recognition and enforcement of foreign and non-domestic arbitral awards. Its principal aim is to ensure that foreign and non-domestic arbitral awards "will not be discriminated against" and parties to the convention are obliged to ensure such awards are "recognized and generally capable of enforcement in their jurisdiction in the

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1 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd 1984 (3) SA 233 (D)* at p239

same way as domestic awards".[2] South Africa acceded to the New York Convention on 3 May 1976 and the legislature gave effect to obligations arising from the Convention by enacting the Recognition and Enforcement Act which came into effect on 13 April 1977.[3]

14 The Recognition and Enforcement Act has a counterpart in the enforcement of foreign civil law judgments that can be enforced both at common law and in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988. See in this regard *Purser v Sales; Purser and another v Sales and another 2001 (3) SA 445 (SCA)* at para [11] where it was held that the principles recognised by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are:

> *1 at the time of the commencement of the proceedings the defendant (appellant in this case) must have been domiciled or resident within the State in which the foreign court exercised jurisdiction; or*
>
> *2 the defendant must have submitted to the jurisdiction of the foreign court.*

15 In the *Government of the Republic of Zimbabwe v Fick and Others 2013 (5) SA 325 (CC)* the Constitutional Court upheld an order of the North Gauteng High Court for the registration and enforcement of a costs order granted by a SADC regional tribunal to facilitate execution by the successful litigants

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2 See the section "Objective" in the Introduction to the New York Convention

3 see *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (supra) at p239 and *Pierre Fattouche v Mzilkazi Khumalo GSJ 5082012* (unreported) at para [49]

against Zimbabwe's property in South Africa. In extending the common law to apply to the enforcement of decisions of this tribunal the Constitutional Court held that the development of the common law "was driven by the need to ensure that lawful judgments are not to be evaded with impunity by any state or person in the global village" [4]. The reasons were stated as follows:

> *[55] This finds support from the two reasons advanced in Richman v Ben-Tovim [5] for the existence of the law on the enforcement of judgments of foreign courts: First, enforcement is what is required by the 'exigencies of international trade and commerce'; and second, because 'not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for their wrongful actions'.*
>
> *[56] Other reasons are: (i) the principle of comity, which requires that a state should generally defer to the interests of foreign states — with due regard to the interests of its own citizens and the interests of foreigners under its jurisdiction — in order to foster international cooperation; and (ii) the principle of reciprocity, the import of which is that courts of a particular country should enforce judgments of foreign courts in the expectation that foreign courts would reciprocate.*

16 In case of *The Saharawi Arab Democratic Republic v The Owner and Charterers of the 'MV NM Cherry Blossom', Case No. 148717* (unreported) ECD, the applicants applied *ex parte* for an interdict to restrain the removal of cargo of phosphate on board the 'NM Cherry Blossom' from the jurisdiction of the court in Algoa Bay, pending the determination of an action in which they claimed *inter alia* delivery of the cargo. The court granted *ex parte* interim

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4 *Government of the Republic of Zimbabwe v Fick and Others (supra)* at para [54]

5 *Richman v Ben-Tovim 2007 (2) SA 283 (SCA)*

relief to attach the cargo and confirmed such relief on the return day even though none of the parties to the proceedings resided in South Africa. The only connection was that the phosphate that the applicants sought to attach pending their action to vindicate the cargo was within the jurisdiction of the court. Similarly in *Government of the Republic of Zimbabwe v Fick and Others (supra)* the only connection was property in South Africa belonging to the Government of Zimbabwe which the successful parties before the SADC tribunal were permitted to attach to satisfied their claim for costs.

17 I am respectfully in agreement with the reasoning and conclusions to which the court came in *Laconian Maritime Enterprises Ltd.* In my view, the facts in that case are applicable to the facts in the present matter. A search of South African case law reveals that in the 33 years since the case was decided, there has not been a single instance of disagreement with or dissent from its findings in relation to the interpretation of the Recognition and Enforcement Act. The court's reasoning is bolstered by the Constitution of South Africa and in particular section 231(5). It provides that South Africa is bound by international agreements which were binding when the Constitution took effect. This is the case in respect of the New York Convention.

18 Neither the applicants' founding affidavit nor their written submissions make any reference to the Protection of Businesses Act 99 of 1978. It may have been that the applicants did not consider this Act to be applicable or that it was inadvertently overlooked. However, as it aims to restrict the enforcement

in the Republic of *inter alia* certain foreign judgments, orders, directions and arbitration awards, it is unavoidable that some consideration be given to its provisions.

19 Section 1(1) of the Protection of Businesses Act provides:

> *1(1) Notwithstanding anything to the contrary contained in any law or other legal rule, and except with the permission of the Minister of Economic Affairs- (a) no judgement, order, direction, arbitration award, interrogatory, commission rogatoire, letters of request or any other request delivered, given or issued or emanating from outside the Republic in connection with any civil proceedings and arising from any act or transaction contemplated in subsection (3), shall be enforced in the Republic;*

20 Section 3(3) of the Protection of Businesses Act provides:

> *1(3) In the application of subsection (1)(a) an act or transaction shall be an act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic.*

21 Weiner J, in the unreported decision of *Pierre Fattouche v Mzilkazi Khumalo GSJ 5082012,* considered these sections of the Protection of Business Act in the context of an application to have a foreign arbitration award enforced in terms of the Recognition and Enforcement Act. The learned judge also referred to three cases decided in our courts in relation to the interpretation of section 1(3), in which it was held that the wording of the section refers to transactions connected with raw materials or substances from which physical

things are made.[6]

22 *Pierre Fattouche* was followed in *Danielson v Human and Another 2017 (1) SA 141 (WCC)* in which it was held that a venture between two parties to develop and market a battery technology that one of the parties had invented was not an "act or transaction" that fell within the scope of s 1(3) of the Act. It was therefore not incumbent upon the applicant (in those proceedings) to obtain ministerial permission before seeking to enforce a foreign judgment.

23 The preamble to the PPA sets out the nature and purposes of the agreement between the parties. It is as follows:

> *WHEREAS,*
>
> *(i) The Government of Ghana has an urgent additional electricity generation capacity to meet its power supply deficiencies; and*
>
> *(ii) BEC has agreed to lease a one hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) power barge, named the Osagyefo Barge from the GoG with the further understanding of the parties that the facility shall be placed in service by BEC under the terms and conditions of this Agreement*
>
> *(iii) BEC shall commission a one hundred twenty five megawatt (125 MW) power barge, named the Osagyefo Barge and associated facilities ('the Power Station') within 90 working days of the Effective Date of this Agreement.*
>
> *(iv) BEC shall convert the Power Station into a combined cycle power plant by the addition of a heat recovery steam generator*

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6 *Tradex Ocean Transportation SA v MV Silvergate (Astyanax)and Others 1994 (4) SA 119 (D)* at p120J - p121C, *Chinatex Oriental Trading Co v Erskine 1998 (4) SA 1087 (C)* at p1095I - p1096C, *Richman v Ben-Tovim 2007 (2) SA 283 (SCA)* at para [11]

(HRSG) with an incremental capacity of approximately 60MW within nine (9) months of the Effective Date.

(v) BEC shall privately invest and bring two more combined cycle barge mounted systems to the Site within thirty-six (36) months of agreement with GoG on a Tolling Fee for these systems. These systems will each have a similar capacity of approximately 185 megawatts. This investment will bring the Site generation capacity to more than 550 megawatts. The Tolling Fee for these additional systems will be agreed prior to their mobilization.

(vi) BEC shall, subject to the satisfactory conclusion of supply agreements with other source providers, invest in infrastructure to enable natural gas to be supplied to the Power Station within three (3) years of the Effective Date."

(vii) BEC shall provide all fuel to the Project at Cost.

24 It is apparent from the above that the PPA involves a contract for the supply of electricity by the second applicant by means of the lease, commissioning and operation of a power barge.[7] *Prima facie* in my view, this is not an act or transaction connected with raw materials or substances from which physical things are made and therefore it does not fall within the ambit of section 1(3) of the Protection of Businesses Act.

25 The applicants pre-empted in their founding affidavit a possible claim by the respondent that as a foreign state it is immune from the jurisdiction of the courts in South Africa. They submit that Article 24 of the PPA constitutes a waiver in terms of section 3(1) of the Foreign States Immunities Act, 87 of 1981. I am satisfied for the purposes of the order sought by the applicants in

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[7] for general information on power barges see:

https://en.wikipedia.org/wiki/Powership (accessed 26 June 2017)

these proceedings that although the respondent is a foreign state, by reason of its waiver in clause 24 of the PPA it *prima facie* is not immune from the jurisdiction of our courts.[8]

26 I am mindful of the fact that the order sought has been applied for on an *ex parte* basis and that the respondent has not had an opportunity to make submissions before this court or oppose the relief sought. However, in accordance with well established practice and principles, the respondent has the right and can approach the court, at short notice if necessary, to set aside or vary the order I propose to grant should it believe that there are grounds to do so.[9] The respondent will also have the opportunity to oppose and raise defences to the application that the applicants intent to make to have the arbitral award made an order of court in South Africa.

27 In all the circumstances, I am of the view that the applicants are entitled to the relief that they seek. Accordingly, I make the following order:

1 The Sheriff of the court or his deputy is authorised and directed to attach *ad fundandam jurisdictionem* the shares of the respondent in AngloGold Ashanti Limited, a company incorporated in accordance with the laws of the Republic of South Africa under registration number 1944/017354/06, having its registered place of business at 76 Rahima

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8 *Government of the Republic of Zimbabwe v Fick and Others* (supra), *The Saharawi Arab Democratic Republic v The Owner and Charterers of the MV "NM Cherry Blossom", Case no. 1487/17*, unreported ECD

9 *Orion Pacific Traders Inc v Spectrum Shipping Ltd 2006 (2) SA 586 (C)*

Moosa Street, Newtown, Johannesburg.

2 Leave is granted to the applicants to institute application proceedings against the respondent ("Anticipated Application") by way of edictal citation, in accordance, substantively, with the draft set of application papers annexed to the applicants' founding affidavit marked "X".

3 Service of the final *intendit*, being the signed and issued Anticipated Application and such order as may be made by this court shall be effected on the respondent as provided for in section 13(1) of the Foreign States Immunities Act, 87 of 1981 by way of:

3.1 service by the Sheriff of this court or his deputy of the final *intendit* and the order made in this application on the Department of Foreign Affairs of the Republic of South Africa;

3.2 service by the Department of Foreign Affairs of the Republic of South Africa through transmission to the Minister of Foreign Affairs and Regional Integration of the Republic of Ghana; and

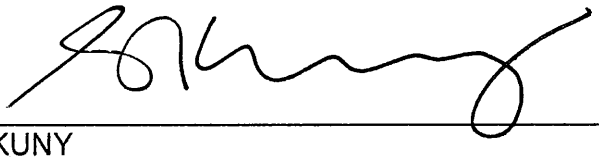
3.3 requiring the Department of Foreign Affairs of the Republic of South Africa to provide the applicant and the Registrar of this court with written confirmation that the final *intendit* has been transmitted to the Minister of Foreign Affairs and Regional

Integration of the Republic of Ghana, including the date and method of transmission.

4 The Sheriff of this court or his deputy shall forthwith serve a copy of this order on the High Commissioner for Ghana, at the Ghana High Commission, 1038 Arcadia Street, Hatfield, Pretoria.

5 The applicants are required within two months of the granting of this order to institute the Anticipated Application against the respondent out of the above Honourable Court substantively in accordance with the draft *indendit* marked "X".

6 The cost of this application shall be costs in the Anticipated Application to be instituted by the applicants against the respondent.



S KUNY
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date heard:	23 June 2017
Date of judgment:	29 June 2017
Applicants' Counsel:	EM Eloff SC
Applicants' Attorneys:	Baker & McKenzie Ref: D Bernstein, (011) 911 4300