THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 421/2013

REPORTABLE

In the matter between:

ZHONGJI DEVELOPMENT CONSTRUCTION ENGINEERING COMPANY LIMITED

Appellant

and

KAMOTO COPPER COMPANY SARL Respondent

Neutral citation: *Zhongji Construction v Kamoto Copper Company* (421/13) [2014] ZASCA 160 (1 October 2014)

Coram: Mpati P, Willis and Mbha JJA and Mathopo and Gorven AJJA

Heard: **5 September 2014**

Delivered: **1 October 2014**

Summary: **Appeal -** jurisdiction – on appeal, held that the process of arbitration should be respected – no basis for a declaratory order – appeal dismissed.

ORDER

On appeal from: **South Gauteng High Court, Johannesburg (Myburgh AJ sitting as the court of first instance):**

The appeal is dismissed.

JUDGMENT

Willis JA (Mpati P, Mbha JA and Mathopo AJA concurring):

[1] This appeal is concerned with whether the high court (Myburgh AJ) was correct in dismissing an application for a declaratory order that a particular dispute was 'arbitrable' and whether an arbitration agreement applied in respect of certain invoices that form the subject matter of the dispute between the parties. The appeal to this court is with the leave of the high court.

[2] The appellant, which was the applicant in the high court, is a Chinese company known as Zhongji Development Construction Engineering Company Limited (Zhongji Construction). The respondent is a Congolese company, Kamoto Copper Company SARL (Kamoto). The parties are therefore both *peregrini* of the courts of South Africa.

[3] In April 2007 Zhongji Construction had been invited by a South African company, Bateman Minerals & Metals (Pty) Limited (Bateman), acting on behalf of a Congolese company known as DRC Copper and Cobalt Project SARL (the DCP), to tender for the supply and construction of piling and civil works at the DCP's mining site near Kolwezi in the Democratic Republic of Congo (the Congo). Arising from this invitation, Zhongji Construction was awarded the tender. As a result of the award of the tender Zhongji Construction and the DCP concluded a written agreement on 20 August 2008.

[4] The parties have referred throughout the proceedings in both the high court and this court to this agreement as ‘the main agreement’. For convenience, I shall do so as well. In terms of this agreement, the ‘governing law’ thereof is ‘English law’. The main agreement provides that, unless the parties otherwise agree, disputes between them ‘shall be finally settled under the Rules for the Conduct of Arbitrations as published by the Association of Arbitrators (Southern Africa)’ (the Arbitration Association). This main agreement also provides that three arbitrators would be appointed in any arbitration between them, these arbitrators to be chosen either by agreement between the parties or, failing such an agreement, by the chairperson of the Arbitration Association. The arbitration clause in the main agreement moreover provides that the arbitration shall be held in Gauteng.

[5] At all material times in its dealings with Zhongji Construction, Bateman had been acting on behalf of the DCP. Prior to the formal conclusion of the main agreement Bateman had advised Zhongji Construction in a series of letters, stretching from 12 May 2007 to 21 September 2007, that it would be awarded the tender and should proceed accordingly. In November 2007 Bateman, again acting on behalf of the DCP, informed Zhongji Construction that, as a result of ‘merger talks’, Zhongji Construction should suspend its construction operations for about ‘three to six months’.

[6] In the meantime, shipments from China to the Congo were already on the high seas and could not be stopped. In consequence of the suspension of operations, representatives of Zhongji Construction and the DCP met in Beijing on 26 and 27 November 2007 to reach an agreement that would ensure that Zhongji Construction would not be compromised in respect of work already done and expenses actually incurred thus far.

[7] Arising from the discussions which took place at the meeting in Beijing in November 2007, an interim agreement was reached between Zhongji Construction and the DCP to tide things over until there was greater certainty about the future of the piling and construction project. This interim agreement is reflected, at first, in an exchange of correspondence at the end of November 2007 and the beginning of December 2007. The interim agreement was formalised on 30 January 2008. The

parties have referred to this agreement as the ‘interim agreement’. I shall do so as well. Concluded under stressful conditions, the interim agreement had, quite understandably, been short on detail other than what were, in the minds of the parties, the *essentialia*. Counsel for Zhongji Construction has referred to the interim agreement as being ‘skeletal’. This is not an inaccurate description. It contains no clause dealing with any dispute resolution mechanisms.

[8] On 8 May 2008, Bateman gave notice to Zhongji Construction that the piling and civil work should proceed and that the drilling rigs should be re-mobilised. With a view to this work being done, Bateman supplied Zhongji Construction with geological data so that it could proceed with the piling, as well as the pile cape and the pile layout. Bateman also gave Zhongji Construction drawings for the civil works, instructing Zhongji Construction to purchase the necessary materials for construction and to mobilise the necessary equipment and personnel accordingly. Zhongji Construction began driving the first test piles at the site during September 2008, completing all test piles by 24 October 2008.

[9] Similarly to its conduct on 8 May 2008, the DCP instructed Zhongji Construction on 15 October 2008 not to proceed with the procurement or shipping of any cement or reinforcing steel and also informed it that it should not mobilise any additional personnel to site until further notice. On 29 October 2008, the DCP instructed Zhongji Construction to suspend progress of all works.

[10] On 20 November 2008, Bateman on behalf of the DCP gave Zhongji Construction a written instruction that all materials in transit between China and the site near Kolwezi should be dealt with as follows:

(a) Cargo that was, at that time, in transit in Zambia, Zimbabwe or the northern parts of South Africa should be delivered to and held in storage at Bridgeport, No1 Bridge Close, City Deep, Johannesburg; and

(b) All other cargo, in transit either in or to South Africa, should be delivered to and held in storage at Bridgeport, 151 South Coast Road, Rossburgh, Durban.

[11] In this instruction of 20 November 2008, Bateman assured Zhongji Construction that it would be reimbursed for all expenses in relation thereto, storage

charges in South Africa to be levied at US$2.75 per ton per week and US$210 per container per week. Zhongji Construction implemented the instruction, incurring transport and storage costs.

[12] On 5 December 2008, Zhongji Construction was given due notice that the construction work by it was no longer to continue. As a result, Zhongji Construction ceased operations and commenced with its demobilisation on 2 January 2009. Zhongji Construction did no further construction work at the site near Kolwezi.

[13] Arising from the interim agreement, Zhongji Construction submitted payment certificates to Bateman as follows:

(a) On 21 May 2008 in an amount of US$ 1 733 294.39 (relating, inter alia, to the construction costs of the construction camp itself as well as the batch plants and approved lump sum costs). This was approved by Bateman on 19 June 2008.

(b) On 13 July 2008 in an amount of US$1 049 386.30 (relating, inter alia, to the cost of building the cement stores, as well as standing time from 1 May 2008 to the end of June 2008). This was approved by Bateman on 2 October 2008.

(c) On 25 August 2008 in an amount of US$623 994.30 (relating, inter alia, to standing time for July 2008). This was also approved by Bateman on 2 October 2008.

(d) On 23 September 2008 in an amount of US$823 994.30 (relating, inter alia, to standing time for August 2008 as well as a once-off cost of remobilising and servicing the drilling rigs). This was approved by Bateman on 19 November 2008.

[14] The DCP paid Zhongji Construction US$1 733 294.39 in respect of the first of these invoices. Zhongji Construction has not been paid in respect of the remaining three invoices, arising from the interim agreement, in respect of which there is a total of US$2 497 374.90 outstanding. Zhongji Construction claims this amount, together with interest and costs, from Kamoto.

[15] Moreover, Zhongji Construction also submitted an invoice in an amount of US$7 938 780.98 for work performed in terms of the main agreement during September 2008. Bateman rejected this claim, indicating a number of items that should be removed therefrom. Zhongji Construction then submitted a revised interim

payment certificate for US$5 027 380.99, which Bateman approved on 1 December 2008. Zhongji Construction also submitted a claim for work performed in terms of the main agreement for the period from 1 to 29 October 2008 in an amount of US$3 324 995.68. This claim remains unpaid.

[16] In the meanwhile, the DCP and Kamoto concluded a written agreement of merger in Kinshasa in the Congo on 25 July 2009. The language in which this merger agreement was concluded is French. The merger was authorized by a decree signed by the President of the Congo on 27 April 2010. Translations into English of both the merger agreement and the decree were annexed to Zhongji Construction's replying affidavit. The accuracy of these translations is not in dispute.

[17] The English translation from the French of the relevant portion of the merger agreement reads:

'Under the terms hereof, DCP hereby contributes with the ordinary legal guarantees and subject to the definitive fulfillment of the conditions precedent hereafter set out under Clause 9, to KCC, which accepts all of its goods, rights and obligations, assets and liabilities on 31 December 2008, without exception or reserve, in return for taking over its liabilities on the same date under the terms and conditions provided in this agreement in consideration of these contributions, the shareholders of DCP shall be allotted, in exchange, new shares in KCC.

Therefore, as a result of the merger:

- The property of DCP shall vest in KCC in the state which it exists at the time of realization of the merger, it shall include all the goods, rights and assets belonging to the Absorbed Company at that time, without exception;
- KCC shall become debtor to the creditors of DCP in place of these, without this substitution implicating novation with respect to them.'

'KCC' in the agreement is Kamoto and the DCP is defined as the 'Absorbed Company'.

[18] A turn of events then occurred. On 15 November 2010, Mr Williams of Werksmans informed Zhongji Construction's attorneys that he acted for the DCP, that the DCP had been dissolved and that, as a result of the merger agreement, Zhongji Construction's claim lay against Kamoto. Thereafter, further turns occurred. A pre-arbitration meeting was held and there were exchanges of correspondence

between the parties. Kamoto's attorneys were, all the while, careful to make it clear that they neither consented nor submitted to arbitration. Ultimately, Kamoto's position consolidated into one in which the following was its standpoint:

(a) The interim agreement was silent on dispute resolution procedures and, therefore, any claims arising out of that agreement were not susceptible to arbitration;

(b) Kamoto had not been a party to the dispute resolution procedures provided for in the main agreement;

(c) In any event, in the light of –

(i) both parties being *peregrini* of South Africa;

(ii) there having been no attachment to confirm or found jurisdiction;

(iii) the contract having been concluded outside of South Africa; and

(iv) the performance of the contract having been outside of South Africa

no court in South Africa had jurisdiction to make any order as to whether the dispute was subject to the arbitration clause in the main agreement.

[19] On 24 November 2010 Kamoto's attorneys, Werksmans, referred Zhongji Construction, once again, to the merger agreement, drawing attention to the fact that it had the effect of dissolving DCP. Werksmans did so by sending a letter to Zhongji Construction's then attorneys, Deneys Reitz. A copy of the Presidential decree authorizing the merger was attached to the letter. In response thereto, Deneys Reitz wrote to Werksmans advising that it would proceed against Kamoto with the recovery of the debt allegedly owed to Zhongji Construction.

[20] In addition to the claims mentioned above, Zhongji Construction has asserted that it was entitled to payment of US$27 724 677.02 arising from its being 'out of pocket' as a result of the suspension and, ultimately, the termination of the piling and construction works in terms of the main agreement. Zhongji Construction's version of events is that the suspension and termination of these works occurred in order to suit the DCP's convenience.

[21] In July 2010 Zhongji Construction, acting through its erstwhile attorneys, submitted a letter of demand to Kamoto in which it claimed payment of US$25 661 345.36. This demand included claims that fell outside those that arose

from the interim agreement. In the letter Zhongji Construction threatened that if this demand went unsatisfied, it would 'institute proceedings'. Following discussions between the two respective sets of attorneys, it was agreed that the dispute would be referred to arbitration and that an agreement to this effect would be prepared for signature. Zhongji Construction's attorneys drew up an agreement which it sent to the attorneys for the other side for consideration. It has not been signed.

[22] On 22 December 2011, more than a year later, Werksmans wrote to Bowman Gilfillan, the attorneys that were then acting for Zhongji Construction, to advise that Kamoto was prepared to agree to the submission of Zhongji Construction's claims under the 'main contract' (ie the main agreement) but that it would not agree to 'the submission to arbitration of any claims made against it, arising from the interim agreement.'

[23] Relying on the arbitration clause in the main agreement, Zhongji Construction has sought redress by way of arbitration. Originally, when Zhongji Construction made application to the high court, it sought relief in the following terms:

'1. Declaring the dispute between the applicant and the respondent for the payment in the sum of US$2 616 847.84 in respect of three invoices issued under the interim agreement concluded between the applicant and the DRC Copper and Cobalt Project SARL on 30 January 2008 to be arbitrable;

2. Declaring that the arbitration agreement contained in the main agreement concluded between the applicant and the DRC Copper and Cobalt Project SARL on 20 August 2008 applies to the three invoices annexed hereto marked 'A', 'B' and 'C', issued under the interim agreement concluded between the applicant and DRC Copper and Cobalt Project SARL on 30 January 2008.

3. Costs of suit.

4. Alternative relief.'

The three invoices 'A', 'B' and 'C' to which reference was made in Zhongji Construction's notice of motion are the three unpaid invoices referred to in paragraph 14 above.

[24] Kamoto's statement of its position in the answering affidavit has been confusing. It appeared to Zhongji Construction, the high court and, until near the end

of the argument, to several members of this court that not only did Kamoto dispute both its liability to submit to arbitration under the provisions of the main agreement and any liability under the interim agreement, but also that Kamoto took the position that even if the court found that it was bound by the arbitral provisions of the main agreement, the arbitrator could not have jurisdiction even to consider the claims arising from the interim agreement. The reason that was given was that the arbitration tribunal could not decide its own jurisdiction and the interim agreement contained no reference to dispute resolution procedures. Furthermore, Kamoto appeared to contest its liability under the interim agreement not only because that agreement contained no reference to dispute resolution procedures, but also because Kamoto had not been a party to the interim agreement which, it contended, stood entirely separate and apart from the main agreement.

[25] In its answering affidavit, Kamoto accepted that in terms of the merger agreement, it 'becomes the debtor to the creditors of DCP' and that it 'acquired all of DCP's goods, rights and obligations, assets and liabilities on 31 December 2008'. It then goes on to contend that:

'The dispute resolution regime agreed between those parties in the main agreement was not agreed by the respondent and was not an obligation assumed by the respondent in terms of the merger agreement'.

Kamoto thereafter adds that:

'The respondent submits, therefore, that although it accepted all of DCP's "goods, rights and obligations, assets and liabilities on 31 December 2008" in terms of the merger agreement, it did not thereby agree to the submission to arbitration of disputes relating to "such goods, rights and obligations, assets and liabilities" either under the main agreement or the interim agreement.'

[26] In its replying affidavit, Zhongji Construction says:

'[I]t was the applicant's understanding that the respondent had submitted to arbitration the disputes under the main agreement, and that the only issue at the time of launching these proceedings was whether the respondent had submitted to arbitration the disputes pertaining to the interim agreement'.

Zhongji Construction's confusion was understandable. This will have a bearing on costs. After Kamoto had filed its answering affidavit, Zhongji Construction then amended its notice of motion to seek an order as follows:

'1 Declaring that the respondent:

(a) Has assumed the rights and obligations of DRC Copper and Cobalt Project SARL under the main agreement concluded between the applicant and DRC Copper and Cobalt Project SARL on 20 August 2008;

(b) Is bound by the arbitral regime catered for in clause 20 of the main agreement in relation to disputes in connection with or arising out of the main agreement or the execution of the works thereunder as envisaged by clause 20.4 of the main agreement:

2 Declaring the following disputes between the applicant and the respondent to be arbitrable:

(a) Payment in the sum of US$5 263 896.79 in respect of an invoice issued under the main agreement (annexed hereto marked "A");

(b) Payment in the sum of US$3 324 995.68 in respect of work performed in terms of the main agreement for the period 1 October 2008 to 29 October 2008 and in relation to which no interim payment certificate was issued (Annexed hereto marked "B");

(a) Payment in the sum of US$25 369 421.06 in respect of the suspension and thereafter the rumination of the main agreement (Annexed hereto marked "C");

(b) Payment in the sum of US$2 616 847.84 in respect of three invoices (Annexed hereto marked "E", "F" and "G") issued under the interim agreement concluded between the applicant and the DRC Copper and Cobalt Project SARL on 30 January 2008.

3 Costs of suit.

4 Alternative relief.'

[27] Kamoto's counsel, Mr Leech, submitted that the relief sought by Zhongji Construction was without precedent – anywhere in the English-speaking world. That may be so, but his Kamoto's stance with respect to the referral of the disputed issues to arbitration has been singularly unforthcoming. It was only after Kamoto's counsel was confronted in this court with the confusing and contradictory statement of Kamoto's position in the answering affidavit, as well as the stance which appeared to have been taken by its attorneys in correspondence when the arbitration was first mooted by Zhongji Construction, that Mr Leech made concessions which made Kamoto's position comprehensible. I now understand Kamoto's position to be this: If this court were to find that there was a binding obligation, in terms of the main agreement, read together with the merger agreement, for Kamoto to submit to

arbitration in respect of Zhongji Construction's claims arising from the main agreement, the duly appointed arbitration tribunal would then have the power (some might describe this as the 'jurisdiction') to decide whether Kamoto was liable to Zhongji Construction for its claims that arose from the interim agreement. In the meantime, Kamoto persisted with its contentions referred to in paragraph 18 above. In the light of the letter from Kamoto's attorneys to Zhongji Construction's attorneys on 22 December 2011, to which reference has been made in paragraph 22 above, this stance is not only baffling but extraordinarily unusual.

[28] The high court judge said:

'I am accordingly of the view that the respondent's objection with regard to jurisdiction is well founded: disputes between it and the applicant concerning the effects of the merger are, at best for the applicant, disputes which fall to be addressed by the arbitrator; they are not matters in respect of which this Court has any jurisdiction absent an attachment.

I think it appropriate to add that I have, in coming to this conclusion, grappled with the fact that there does not appear to be any genuine dispute with regard to the legal effect of the merger. I was not however referred to any authority to support the proposition that a court is entitled to have regard to the merits of a dispute in determining whether or not it has jurisdiction; nor have I been able to find any.'

It was on this basis that he found that the application had to be dismissed. The judge also found that, in any event, there was a dispute as to whether or not the procedural prerequisites for the arbitration had been waived and on this basis, too, he could not find in favour of Zhongji Construction.

[29] The majority judgment in the Constitutional Court, delivered by O'Regan ADCJ in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another*[1] makes it plain that our law of arbitration is not only consistent with, but also in full harmony with, prevailing international best practice in the field. Since 1976, our country has been a party to The New York Convention on the Recognition of Foreign Arbitral Awards 10 June 1958, widely known simply as 'The New York Convention'. The duty of our courts to support international arbitration and to give effect, where they can, to international arbitration agreements is bolstered by the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

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[1] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009 (4) SA 529 (CC) esp in paras 195 to 236.

[30] In *Bank Mellat v Helsinki Techniki S.A.*[2], decided in the English Court of Appeal, Robert Goff LJ said:

'Many important states are now parties to the New York Convention; and in this country the Arbitration Act 1975 was enacted to give effect to the convention, to which this country is a party. Parties to international arbitrations must nowadays frequently rely upon the convention for the purpose of enforcing awards; and when the award contains (as it will, for example, where the arbitration is conducted in accordance with the I.C.C Rules) an order for costs, the enforcement of the award will include an order for costs comprised in the award.

Parties to an arbitration may well choose London as a convenient neutral forum. There are now excellent, and rapidly developing, services available in London for the conduct of such arbitrations. The English language used is frequently a language familiar to both parties, and often too the language of the contract: for that reason, too, London may be a suitable forum. The services of very experienced solicitors, counsel, experts and arbitrators are readily available here. So London may be chosen as a convenient neutral forum; or it may be nominated by a body such as the I.C.C.

The holding of such an arbitration in London appears to me to be a far cry from litigation where a foreign litigant comes to this country to sue an English resident in the English courts.'[3]

Mutatis mutandis, one could substitute for 'London' in this passage, a number of different centres in South Africa where the same observations would apply, with equal effect. The South African courts not only have a legal but also a socio-economic and political duty to encourage the selection of South Africa as a venue for international arbitrations. International arbitration in South Africa will not only foster our comity among the nations of the world, as well as international trade but also bring about the influx of foreign spending to our country.

[31] In *Fili Shipping Co Ltd v Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corporation and others v Primalov and others]*[4], Lord Hoffmann, delivering the speech with which all their lordships concurred, said:

'In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are inclined to have intended <u>any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the</u>

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[2] *Bank Mellat v Helsinki Techniki S.A* [1984] Q.B. 291.

[3] At 314G-315C.

[4] *Fili Shipping Co Ltd v Premium Nafta Products and Others [On appeal from Fiona Trust and Holding Corpn and others v Primalov and others*] [2007] UKHL 40; [2007] Bus LR.

same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.'[5] (My emphasis.)

[32] In *Fiona Trust*[6] (which the House of Lords upheld in *Fili Shipping*), decided in the English Court of Appeal, Longmore LJ, delivering the court's unanimous judgment, said:

'As it seems to us any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. The words "arising out of" should cover "every dispute except a dispute as to whether there was ever a contract at all".'[7]

And

'One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.'[8]

And

'If there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid, eg for illegality, misrepresentation or bribery, and the arbitration is merely part of that overall contract. In these circumstances it is not necessary to explore further the various options canvassed by Judge Humphrey Lloyd QC since we do not consider that the judge had the discretion which he thought he had.' [9]

[33] The respective definitions of 'arbitration agreement' and 'arbitration proceedings' in the Arbitration Act confer wide powers on an arbitrator. These definitions read as follows:

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[5]Para 13.
[6]*Fiona Trust Holding Corpn and others v Privalov and others* [2007] EWCA Civ 20; [2007] Bus LR.
[7]Para 18.
[8]Para 19.
[9]Para 39.

‘“**arbitration agreement**” means a written agreement providing for a reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.’[10]

And

‘“**arbitration proceedings**” means proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement.’[11]

[34] In terms of rule 12.1 of the sixth edition of the Rules of the Arbitration Association:

‘The arbitrator may decide any dispute regarding the existence, validity, or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act’.

[35] Accordingly, once the arbitration tribunal has been duly appointed in terms of the main agreement, the rules of the Arbitration Association would give the tribunal itself jurisdiction to decide the issues which may be raised before it, including those which have been raised both in the high court and this court.

[36] In the light of an arbitrator’s power to determine his or her jurisdiction in an issue that arises from the referral to arbitration itself, there is, therefore, no reason why the dispute about whether or not the claims arising from the appellant’s performance in terms of the interim agreement is indeed arbitrable should not be decided by the arbitration tribunal prior to an application to the high court. In the event that the arbitration tribunal decides in Zhongji Construction’s favour, Zhongji may then apply, in terms of s 31 of the Arbitration Act, for the award to be made an order of court. Once that happens, the award would be internationally enforceable by reason of the New York Convention and treaties, too numerous to mention, in terms of which there is reciprocal recognition, within the comity of nations, of orders of court made in foreign countries.[12]

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[10]Section 1 of the Arbitration Act.

[11]Ibid.

[12] See also the Enforcement of Foreign Civil Judgments Act 32 of 1988, esp s 2 thereof.

[37] In terms of s 19(1)*(a)* of the old Supreme Court Act 59 of 1959, which read the same as s 21(1) of the now prevailing Superior Courts Act 10 of 2013, the high court 'has jurisdiction…in relation to all causes arising within, its area of jurisdiction and all other matters of which it may according to law take cognisance.' Once the arbitration has commenced, the high court in Gauteng would therefore have jurisdiction to exercise its powers in terms of the Arbitration Act, by reason of the combination of the following:

(a) the arbitration will be held in Gauteng (and therefore a cause will have arisen within its area of jurisdiction); and

(b) the New York Convention; and

(c) the Recognition and Enforcement of Foreign Arbitral Awards Act; and

(d) the Arbitration Act, which, inter alia, provides for making an arbitration award an order of court; and

(e) international treaties, to which South Africa is a party, which enable the international enforcement of orders of the South African courts.

The reason is that the coalescence of these factors not only permits the making of an order by the court but also ensures its effectiveness. As this court made clear in *Bid Industrial Holdings (Pty) Ltd v Strang and another (Minister of Justice and Constitutional Development, Third Party),*[13] the effectiveness of its orders remains an important consideration when a court is making a decision as to whether jurisdiction is present, even though, nowadays, a generally more relaxed approach is taken on the issue.[14]

[38] The process of arbitration must therefore be respected. Zhongji Construction's application to the high court was accordingly premature and perhaps unnecessary. In *Geldenhuys and Neethling v Beuthin*[15] Innes CJ said:

'Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important. And I think we shall do well to adhere to the principle laid down by a long line of South African decisions, namely that a declaratory order cannot be claimed merely

[13] 2008 (3) SA 355 (SCA).
[14] Paras 38 to 59. See also *Metlika Trading Ltd v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) para 36.
[15] *Geldenhuys and Neethling v Beuthin* 1918 AD 426.

because the rights of the claimant have been disputed, but that such a claim must be founded upon an actual infringement.'[16] (My emphasis.)

Kamoto came perilously close to infringing Zhongji Construction's right to arbitration under the main agreement. Nevertheless, the relief which Zhongji Construction sought in the high court related to an abstract or 'academic' question of the kind to which Innes CJ referred.[17] The application ought to have been dismissed for this reason alone. The arbitration must first be given the opportunity to have run its course before the court considers any application relating thereto.

[39] In all the circumstances of the matter, it is inappropriate to mulct Zhongji in the costs of this appeal.

[40] The following is the order of the court:

The appeal is dismissed.

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N P WILLIS

JUDGE OF APPEAL

Gorven AJA (Mpati P, Mbha JA and Mathopo AJA concurring):

[41] I have had the benefit of reading the judgment of my colleague Willis JA. I arrive at the same outcome of the appeal but do so by a different route. The crisp issue in this appeal was whether the court below was entitled or obliged to grant the declaratory relief sought by the appellant (Zhongji). It held that it did not have jurisdiction to grant the relief and, as a result, dismissed the application with costs. This appeal is with its leave.

[42] The relief ultimately sought by Zhongji was an order:

'1 Declaring that the respondent:

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[16] At 441.

[17] The term 'academic', in this context, has been used in the following cases: *Trustees J C Poynton Property Trust v Secretary for Inland Revenue* 1970 (2) SA 618 (T) at 620B-D; *South African Mutual Life Assurance Society v Anglo-Coal Collieries Ltd* 1977 (3) SA 642 (A) at 658; *Muller v The Master and others* 1992 (4) SA 277 (T) at 282A and was approved by the Constitutional Court in *Zantsi v Council of State, Ciskei, and others* 1995 (4) SA 615 (CC) para 6.

(a) has assumed the rights and obligations of DRC Copper and Cobalt project SARL under the main agreement concluded between the applicant and DRC per and Cobalt Project SARL on 20 August 2008;

(b) is bound by the arbitral regime catered for in clause 20 of the main agreement in relation to disputes in connection with or arising out of the main agreement or the execution of the works thereunder as envisaged by clause 20.4 of the main agreement.

2 Declaring the following disputes between the applicant and the respondent to be arbitrable:

(a) Payment in the sum of US$5 263 896.79 in respect of an invoice issued under the main agreement…

(b) Payment in the sum of US$3 324 995.68 in respect of work performed in terms of the main agreement for the period 1 October 2008 to 29 October 2008 and in relation to which no interim payment certificate was issued…

(c) Payment in the sum of US$25 369 421.06 in respect of the suspension and thereafter the termination of the main agreement…; and

(d) Payment in the sum of US$2 616 847.84 in respect of three invoices… issued under the interim agreement concluded between the applicant and the DRC Copper and Cobalt Project SARL on 30 January 2008.

3 Costs of suit.

4 Alternative relief.'

[43] The following was common cause. Zhongji is a Chinese company and the respondent (Kamoto) one based in the Democratic Republic of the Congo (the DRC). Two agreements were concluded outside of South Africa between Zhongji and another DRC based company, DRC Copper and Cobalt Project SARL (DCP). The agreements were for the supply and construction of certain piling and civil works at a mining site in the DRC. They were referred to throughout as the interim and main agreements respectively. The interim agreement was concluded on 30 January 2008 and the main agreement on 20 August 2008. DCP terminated the main agreement by letter dated 5 December 2008.

[44] The interim agreement contained no dispute resolution clause. The main agreement contained an arbitration clause providing for disputes to be resolved by arbitration in Sandton, Gauteng. It further provided that the arbitration would be governed by the provisions of the Arbitration Act 42 of 1965 and would be subject to

the Rules for the Conduct of Arbitrations as published by the Association of Arbitrators for Southern Africa (the Rules).

[45] Zhongji delivered four invoices to DCP arising from work done under the interim agreement. One of these was paid and the other three were not. Zhongji also delivered two invoices relating to work done under the main agreement. Neither was paid. It invoiced DCP in respect of the suspension and termination of the main agreement. This has not been paid. The unpaid invoices were disputed by DCP.

[46] Negotiations ensued for the disputes to be referred to arbitration. These reached an advanced stage without actual agreement. On 15 November 2010, attorneys who had been negotiating on behalf of DCP informed Zhongji's attorneys that what was termed a merger agreement had been concluded in the DRC between DCP and Kamoto (the merger agreement). They said that this had the effect of dissolving DCP with effect from 31 December 2008 and, having annexed a copy in the original French and an English translation, said that they assumed that Zhongji would now pursue its claim against Kamoto, but that Kamoto did not admit liability. When further correspondence did not result in an agreement on arbitration proceedings, the application to the high court was launched. Its purpose, as appears from the relief sought, was to establish that Kamoto was obliged to arbitrate disputes between Zhongji and DCP in Sandton in terms of the arbitration clause in the main agreement.

[47] The defences raised by Kamoto can be summarised as follows. First, the court had no jurisdiction over it. Secondly, Kamoto was not bound by the arbitral regime agreed between Zhongji and DCP in the main agreement. Thirdly, if it was so bound, this arbitral regime did not apply to disputes under the interim agreement.

[48] Both parties were *peregrini* of South Africa. The interim, main and merger agreements were concluded outside South Africa and all the work on the project took place in the DRC. No attachment had been made to found jurisdiction. There had been no submission to jurisdiction by Kamoto. These were the points advanced by Kamoto in contending that the court below had no jurisdiction. Against that, it was common cause that the *lex arbitri* comprised the Act, the New York Convention on

the Recognition and Enforcement of Foreign Arbitral Awards (the New York convention) and the Recognition and Enforcement of Foreign Arbitral Awards Act.[18] Zhongji sought to persuade the high court that it had jurisdiction to grant the relief on the basis that 'the Court *a quo* should have identified itself as the Court *having jurisdiction* within the meaning of the Arbitration Act; it was the only Court, or at least the best placed Court, to pronounce on the arbitration agreement in terms of the *lex arbitri* which constitutes the relevant jurisdictional *causa*.'[19]

[49] It was further submitted on behalf of Zhongji that if the court declined to exercise jurisdiction, 'then an essential piece of the infrastructure of international arbitration is missing'. This would, in turn, lead to a decline in the number of entities being willing to select this country as a neutral international venue for arbitrating disputes arising from their agreements. A submission made on behalf of Kamoto was that the invocation of this jurisdiction would lead to the opposite result. It was submitted that '[a]pplication of the concepts of *competence/competence*, party autonomy and the consensual underpinning of arbitrations, as well as the international trend to minimise court interference in international arbitrations militate against the court extending its jurisdiction in the manner sought to be encouraged by [Zhongji]'.[20]

[50] When a party raises a challenge to the jurisdiction of a court, this issue must necessarily be resolved before any other issues in the proceedings. The reason is simple. If the court has no jurisdiction, it is precluded from dealing with the merits of the matter brought to it.[21] Both of the parties' submissions focussed on the question of jurisdiction and both treated this as the real issue in the application. But what these submissions overlooked in my view is that an arbitration clause embodies an agreement that is distinct from the terms of the agreement of which it forms a part. Sometimes the fact that it is embodied in another agreement may affect its validity because a challenge to the validity of the agreement in which it is incorporated is also a challenge to the validity of the arbitration agreement.[22] In the absence of such

[18]Act 40 of 1977.
[19] Emphases in the original.
[20]Emphases in the original.
[21]*Metlika Trading Ltd & others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) para 25.
[22]*North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA).

a challenge, however, the arbitration agreement must be given effect in accordance with its terms. The terms of this agreement require that the parties submit disputes to arbitration in Sandton, Gauteng. In other words, the arbitration agreement fell to be performed within the area of jurisdiction of the court below, because the seat of the arbitration was within that area of jurisdiction.

[51] It was accepted by both Zhongji and Kamoto that, in an arbitration subject to the *lex arbitri*, a court must have jurisdiction to deal with certain matters concerning the arbitration at a certain stage. This is correct. The question then is to identify the court that will exercise that jurisdiction. The obvious answer is that it is the court of the seat of the arbitration, in this case, the high court in Johannesburg. The jurisdiction of the court arises from the principle that the arbitration clause is to be performed in Sandton, Gauteng by way of conducting an arbitration there. The court has jurisdiction in relation to the arbitration clause in terms of s 19(1)(*a*) of the Supreme Court Act.[23] The real issue is whether it was entitled to grant the relief sought.

[52] As mentioned, the Rules were imported as terms of the arbitration clause. Rule 12 provides, in its relevant parts:

'12.1 The Arbitrator may decide any dispute regarding the existence, validity or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act.

12.2 A party to the reference wishing to challenge the jurisdiction of the arbitrator or who avers that the arbitrator is exceeding his jurisdiction shall raise the jurisdictional issue at the first available opportunity, failing which he shall be deemed to have consented to the arbitrator's jurisdiction.

12.3 Where the Arbitrator has made a jurisdictional ruling pursuant to this rule otherwise than in an award, a party who wishes to contest that ruling in court may only do so after the award, in the absence of exceptional circumstances.

12.4 For the purposes of this Rule an arbitration clause which forms part of a contract shall be regarded as an agreement independent of the other terms of the contract. A

[23]Act 59 of 1959 (the old Act). The old Act governed the application but s 21(1) of the Superior Courts Act 10 of 2013 is to the same effect as s 19(1)(*a*) of the old Act in this regard. The definition of court in s 1 of the Arbitration Act 42 of 1965 refers us to the general grounds for South African courts to exercise jurisdiction.

decision by the Arbitrator that the contract is null and void shall not of itself result in invalidity of the arbitration clause.'[24]

[53] This means that, on Zhongji's own version, the very issues on which it sought judicial pronouncement fell to be dealt with by the arbitration tribunal. This was because the rules place the question of the scope of the arbitrator's jurisdiction and whether any particular dispute falls within that jurisdiction in the hands of the arbitrator. That is entirely permissible.[25] If the arbitration tribunal in due course makes an award concerning the disputed invoices, it must needs make findings on the second and third defences raised by Kamoto in the application. In doing so, it would give effect to the terms of the arbitration clause relied on by Zhongji.

[54] If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator in terms of the arbitration agreement. A court is not entitled to do that unless an order has been granted in terms of s 3(2)(*b*) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted.

[55] This approach, and the underlying rationale for circumscribing the powers of a court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked.

[56] This court has said that parties who refer matters to arbitration 'implicitly, if not explicitly, (and subject to the limited power of the Supreme Court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator.'[26] The Constitutional Court[27] dealt

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[24]Rule 12 of the 6th edition of the Rules and Rule 11 of the 5th edition.
[25]*Amalgamated Clothing & Textile Workers Union of South Africa v Veldspun Ltd* 1994 (1) SA 162 (A) at 169E-G; *North East Finance* para 16.
[26]Per Goldstone JA in *Veldspun* at 169F-G.
[27]*Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC).

with the question whether s 34 of the Constitution applied directly to arbitrations. In finding that it did not do so, O'Regan ADCJ said:

'The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.'[28]

O'Regan ADCJ went on to state pertinently that:

'Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.'[29]

It seems to me that the note of caution about enlarging the powers of courts in matters concerning arbitrations, although made in relation to s 33(1) of the Act, applies with equal force to powers of courts in dealing with arbitrations in general.

[57] The need to respect the provisions of arbitration agreements was underscored by Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd*[30] when he decried the approach of the high court in setting aside an arbitration award, saying that, in doing so, the court had -

'disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, "dictates a high degree of deference for decisions . . .

[28]Paragraph 219.
[29]Paragraph 235.
[30]*Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 4.

for awards of consensual arbitration tribunals in particular." And the "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" have given rise in other jurisdictions to the adoption of "a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial arbitral awards".'[31]

[58] In the present matter, the forum selected by Zhongji and DCP is that of a private arbitration. Zhongji cannot be prejudiced if the arbitration tribunal gives effect to the arbitration clause and rules on the issues which it sought to have resolved by the high court. If the tribunal finds for Zhongji on the second and third defences raised in the application and makes an award in its favour, it can apply to have the award made an order of court.[32] This order then becomes enforceable under the New York convention. If the tribunal rules against it, it has chosen this forum. Kamoto is entitled to raise a question of the jurisdiction of the tribunal to deal with the matter as well as the second and third defences in resisting an award being made by the Tribunal. Section 33 of the Act entitles a party to apply to set aside an award where an arbitration tribunal has exceeded its powers. It has been held that if 'an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s 33(1)(*b*)'.[33] Within the compass of the Rules, a ruling on jurisdiction of an arbitration tribunal can be challenged in court.[34] Kamoto therefore has remedies to protect itself in the event that an arbitration tribunal exceeds its powers. This is consistent with recognising that a high court has jurisdiction but that its powers are circumscribed in deference to the autonomy of the parties to the arbitration clause.

[59] With reference to the Rules and the international trend referred to and relied on by both parties, it is clear that if courts arrogate to themselves the right to decide matters which parties have agreed should be dealt with by arbitration, the likelihood of this country being chosen as an international arbitration venue in future is remote in the extreme. Persons wishing to have their disputes resolved by arbitration do not

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[31]References omitted.
[32]Section 31.
[33]*Veldspun* at 169C-D.
[34]Rule 12.3.

wish the process to be retarded by constant recourse to courts. As was said by Lord Hoffman:

'[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

[7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.'[35]

Lord Hope of Craighead, in the same matter, said that the wording of an agreement might provide that 'arbitration may be chosen as a one-stop method of adjudication for the determination of all disputes'.[36] In the present matter, the arbitration clause also tends to the notion of a one-stop method for determining all disputes. To recognise the limited powers of the court is in line with the international trends referred to in *Lufuno*, *Telcordia* and *Fiona Trust*.

[60] In the result, I agree with my colleague Willis JA that the court a quo arrived at the correct result in dismissing the application with costs. As to the costs on appeal, both parties dealt with the matter primarily as one involving jurisdiction. In fact, Kamoto raised this as its primary point of defence to the application and on this point

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[35] *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40; [2007] 4 All ER 951 (HL) paras 6 & 7.

[36] Paragraph 27.

it has failed. In the result, I also agree that there should be no order for costs on appeal.

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T R GORVEN

ACTING JUDGE OF APPEAL

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